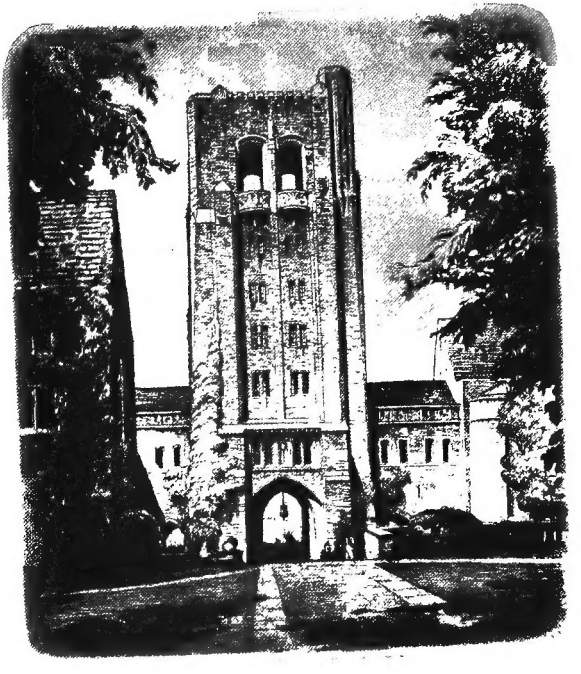

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[From the HARTFORD DAILY COURANT]

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[From the NEW YORK COMMERCIAL ADVERTISER.]

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[From the COMMERCIAL ADVERTISER.]

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[From the NEW YORK LEGAL OBSERVER.]

We have for some time past intended to direct the attention of the legal profession to the Hon. E. Fitch Smith's "Commentaries on Statute and Constitutional Law and Constitutional Construction." Instead of a review of these Commentaries, we have concluded to present to our readers some of the many testimonials which, at our request, the publishers have furnished us. In the *Belknap Gazette*, published in New Hampshire, we find these Commentaries thus alluded to:

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We understand the article above quoted emanated from the pen of the late attorney-general, a distinguished and learned constitutional lawyer.

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Our space will not admit of further extracts at present. We would add, in our opinion, the work of Judge Smith evinces an intimate and accurate acquaintance with constitutional law and other subjects of which he treats. We find in it the impress of a clear and discriminating mind, legal ability as a juridical writer, unsurpassed by few writers of the present day. From the learning and talent exhibited in the numerous judicial opinions of this author, which we have heretofore published, we had reason to expect that a work emanating from his pen would be one of real intrinsic merit. Our expectations in this respect have been fully realized.

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[From the NEW YORK EVENING POST.]

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THOMAS JAMES ARNOLD, ESQ.,

ONE OF THE POLICE MAGISTRATES FOR THE METROPOLIS.

FOURTH AMERICAN EDITION,

WITH

COWEN AND HILL'S NOTES,

AND

WITH ADDITIONAL NOTES AND REFERENCES TO THE ENGLISH AND AMERICAN CASES, TO THE PRESENT TIME, INCLUDING THOSE ADDED TO THE LAST EDITION BY J. MARSDEN VAN COTT,

BY ISAAC EDWARDS,

COUNSELOR AT LAW.

VOL. I.

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PREFACE.

THIS treatise, which has already passed through ten editions in England and been as often revised by its author, holds deservedly high rank as an elementary exposition of the Law of Evidence; while the notes by Messrs Cowen & Hill, elaborate and comprehensive beyond any work of the kind, have given to these volumes the highest value and widest reception.

The new form in which the present edition appears, demands from the editor a few words of explanation. The notes are printed in the same volume with, and (as far as practicable) immediately under the text to which they refer—a change in the mode of printing that will doubtless prove convenient, and greatly facilitate the labor of comparing one part of the work with another. The notes, which contain frequent references from one to another, are numbered from the beginning of the first to the end of the third volume, and are printed without alteration; those added to the previous edition by Mr. Van Cott retain the designation of stars by which they were distinguished from the others, and the citation of new authorities and statutes in this, are inclosed in parentheses. Keeping this in mind, the reader will readily place the responsibility of the successive annotations where it belongs.

By a careful study of the notes, it will be seen that as a general rule, the division of either of them into separate parts cannot be made without breaking that fine chain of reasoning and discussion that runs through nearly all of them, making each a complete essay in itself. In a few cases the note embracing two subjects and appearing to be fairly divisible, has been divided, so as to bring each part under the appropriate head of the text; and here and there, where the author in his late revision has *adopted* into the text only part of such a note, the part so appropriated has not been reprinted in its original form.

In frequent instances the original note, citing and commenting upon English authorities, has been wholly absorbed and embodied in the text, enriching that at the expense of the annotators; in these instances, of course, the note has not been reprinted, as such. Occasionally, the note, in its nature indivisible, has been only partly incorporated into the text, and has therefore, as a rule, been retained in full, as written. In brief, the entire work has been reproduced with the design of preserving the notes intact, as far as practicable.

The text, it will be seen, is reprinted from the last English edition, which has been revised to meet the altered condition of the law; some parts of it have been rewritten, and others transposed, and others again, including Sections iv, v, vi and vii, of Chapter v, of the former edition, devoted to the incompetency of witnesses on the ground of interest, have been wholly omitted. This change and re-arrangement of the text, required by recent acts of legislation, have made it necessary to re-arrange the notes.

The two first volumes embrace the last edition of the text and the notes of Messrs Cowen & Hill, with the exception of that part of them relating to the competency of witnesses covered by the omitted sections. These sections and the notes to them are printed in the third volume; which also contains that part of the text of a former edition which gives the rules of evidence applicable in the common-law forms of action, with the valuable notes published in previous editions.

Each volume contains an index to itself, and the third, besides an index to itself, a general index to the entire work; *the references in each being made to both the text and notes.*

The labor of editing this new edition and adding references to the later authorities and statutes, greatly increased by the mode in which it has been printed, need not be commented upon; it will, however, be allowed to qualify one to appreciate the infinite labor and research by which the great body of the work has been prepared.

ALBANY, December, 1858.

PREFACE

TO THE THIRD EDITION.

SINCE the publication of the last American edition of Phillipps on Evidence, with Cowen & Hill's Notes, Mr. Phillipps (profiting by the labors of his American editors), has published a new and greatly improved edition of that part of his Treatise which relates to the general rules of evidence. The text of this work is a reprint of Mr. Phillipps' last edition. A large portion of it has been rewritten, its arrangement materially altered, and several new heads added. The alterations made by him in the arrangement of the text have required a corresponding change in the arrangement of the notes. Although a task of great labor, that requirement has been met.

The principal duty of the American editor, shortly stated, was, to indicate the alterations made in the law of evidence, since the last edition was published. This he has labored diligently to accomplish; and he indulges the belief, that no case, material to this purpose, has been overlooked or omitted. A vast number of decisions upon points in the law of evidence, have been made, by the English and American courts, within the last ten years, but only a small numbe of them have involved anything really new. These had to be carefully sifted, that the few grains of wheat might be separated from the many bushels of chaff. The work was not designed to be either an abridgment or a digest, but an elementary exposition of the law of evidence, with copious practical illustrations drawn from the adjudged cases. It has been the anxious wish of the editor (as of the publishers), to avoid unnecessarily increasing the bulk of a work already voluminous, but, at the same time, to omit nothing that would essentially increase its usefulness and value. In the execution of this task, it has been his aim, where the law had been altered, to indicate the alteration; where a point was in doubt, to bring forward any recent adjudication that would tend to clear it up; and where a judgment was remarkable for its learning, or expounded a rule with uncommon force, to note the case, although the point adjudged was not new. And he has, generally, omitted to cite those cases (and they are very numerous), which were not admissible in one of these aspects.

It is understood that the late Mr. Justice Cowen had intended, on his approaching retirement from the Bench, to write an elaborate Treatise on the Law of Evidence. His long and distinguished career, and his laborious habits, as a lawyer, reporter, and judge, had placed at his disposal the most ample materials for such a work. But his lamented death has deprived the

profession of a treatise in which the learning of this important head of the law would have been completely expounded and exhausted. It may be said of that learned and laborious judge with great truth, in his relation to this subject, that other men have entered into his labors. To his predilection for this great head of the law (which was as decisively evinced as that of the illustrious Lord Chief Baron Comyns for his favorite title, Pleader), and his indefatigable industry (aided by his learned associate, Mr. Hill), in accumulating its various learning, as displayed in the voluminous notes to Mr. Phillipps, we are, doubtless, indebted for the practical Treatise on Evidence by Professor Greenleaf, the chief materials of which were evidently drawn from the publications of Phillipps, Cowen & Hill.

It is confidently believed that the text of Mr. Phillipps, and the accompanying notes, present a complete and accurate view of the present state of the law of evidence. The additions made by the present editor, when in the body of the notes, are contained between double asterisks. The other cases he has cited are noted in the index. Besides its adaptation to the latest edition of the text, and bringing down the English and American decisions to the present time, this edition of the notes contains several improvements upon the last. Reference to the text and notes is facilitated by a table of contents, and the index is somewhat enlarged and, it is hoped, commensurably improved.

J. M. V. C.

New York, October, 1849.

PREFACE

TO THE SECOND EDITION.

The notes of Messrs. COWEN & HILL are confined to the first volume. In those which they understand are about to be published with the second volume, they have neither of them had any share whatever, except that the senior editor loaned the used of his office and books to a member of the bar employed by the bookseller to compile them.

In preparing the notes for the first volume, one object has been to introduce such English cases as were printed intermediate the time of publishing the London edition and the printing of the present notes; and occasionally some of the most useful among the earlier cases, which were omitted in the text. Several cases cited there have also been referred to in the notes, for the purposes of correction, or more enlarged illustration.

The following American books have been consulted, besides some others:

UNITED STATES - Admiralty Decisions, 2 vols.; American Law Journ. 6 vols.; Baldwin's Rep. 1 vol; Bee's Admiralty Rep. 1 vol.; Brockenbrough's Rep. 2 vols.; Burr's Trial, 2 vols.; Chase's Trial, 1 vol.; Cranch's Rep. 9 vols.; Dallas' Rep. 4 vols.; Day's Rep. (a few cases decided by the U. S. Courts), 3d and 4th vols.; Gallison's Rep. 2 vols.; Gilpin's Rep. 1 vol.; Journal of Jurisprudence, 1 vol.; Law Intelligencer, 3 vols.; Martin's Rep. 1 vol.; Mason's Rep. 5 vols.; Paine's Rep. 1 vol.; Peters' C. C. Rep. 1 vol.; Peters' S. C. Rep. 16 vols.; Sumner's Rep. 3 vols.; Trial of Smith & Ogden, 1 vol.; U. S. Law Journal, 1 vol.; U. S. Law Register, 2 vols.; Wallace's Rep. 1 vol.; Washington's C. C. Rep. 4 vols.; Wheaton's Rep. 12 vols.; Howard U. S. Rep. 6 vols.; Story's C. C. U. S. Rep. 3 vols.; Woodbury & Minot's C. C. Rep. 1 vol.; M'Lean's C. C. Rep. 3 vols.; Van Ness' Prize Cases, 1 vol.; Ware's Admiralty Rep. 1 vol.

ALABAMA - Alabama Rep. 1 vol.; Porter's Rep. 9 vols.; Stewart's Rep. 3 vols.; Stewart & Porter's Rep. 5 vols.; Alabama Rep. by the Judges, 13 vols.

CONNECTICUT - - Connecticut Rep. 18 vols.; Day's Rep. 5 vols.; Kirby's Rep. 1 vol.; Root's Rep. 2 vols.

DELAWARE - - Harrington's Rep. 3 vols.

GEORGIA - - - Charlton's Rep. 1 vol.; Dudley's Rep. 1 vol.; R. M. Charlton's Rep. 1 vol.; Kelly's Rep. 4 vols.

ILLINOIS - - - Breese's Rep. 1 vol.; Scammon's Rep. 4 vols.; Gilman's Rep. 4 vols.

INDIANA - - Blackford's Rep. 7 vols.

KENTUCKY - - - Bibb's Rep. 4 vols.; Dana's Rep. 9 vols.; Hardin's Rep. 1 vol.; Hughes' Rep. 1 vol.; Littell's Rep. 5 vols.; Littell's Select Cases, 1 vol.; Marshall, A. K.'s Rep. (generally cited as Marshall's Ken. Rep.) 3 vols.; Marshall, J. J.'s Rep. 7 vols.; Monroe's Rep. 7 vols.; Kentucky Decisions, 2 vols.; Ben. Monroe, 8 vols.

LOUISIANA - - - Louisiana Rep. 19 vols.; Martin's Rep. 20 vols. [cited after the 12th as N. S. or new series]; Robinson's Rep. 12 vols.; Louisiana Annual Rep. 2 vols.

MAINE - - - Fairfield's Rep. 3 vols.; Greenleaf's Rep. 9 vols.; Maine Rep. 12 vols. (often cited as Shepley's Rep.); Appleton's Rep. 2 vols.

MARYLAND - - - Bland's Ch. Rep. 3 vols.; Gill & Johnson's Rep. 12 vols.; Harris & Johnson's Rep. 7 vols.; Harris & M'Henry's Rep. 4 vols.; Maryland Rep. (often cited as Harris & Gill's Rep.), 2 vols.; Gill's Rep. 3 vols.

MASSACHUSETTS - Dane's Abridgment, 9 vols.; Massachusetts Rep. 17 vols.; Pickering's Rep. 24 vols.; Metcalf's Rep. 11 vols.

MICHIGAN - - Douglass' Rep. 1 vol.; Harrington's Rep. 1 vol.; Walker's Ch. Rep. 1 vol.

MISSISSIPPI - - Walker's Rep. 1 vol.; Howard's Rep. 7 vols.; Freeman's Chancery Rep. 1 vol.; Smedes & Marshall's Rep. 11 vols.; Smedes & Marshall's Chancery Rep. 1 vol.

MISSOURI - - Missouri Rep. 4 vols.

NEW HAMPSHIRE New Hampshire Rep. 13 vols.

NEW JERSEY - - Coxe's Rep. 1 vol.; Green's Rep. 3 vols.; Halstead's Rep. 7 vols.; Pennington's Rep. 2 vols.; Southard's Rep. 2 vols.; Harrison's Rep. 4 vols.; Saxton's Chancery Rep. 1 vol.; Green's Chancery Rep. 3 vols.

NEW YORK - - Anthon's N. P. Rep. 1 vol.; City Hall Recorder, 6 vols.; Coleman's Cases, 1 vol.; Cowen's Rep. 9 vols.; Edwards' Ch. Rep. 3 vols.; Hall's Superior Court Rep. 2 vols.; Hopkins' Ch. Rep. 1 vol.; Johnson's Cases, 3 vols.; Johnson's Ch. Rep. 7 vols.; Johnson's Rep. 20 vols.; Judicial Opinions of the Mayor's Court, 1 vol.; Judicial Repository, 1 vol.; Kent's Commentaries, 4 vols.; New York Cases in Error (Caines), 2 vols.; New York Term Rep. (commonly cited as Caines' Rep.) 3 vols.; Paige's Ch. Rep. 11 vols.; Revised Statutes, 3 vols.; Wendell's Rep. 26 vols.; Wheeler's Criminal Cases, 3 vols.; Hill's Rep. 7 vols.; Denio's Rep. 4 vols.; Barbour's Ch. Rep. 3 vols.; Sandford's Ch. Rep. 3 vols.; Hoffman's Ch. Rep. 1 vol.; Clarke's Ch. Rep. 1 vol.; Barbour's Law Rep. 3 vols.; Comstock's Rep. 1 vol.; Sandford's Superior Court Rep. 1 vol.; Howard's Practice Rep. 3 vols.

NORTH CAROLINA - Cameron & Norwood's Rep. 1 vol.; Devereux Eq. Rep. 2 vols.; Devereux's Rep. 4 vols.; Devereux & Battle's Eq. Cases, 2 vols.; Devereux & Battle's Rep. 4 vols.; Hawks' Rep. 4 vols.; Haywood's Rep. 2 vols.; Martin's Rep. 1 vol.; Murphy's Rep. 3 vols.; North Carolina Law Respository, 3 vols. Taylor's Rep. 1 vol.; Iredell's Rep. 8 vols.; Iredell's Eq. 5 vols.

OHIO - - - Hammond's Rep. (or Ohio Rep.) 9 vols.; Ohio Sup. Court Reports, (Wright) 1 vol.; Wilcox's Rep. 1 vol.; Stanton's Rep. 3 vols.; Griswold's Rep. 4 vols.

PENNSYLVANIA - Addison's Rep. 1 vol.; Ashmead's Rep. 2 vols.; Binney's Rep. 6 vols.; Browne's Rep. 2 vols.; Dalla's Rep. 4 vols.; Miles' Rep. 2 vols.; Pennsylvania Rep. 3 vols. (Penrose & Watts); Rawle's Rep. 5 vols.; Sergeant & Rawle's Rep. 17 vols.; Watts' Rep. 10 vols.; Wharton's Rep. 6 vols.; Yeates' Rep. 4 vols.; Watts & Sergeant's Rep. 9 vols.; Barr's Rep. 9 vols.

SOUTH CAROLINA - Bailey's Rep. 2 vols.; Bay's Rep. 2 vols.; Carolina Law Journal. 1 vol.; Constitutional Rep. (Treadway) 3 vols.; Equity Rep. (Dessaussure) 4 vols.; Harper's Eq. Rep. 1 vol.; Harper's Rep. 1 vol.; Hill's Ch. Rep. 2 vols.; Hill's Rep. 3 vols.; M'Cord's Ch. Rep. 2 vols.; M'Cord's Rep. 4 vols.; Nott & M'Cord's Rep. 2 vols.; Reports Constitutional Court (Mills), 2 vols.; Brevard's Rep. 3 vols.; Riley's Law & Eq. Rep. 2 vols.; Rice's Law Rep. 1 vol.; Rice's Eq. Rep. 1 vol.; Bailey's Eq. Rep. 1 vol.; Dudley's Law & Eq. Rep. 1 vol.; Cheeves' Law & Eq. Rep. 1 vol.; McMullan's Law Rep. 2 vols.; McMullan's Eq. Rep. 1 vol.; Spear's Law Rep. 2 vols.; Spear's Eq. Rep. 1 vol.; Richardson's Law Rep. 3 vols.; Richardson's Eq. Rep. 2 vols.; Strobhart's Law Rep. 2 vols.; Strobhart's Eq. Rep. 1 vol.

TENNESSEE - - - Cooke's Rep. 1 vol.; Haywood's Rep. (cited as 3, 4 and 5 Hayw.) 3 vols.; Martin & Yerger's Rep. 1 vol.; Peck's Rep. 1 vol.; Tennessee Rep. (Overton) 2 vols.; Yerger's Rep. 10 vols.; Meigs' Rep. 1 vol.; Humphrey's Rep. 8 vols.

VERMONT - - - - Aiken's Rep. 2 vols.; Brayton's Rep. 1 vol.; Chipman, N.'s Rep. 1 vol.; Chipman, D.'s Rep. 1 vol.; Tyler's Rep. 2 vols.; Vermont Rep. 9 vols.; Shaw's Rep. 2 vols.; Weston's Rep. 4 vols.; Slade's Rep. 1 vol.; Washburn's Rep. 4 vols.

VIRGINIA - - - Call's Rep. 6 vols.; Henning & Munford's Rep. 4 vols.; Leigh's Rep. 12 vols.; Mumford's Rep. 6 vols.; Randolph's Rep. 6 vols.; Virginia Cases, 2 vols.; Virginia Chancery Rep. 1 vol.; Virginia Rep. (Gilmer) 1 vol.; Washington's Rep. 2 vols.; Robinson's Rep. 2 vols.; Grattan's Rep. 5 vols.

Also the following IRISH BOOKS: Ball & Beatty's Rep. 2 vols.; Batty's Rep. 1 vol.; Beatty's Rep. 1 vol.; Conroy's Rep. 1 vol; Davies's Rep. 1 vol.; Fox & Smith's Rep. 2 vols.; Gilb. Eq. Rep. 1 vol. (contains a few Irish cases); Hayes' Rep. 1 vol.; Hogan's Rep. 2 vols.; Hudson & Brook's Rep. 2 vols.; Irish Term Rep. 1 vol.; Jones' Rep. 1 vol.; Macnally's Evidence, 1 vol.; Ridgway's Rep. 3 vols.; Schoales & Lefroy's Rep. 2 vols.; Smith & Batty's Rep. 1 vol.; Vernon & Scriven's Rep. 1 vol.

The ENGLISH BOOKS OF EVIDENCE, Gilbert, Peake, Starkie, Roscoe, Gresley, Matthews, Wigram, Wills, Taylor, Tamlyn, Van Heythusen, &c., have also been freely consulted; and such additions made from these, as were deemed to be useful.

In the present text of Phillipps's Evidence, we have probably the *last* edition of his book, which we are to expect on the original plan. That plan was to comprise the doctrines of evidence generally applicable to all actions, in the first volume, reserving those which were more appropriate to certain kinds of actions, for the second. In our annotations we have not adhered to this division with much care. Whenever we have found that decisions were useful as illustrating a general head, we have used them; and in this way anticipated the greater part, though by no means the whole of the matter which would, under Mr. Phillipps's arrangement, have fallen in with some division of the second volume. One instance of this will be found in the cases as to the competency of witnesses in actions on bills of exchange, &c. After these notes were partly printed, we received a work compiled by Messrs. Amos & Gale, from the materials of Phillipps's two volumes, and later books, in which we perceive, that the part of our plan just mentioned has been pursued under a new arrangement of the general heads of Phillipps's first volume. Mr. Phillipps himself participated in the arrangement and correction of the work. That also was consulted in our later notes; and as far as we have been able to observe, about all the matter, and most of the English cases there added will be found in our notes.

The above remarks and enumeration of books must be taken with the qualification, that the latest of the books mentioned were not published, and therefore could not be consulted in respect to many, not to say most of the notes, when the latter were printed. So far as books were published, and could be procured at the time, they were faithfully examined; and the points of evidence decided, carefully extracted, and arranged under their appropriate heads. The arrear of books on any very valuable head, is believed to be few in number; and those are still fewer which materially affect the existence or the application of any important rule of evidence.

The work has been conducted under some disadvantages, which justice to the editors requires should be mentioned. The judicial avocations of the senior editor were so constant, that he originally declined engaging as anything more than a gratuitous contributor to the work, in a small degree, his principal motive being the aid in his Nisi Prius duties, to be derived from the business of partial compilation, and an occasional examination and study of the whole as it progressed. Several gentlemen who had undertaken as principals in the work, failing to prosecute, or take any share in it, he went through with the greater part himself, without venturing to make the bookseller any promise as to the time of its completion, or proposing any charge beyond what might operate as a scanty compensation for stationery, and the use of his office and library for gentlemen, who might, in their turn, take the place of assistants. The gentleman who finally undertook and persevered in the latter character, being also engaged in the legal profession, and the principal editor, either as judge of the fourth circuit or of the supreme court, he need not say most laborious departments of duties, the progress of the notes has been dilatory, fitful and

desultory. These things must be an apology for mistakes, (and there are doubtless several,) which might have been avoided under more favorable circumstances. To obviate erroneous references, the titles of cases have uniformely been mentioned, even when *dicta* alone are cited. The object, in respect to matter, has been, in general, rather to furnish illustrations and distinctions by a short sketch of the case cited, than to repeat the principle which it exemplifies. The reader will better see from this, the degree in which the original case may be pertinent to the question he is upon, and though the book has, in that way been made larger, it will, in itself, come nearer to a general library of cases upon evidence. It was a form which the senior editor thought he found more useful to himself as a judge, and the junior editor in his professional business. The elemental rules of evidence are short, occupying but a few pages even in this largest edition of Phillipps. Those principles have been before the English and American public ever since 1816, when Phillipps was first published in this country, undergoing constant application in the books of common-law reports on both sides of the Atlantic. To trace, through such books, the connection between cases and their principles, as each question arises in the course of practice, is a work of great labor to the lawyer, even in his office. At Nisi Prius it is impossible. The expense of purchasing the books which contain the cases is also considerable. One object of the editors has been to lighten these burdens, by presenting in connection with the principle, the manner in which it has been made to act upon cases in the various combination of their circumstances.

Yet, after all, this, like other abridgments, must be read, in general, as a mere book of reference; for, in abridgment, as Lord Coke has shown in several places, the most careful compiler from numerous cases, must many times omit material and turning circumstances. This, Lord Coke shows of Brooke, (*vid.* Palmer's Case, 5 Rep. 25,) and Fitzherbert, (*vid.* Mary Portington's Case, 10 Id. 41.) And again he mentions a case in which Fitzherbert, Statham, and Brooke, all disagreed in stating. (*Vid.* Pilford's Case, 10 Rep. 118.) Each time he admonishes the reader to be cautious in finally relying upon abridgments even of these learned and approved authors. In the preface to his 4th vol. pp. x and xi, he says, "This I know, that abridgments, in many professions, have greatly profited the authors themselves; but, as they are used have brought no small prejudice to others; for the advised and orderly reading over of the books at large in such a manner, as elsewhere I have pointed at, I absolutely determine to be the right way to enduring and perfect knowledge; and to use abridgments as tables; and to trust only to the books at large; for I hold him not discreet, that will *sectari rivulos*, when he may *petere fontes*. And certain it is, that the tumultuary reading of abridgments doth cause a confused judgment, and a broken and troubled kind of delivery of utterance." We can deny, in regard to these notes, none of the above assertions, except the first; and that only so far as it may be understood in a pecuniary sense.

In regard to local or temporary practice, or matters resting merely in discretion, (and the law of evidence has its share of all these,) no mere compilation can operate as a steady guide. It ought never to be exclusively relied upon. Such is the law of putting off trials for the absence of witnesses, and the forms of affidavits for that purpose, with the amount of costs to be paid. Such also are the forms of proceeding, and the rules of decision upon attachment against witnesses, and the like, which we have considered in their proper places for the sake of general instruction.

NOTICE TO THE READER.

In preparing this Tenth Edition of my Treatise on the Law of Evidence, I have received material assistance from my friend Mr. Arnold; who has given to the Work the greater part of the leisure time that could be spared from his onerous official duties.

Some great and memorable changes in the Law of Evidence have been made within a few years, and since the last Editon. First, by Lord Denman's Act, which put an end to objections on the ground of interest—excepting only parties actually on the record, or those who were substantially parties to a suit; and lastly, by Lord Brougham's Act, which has enacted, that even parties on the record shall be admissible witnesses. The constitution of the County Courts, with their new practice, prepared the way for this last change, and made it unavoidable, in all the Courts of Common Law.

Nearly the whole of the first Volume of this Work had been composed upon the basis of Lord Denman's Act, as settling the general rules of law on the subject of competency of witnesses, when notice was given of the change contemplated by Lord Brougham in his intended Act. This circumstance has caused some delay in the present publication.

The general plan of this Work is the same as before. But parts have been newly arranged, and more than one Chapter have been entirely remodeled. Extensive additions have been made by my Coadjutor. All the new decisions and new statutory provisions, that have appeared since the last Edition, have been inserted by him in their proper places, and incorporated with the text. Much new matter has been introduced, entirely composed by him, and forming Sections of Chapters, upon the following subjects: Of Admissions under a Judge's Order; Of Matters judicially noticed; Of Evidence in Matters of Opinion; and Of Admissions on the Record. The Introductory Chapter, also, and the Addenda to both Volumes are his: and he has taken great trouble in preparing the Tables of Contents and the General Index.

It has been my chief business to superintend and direct the progress of the Work; to review and rejudge, and to make any alterations that might be thought necessary.

S. M. P.

Torquay, *January*, 1852.

INTRODUCTORY CHAPTER.

WHILE this work has been going through the press, very important alterations and, as most will acknowledge, great improvements in the law of evidence have been effected by statutes passed in the session of 1851.

It is proposed in this introductory chapter to specify the various enactments that have been thus recently made, and to point out in what manner, and to what extent they affect the various parts of the law of evidence as set out in the following work.

By one of these, 14 & 15 Vict. c. 99 (The Law of Evidence Amendment Act), the spirit and principle of Lord Denman's Act,(1) whereby the in-

(1) 6 & 7 Vict. c. 85, *infra*, Chap. 4.

Lord Denman's Act (6 and 7 Vict. c. 85), was passed in Aug., 1843, declaring that no person offered as a witness shall hereafter be excluded by reason of incapacity from crime or interest; with a proviso, that the act should not render competent the parties to the action or proceeding, nor any person in whose immediate and individual behalf the same is brought or defended, nor the husband or wife of such persons respectively; and that the act should not repeal or affect the statute for the amendment of the laws with respect to wills. Our code of 1848 (Laws of New York, 560) declared briefly, that no person offered as a witness shall be excluded by reason of his interest in the event of the action, with a proviso, that this general provision should not apply to a party to the action, nor to any person for whose immediate benefit it is prosecuted or defended, *nor to any assignor of a thing in action assigned for the purpose of making him a witness.* §§ 351, 352. This last italicised clause was repealed in July, 1851, and the following sentences substituted in its place: "When an assignor of a thing in action or contract is examined as a witness, on behalf of any person deriving title through or from him, the adverse party may offer himself as a witness to the same matter in his own behalf, and shall be so received. But such assignor shall not be admitted to be examined in behalf of any person deriving title through or from him against an assignee, or an executor or administrator, unless the other party to such contract or thing in action whom the defendant or plaintiff represents, is living, and his testimony can be procured for such examination, nor unless ten days' notice of such intended examination of the assignor, specifying the points upon which he is intended to be examined, shall be given in writing to the adverse party."

Our code also provides, that a party to an action may be examined as a witness at the instance of the adverse party, or of any one of several adverse parties; and for that purpose may be compelled, in the same manner, and subject to the same rules of examination as any other witness, to testify, either at the trial or conditionally, or upon commission. Code of 1848, § 344; Amended Code of 1851, § 390. And a party so examined by an adverse party may be examined

competency of persons to give evidence in a cause in the result of which they were interested had been abolished, have been carried out to the fullest extent. Actual parties to the record, and persons in whose direct and immediate behalf an action was brought or defended, were excepted from the operation of Lord Denman's Act; and they, therefore, still remained incompetent as witnesses, unless in the rare instances where they were divested of any interest in the suit. But this exception has now been repealed by the new statute,(1) which enacts, that in all cases parties to a suit are to be admissible witnesses;(2) but it is provided that no person charged with any criminal offence shall be competent to give evidence for or against himself, and that in criminal proceedings neither husbands nor wives are competent to give evidence for or against each other;(3) nor do the provisions of the act apply to any proceedings instituted in consequence of adultery or to any breach of promise of marriage.(4)

This statute has carried out the principle established in the County Courts;(5) the experiment there made of admitting parties and their wives having, it appears, been found to answer.

(1) Section 1.
(2) Section 2.
(3) Section 3.
(4) Section 4.
(5) Under the 9 & 10 Vict. c. 95, *infra*, p. 97.

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on his own behalf, in respect to any matter pertinent to the issue. But if he testify to any new matter, not responsive to the inquiries put to him by the adverse party, or necessary to explain or qualify his answers thereto, or discharge when his answers would charge himself, such adverse party may offer himself as a witness on his own behalf, in respect to such new matter, and must be so received. Code of 1848, § 349; Amended Code of 1851, § 395. The same provision applies to a person for whose immediate benefit the action is prosecuted or defended. Id. § 396. The code, as amended in 1849, permitted a party to be examined on behalf of his co-plaintiff or co-defendant, provided the examination thus taken should not be used on behalf of the party examined, and that whenever, in the case mentioned in the previous sections, 390 and 391, one of several plaintiffs or defendants who were joint contractors, or united in interest, was examined by the adverse party, the other of such plaintiffs or defendants might offer themselves as witnesses to the same cause of action or defence, and should be so received. § 397. Some difference of opinion arising under this provision of the code (10 Barb. 112, 5 How. Pr. R. 401, and cases cited in Beal v. Finch, 1 Kernan R. 128), the following was inserted in its place in 1851: "A party may be examined on behalf of his co-plaintiff, or of a co-defendant, as to any matter in which he is not jointly interested or liable with such co-plaintiff or co-defendant, and as to which a separate and not joint verdict or judgment shall (may) be rendered. And he may be compelled to attend in the same manner as at the instance of an adverse party, but the examination thus taken shall not be used in behalf of the party examined, unless he is examined at the instance of the adverse party." § 397. Under this provision, it has been held that in an action for tort against two or more, each defendant is a competent witness for his co-defendant. 1 Kernan, 128. But it seems that he could not give evidence affecting simply the amount of the damages, since the judgment in such case could not be entered for one sum against one defendant, and for another sum against another.

The above-mentioned enactments are contained in the following sections:

Section 2. "On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action or other proceeding in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action or other proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *viva voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action or other proceeding.

Section 3. "But nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband.

Section 4. "Nothing herein contained shall apply to any action, suit proceeding, or bill in any court of common law, or in any ecclesiastical court, or in either house of Parliament, instituted in consequence of adultery, or to any action for breach of promise of marriage.

Section 5. "Nothing herein contained shall repeal any provision contained in chapter twenty-six of the statute passed in the session of Parliament holden in the seventh year of the reign of King William the Fourth and the first year of the reign of her present Majesty."(1)

(1) The Wills Act. This act was also excepted from the operation of Lord Denman's Act, *infra*, Chap. 4, pp. 27, 28.

The above section (§ 397) was amended in 1852, so as to read as follows:

"A party may be examined on behalf of his co-plaintiff or of a co-defendant, as to any matter in which he is not jointly interested or liable with such co-plaintiff or co-defendant, and as to which a separate and not joint verdict or judgment *can* be rendered. And he may be compelled to attend in the same manner as at the instance of an adverse party, but the examination thus taken shall not be used in behalf of the party examined. And whenever, in the case mentioned in sections 390 and 391, one of the several plaintiffs or defendants who are joint contractors, or are united in interest, is examined by the adverse party, the other of such plaintiffs or defendants may offer himself as a witness to the same cause of action or defence, and shall be so received." Session Laws of 1852, page 662.

The Law of Evidence Amendment Act (14 and 15 Vict. 99), which was passed in August 1851, makes the parties to the action or proceeding as well as the parties in interest, competent witnesses and compellable to give evidence; but declares that a person charged with a criminal offence shall not be compellable to give evidence for or against himself or herself, and that neither husband nor wife shall be competent or compellable to give evidence for or against the

Before the passing of this statute, the grounds of incompetency to give evidence as a witness, as reduced by Lord Denman's Act, had been classified under three heads; but it may now be convenient to classify the persons who are incompetent to give evidence as follows :—

1. Every person who labors under a defect of understanding;(1) or,
2. A defect of religious principle.(2)
3. Any person charged with the commission of any offence, the subject of an indictment, or punishable by summary conviction.
4. A husband or wife for or against each other, in any criminal proceeding.
5. The parties to any proceeding instituted in consequence of adultery, or to any action for breach of promise of marriage, or the husbands or wives of such parties.

The general effect of the new statute will be to render the parties to all *civil* proceedings, and, as it seems, their wives, competent and compellable to give evidence, except in the instances stated in the last-mentioned class: in other words, it abolishes the last vestige of the old rule as to incompetency by reason of interest; it being upon that ground only that parties to a suit were considered incompetent to give evidence.(3)

(1) *Infra*, Chap. 2, p. 9.
(2) *Infra*, Chap 3, p. 14.
(3) See Worrall v. Jones, 7 Bing. 395, *infra*, p. 36.

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other in any criminal proceeding; that the act shall not apply to any action, suit, or proceeding instituted in consequence of adultery, or to any action for breach of promise of marriage; and that it shall not repeal or qualify the act in relation to the proof of wills.

Our statute, just passed, renders the parties to an action or proceeding competent witnesses, but does not contain the same exceptions as are found in the English statute, nor any express exception where the opposite party is living and capable of giving testimony in the action or proceeding. It takes its place appropriately in the Code of Procedure, as section three hundred and ninety-nine, and is in these words:

"*A party to an action or proceeding, may be examined as a witness in his own behalf, the same as any other witness; but such examination shall not be had, nor shall any other person for whose immediate benefit the same is prosecuted or defended be so examined, unless the adverse party or person in interest is living, nor where the opposite party shall be the assignee, administrator, executor or legal representative of a deceased person, nor unless ten days' notice (if the action be in a court of record, and in all other cases four days' notice), of such intended examination of the party or person interested, specifying the points upon which such party or person is intended to be examined, shall be given in writing to the adverse party, except that in special proceedings of a summary nature, such reasonable notice of such intended examination shall be given as shall be prescribed by the court or judge. And when notice of such intended examination shall be given in an action or proceeding, in which the opposite party shall reside out of the jurisdiction of the court, such party may be examined by commission issued and executed as now provided by law; and whenever a party or person in interest has been examined under the provisions of this section, the other party or person in interest may offer himself as a witness in his own behalf, and shall be so received.* When an assignor of a thing in action or contract is examined as a witness in behalf of any person deriving title through or from him, the adverse party may offer himself as a witness to the same matter in his own behalf, and shall be so received, *and to any matter that will discharge him from any liability that the testimony of the assignor tends to render him liable for.* But such assignor shall not be admitted to be examined

The fourth chapter, therefore, of the ensuing work, which treated of incompetency by reason of interest, will be principally affected by the enactments under consideration.

The first section of that chapter treats of incompetency considered with reference to parties individually named in the record in civil proceedings. The incompetency of all such parties is now removed, with the exception of proceedings instituted in consequence of adultery, or of actions for breach of promise of marriage. In these excepted cases the parties still remain incompetent.

In an action for criminal conversation, therefore, neither the plaintiff, nor his wife, nor the defendant, will be competent to give evidence. The policy of such a rule is obvious. But it would seem, according to the strict interpretation of the statute, that in an action for goods sold and delivered, brought against a husband for necessaries supplied to his wife, where the defence is, that the wife has left the husband and is living in adultery,(1) the defendant would be competent and compellable to give evidence; as such an action is not a proceeding instituted in consequence of adultery, nor a criminal proceeding.(2)

(1) See Ham v. Toovey, 1 Selw. N. P. 281; Hardie v. Grant, 8 C. & P. 512; Emmett v. Norton, Id. 506.

(2) 14 & 15 Vict. c. 99, §§ 3, 4, *supra*.

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in behalf of any person deriving title through or from him against an assignee, or an executor or administrator, unless the other party to such contract or thing in action whom the defendant or plaintiff represents, is living, and his testimony can be procured for such examination, nor unless at least ten days' notice (if the action be in a court of record, and in all other cases four days' notice), of such intended examination of the assignor, specifying the points upon which he is intended to be examined, shall be given in writing to the adverse party." Session Laws of N. Y. 1857, ch. 353, as amended in 1858.

The italicised portion of this section is new; the rest of it stands as it was passed in 1851, except the line included in brackets prescribing the requisite notice inserted in 1858. And under that part of the section it seems that a notice is not required where the defendant is himself a party to the contract sued on. If the defendant is sued on his own contract by an assignee or the other contracting party, he knows that the original owner of the demand is, like everybody else who has any knowledge respecting the controversy, a competent witness; and the defendant is moreover supposed to know all the facts of the case, and must take care to be present and see that the cross-examination is properly conducted. But if he was a stranger to the original contract, he needs a notice and time to look up the original contractor as a witness to repel any untrue testimony he may suspect will be given against him by the original owner of the demand sued on. If the original contractor, whose rights the defendant represents, be dead, the statute assumes that injustice may be done by allowing the original contractor represented by the plaintiff to be sworn, and therefore it excludes him altogether; and so where the attendance of the original party though living, cannot be procured. Per Denio, J., in Vassear v. Livingston, 3 Kernan R. 253.

The statute making the parties to the action or proceeding competent witnesses proceeds upon the same theory, namely, that each shall be allowed to give testimony for himself where the opposite party has the opportunity and is capable of meeting him on the witness' stand. Perhaps the language is not such as to carry this intent into effect in every case. For instance, the opposite party or person in interest *may be living*, and insane or otherwise incapable of giving testi-

In an action for breach of promise of marriage, also, neither the plaintiff nor the defendant will be competent to give evidence. In the somewhat analogous action brought by a father for seducing his daughter, the daughter herself was always considered a competent witness, as she did not stand within the technical rule of exclusion, not having any pecuniary interest in the result of the cause. In such an action the defendant also, it seems, will now be competent and even compellable to give evidence.

It seems unlikely that, after the new act has come into operation, any question can ever arise as to the admissibility of entries made by a person who might not have been a competent witness.

The second section of the fourth chapter treats of the rule of incompetency considered with reference to parties prosecuting for offences, and to defendants in criminal proceedings. The law, as explained in this section, remains unaltered by the new statute. As heretofore a prosecutor will be competent to give evidence, and there seems now to be no doubt that an informer will be so; and a defendant in a criminal proceeding, being a person "charged with the commission of an indictable offence, or an offence punishable on summary consideration,"(1) will in general, be incompetent to give evidence.

(1) 14 & 15 Vict. c. 99, § 3, *supra.*

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mony; and here upon the general principle on which the statute is founded, both parties should be excluded from the privilege of giving testimony in the cause.

Under the statute of 14 & 15 Vict., it has been held that a wife is not a competent witness for her husband, who is a party to the suit. The act in terms applies only to the parties to the action; and Lord Denman's Act did not permit either the husband or wife to testify for or against the other. And although the third section of the statute of 14 & 15 Vict., contains an express provision that the husband and wife shall not be competent or compellable to give evidence against each other in any criminal proceeding, it has been determined that this does not by implication render them competent witnesses for or against each other in a civil action. Stapleton v. Crofts, 83 Eng. Com. Law Rep. 365; S. C., 18 Adol. & Ellis (N. S.) 367, decided in 1852.

On the same principle of construction, the wife cannot give testimony for or against her husband, nor the husband for or against the wife, under our statute. The common-law rule excluding such a witness from giving testimony, is not founded upon the interest of the witness, but upon reasons of public policy, designed to prevent the interruption of domestic peace and harmony and the destruction of that unreserved confidence which the marriage relation implies and requires. Hasbrook v. Vandervoort, 4 Sand. Sup. Court R. 596; S. C., 5 Seld. 153; 2 Id. 340; 5 Barb. 156; 8 Paige, 242; 3 Sand. Ch. 15. And hence the common-law rule, rendering the husband and wife incompetent witnesses for or against each other, must prevail until it is set aside by an affirmative statute; and our recent statute does not in terms declare them competent witnesses for or against each other. See Smith v. Smith, 15 How. Pr. 165; 26 Barb. 612.

By allowing a party to an action or proceeding to be examined on his own behalf, without excepting any form or species of action, it seems to permit the husband to give testimony against his wife, and the wife against the husband, where they are adverse parties to the action. Nevertheless, a party to an action or proceeding can only be examined as a witness in his own behalf, *the same as any other witness;* and since no other witness standing in the relation of husband or

The new statute does not say that no person, who in any criminal proceeding is charged with the commission of any indictable offence, shall be competent to give evidence, but merely enacts that its provisions rendering competent parties to a suit in general, shall not render competent persons so charged.

One of several defendants, therefore, in a criminal prosecution, may still as before, be rendered competent, by a *nolle prosequi* being entered as to him, or by any of the other methods pointed out by that section.

The third section of the fourth chapter treats of the rule of incompetency, considered with reference to persons in whose behalf a civil action is brought or defended. Such persons who were exempted from the operation of Lord Denman's Act, as being substantially the parties to the suit, are now in every instance rendered competent to give evidence.

The fourth section of the fourth chapter treats of the rule considered with reference to the husband or wife of an incompetent party. The new statute does not in terms say that the wives of parties to civil proceedings shall be competent to give evidence, as was expressly enacted in the statute for establishing the county courts;(1) it merely enacts, that "parties" to an action shall be competent, and that nothing therein "shall, in any criminal proceeding, render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband."(2)

(1) 9 & 10 Vict. c. 95, § 83, *infra*, p. 97.
(2) 14 & 15 Vict. c. 99, § 3, *supra*.

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wife to the plaintiff or defendant would be allowed to testify in the action, it is not clear that the statute was designed to abrogate the common-law rule of evidence, even where the husband and wife are both parties to the suit. See Smith v. Smith, *supra*.

This construction is favored by the English decisions just referred to, as well as by a recent English statute (16 & 17 Vict. c. 83); by which husbands and wives are expressly rendered competent and compellable, in all civil cases, to give evidence "on behalf of any or either of the parties to the said suit, action or proceeding"—a provision that does not extend to criminal cases, nor to cases of adultery, nor render either husband or wife competent or compellable to disclose any *communication* made to him or her by the other during marriage.

The law relating to the competency of witnesses has been for several years and is now undergoing a change in many of the states similar to that which has taken place in England and in New York—a change by statutes that are frequently amended and modified by decisions construing them. These statutes and decisions, which are of easy and ready reference to the practitioner in each of the states, have not yet assumed a settled and permanent character; and cannot therefore be advantageously and minutely stated in a work of this kind. The notes that follow will serve to show the tendency of legislation on the subject, without assuming to give the precise state of the statutory law in the several states at the present time.

Connecticut.—It was declared in this state by statute in 1848, that "No person shall be disqualified as a witness in any suit or proceeding at law, or in equity, by reason of his interest in the event of the same, as a party or otherwise; or by reason of his conviction of a crime; but such interest or conviction may be shown for the purpose of affecting his credit." In the year following, it was enacted that so much of the above section (141st) as authorizes a party to testify in any criminal proceeding, be repealed.

The inference to be drawn from the construction of the statute by itself, would be that in the cases not excepted from its operation,—namely, in all civil proceedings (unless such as are instituted in consequence of adultery),(1)—the husband or wife of a party would be competent to give evidence. But on the other hand, considering that the incompetency of husbands or wives, rests not entirely on the ground of identity of interest, but also upon a common law principle of public policy,(2) it may possibly be doubtful whether the statute will be construed to have the effect of rendering a wife a competent witness for or against her husband in all civil proceedings. In the case before supposed,(3) of an action against a husband for necessaries supplied to his wife, where the defence is the adultery of the wife, although the defendant may be competent to give evidence, it seems very questionable whether the wife would be permitted to be a witness, either to establish the fact of adultery or to contradict it.(4) But it would be premature to offer any further opinion or argument upon this part of the statute until some judicial decision shall have been pronounced upon it.(5)

(1) 14 & 15 Vict. c. 99, § 4, *supra.*

(2) See *infra*, pp. 77, 78.

(3) *Supra*, p. xvii.

(4) As to the reasons for excluding the evidence of husband and wife to prove non-access, see *infra*, p. 87.

(5) Since the above observations were in type, the stat. 14 & 15 Vict. c. 99, has come into operation. The first case in which the parties were examined under it was Harrison v. Dunn (Westmr. Sittings, Q. B., Michaelmas Term, 1851, Nov. 4), an action for the keep and maintenance of the defendant's child. After both the plaintiff and defendant had given their evidence, the wife of the defendant was tendered as a witness on his behalf, and objected to; but Erle, J., ruled she was a competent witness under the statute, as the exception as to criminal cases showed the intention of the legislature to be that a wife should be a competent witness for her husband in civil proceedings.

The statute of 1848 also permitted a party to any civil action or proceeding, whether at law or in equity, to compel any adverse party or person in interest to appear and testify therein in the same manner and subject to the same rules as other witnesses.

Under the above statute, the wife has been held a competent witness for the plaintiff, her husband. Merriam v. Hartford & N. H. Railroad Co., 20 Conn. R. 354, 363. The interest of the party to the suit, which the law expressly permits to be proved, goes only to his credibility (Cowles v. Bacon, 21 Id. 451); but as the statute provides expressly that it shall not apply to the execution of last wills and testaments or conveyances of real estate, *quere*, whether the wife of a devisee being a subscribing witness, is competent to prove its execution? Fortune v. Buck, 23 Conn. R. 1.

VERMONT.—The statute of this state is substantially the same as that of Connecticut, rendering all parties and persons competent and compellable to testify; and providing that the same shall not affect the attestation of wills or other instruments, nor any suit pending. See statutes of 1852 and 1853. In an action against the estate of a deceased person, the deceased and not his representative is regarded as the party to the action, for the purpose of construing the statutes cited. Kimball v. Estate of Baxter, 1 Wms. 628.

OHIO.—The act to establish a Code of Civil Procedure was passed March 11, 1853, and took effect in this state on the first of July following. It is very similar to the Code of New York.

In criminal proceedings, neither the wife nor husband of the accused party is competent to give evidence for or against the accused.

It may be advisable, however, to consider a question which may possibly arise upon the construction of the statute under notice, as to how far it may affect the reception of admissions made by parties to a suit. This subject is treated of in the tenth section of the eighth chapter of the following work.

In the case of The Queen agt. The Inhabitants of Adderbury East,(1) which was an indictment against the inhabitants of a township for not repairing a bridge, it was contended that the declarations of some of the inhabitants, which were offered in evidence, were not admissible, as they had been rendered competent witnesses by the statute 3 and 4 Vict. c. 26. But the court held, that the declarations were admissible, and as it appears, principally upon the ground that the inhabitants, though rendered competent, were not compellable to give evidence.

If this were the only ground upon which the admissions of a party were receivable, namely, that he could not be compelled to give evidence, it would follow that since the statute 14 and 15 Vict. c. 99, § 2, makes parties not only "competent," but also "compellable to give evidence," their admissions would no longer be receivable in evidence. But, it is submitted, that this is not the only ground of the reception of such evidence, the principle on which it is received being founded, as hereafter stated, chiefly on the reasonable presumption in favor of the truth of a statement, when it is against the interest of the party who makes it.(2) Admissions

(1) 5 Q. B. 187, *infra*, p. 57.

(2) In R. v. Adderbury, *ut supra*, 196, Patteson, J., says, "Every inhabitant may, though a defendant, be a competent witness by statute; but it does not follow that the crown would compel him to give evidence against his own interest. At all events he is a defendant on the record; and what a defendant on the record says is evidence against him in every case."

"Section 310. No person shall be disqualified as a witness, in any civil action or proceeding, by reason of his interest in the event of the same, as a party or otherwise, or by reason of his conviction of a crime; but such interest or conviction may be shown for the purpose of affecting his credibility." Section 311 declares that the above section shall not affect existing laws, relating to the settlement of estates of deceased persons, infants, idiots or lunatics, or the execution of wills and testaments, or conveyances of real estate, or any instrument required by law to be attested.

Sections 312 and 313 allow a party to call an adverse party or person in interest as a witness, and provide that no party shall be a witness under section 310 where the adverse party is the representative of a deceased person, in relation to matters that took place prior to his death.

Section 314 declares who are incompetent:

1st. Persons of unsound mind.

2d. Children under ten years of age, incapable, &c.

3d. Husband and wife for or against each other.

4th. An attorney to disclose confidential communications.

5th. Clergymen or priests to disclose confessions.

Section 315 provides that if a party offer himself as a witness, that shall be deemed a waiver

made by an agent in the scope of his authority, are receivable in evidence against his principal, although such agent might unquestionably be called as a witness by the opposite party.

It seems, therefore, there can be no reasonable doubt but that the admissions of a party will still be receivable in evidence against him, notwithstanding he may now be compelled to give evidence against his own interest.

The sixth section of the Law of Evidence Amendment Act empowers the common-law courts to compel the inspection of documents in all cases in which equity would grant a discovery. The section is as follows:—

"Whenever any action or other legal proceeding shall henceforth be pending in any of the superior courts of common law at Westminster or Dublin, or the court of Common Pleas for the county palatine of Lancaster, or the Court of Pleas for the county of Durham, such court and each of the judges thereof may respectively, on application made for such purpose by either of the litigants, compel the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party relating to such action or other legal proceeding, and, if necessary, to take examined copies of the same, or to procure the same to be duly stamped, in all cases in which previous to the passing of this act a discovery might have been obtained by filing a bill or by any other proceeding in a court of equity at the instance of the party so making application as aforesaid to the said court or judge."

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of the incapacity of such clergyman, priest or attorney, in respect to the subject matter to which he testifies.

MASSACHUSETTS.—The act of this state, relating to the proceedings, practice and rules of evidence in actions at law, was passed in May, 1852, taking effect on the first Monday of August following.

Section 60. "No person offered as a witness shall be excluded from giving evidence, either in person or by deposition, in any proceeding, civil or criminal, in any court, or before any person having authority to receive evidence, by reason of incapacity from crime or interest; but every person so offered shall be admitted to give evidence, notwithstanding he may have an interest in the matter in question, or may have been previously convicted of any offence; but this act shall not render competent any party to a suit or proceeding who is not now by law rendered competent, nor the husband or wife of any such party. But nothing herein contained shall be deemed applicable to the attesting witnesses to any will or codicil. And the conviction of any crime may be shown to affect the credibility of any person testifying."

The following sections allow each party to interrogate the other on interrogatories, which are required to be answered in writing and on oath.

Under the above statute, an executor or administrator is not competent to testify as to matters known to him before his appointment, not having released his right to recover costs, nor been released from his liability for them, as provided for by a previous statute. Wood v. Gannett, 4 Gray (Mass.) 450.

NEW JERSEY.—Parties in civil actions may be called and sworn by the opposite party, on the trial or on a commission, except where the action is brought to recover a penalty or enforce a forfeiture. Acts of 1849 and 1852. The interest of other persons in the event of an action or proceeding does not render them incompetent; co-defendants not jointly interested may be sworn for each other. The examination of an opposite party may be made by interrogatories,

The powers given by this enactment are an important and useful extension of those previously exercised by the common-law courts, which are treated of in the fourth chapter of the second volume of this work; and they will obviate the necessity that was sometimes experienced of staying proceedings until an application could be made to a court of equity.

The seventh section of the same statute renders foreign and colonial acts of state, judgments and the like, provable by certified copies, without proof of the seal or signature thereto, or of the judicial character of the person signing the same. The section is as follows:

"All proclamations, treaties, and other acts of state of any foreign state or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state or in any British colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such court, may be proved in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, either by examined copies or by copies authenticated as hereinafter mentioned; that is to say, if the document sought to be proved be a proclamation, treaty, or other act of state, the authenticated copy, to be admissible in evidence, must purport to be sealed with the seal of the foreign state or British colony to which the original document belongs; and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign or

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which must be answered under oath. Acts cited above and act of 1855; Elmer's Digest, by Nixon, 887, 889.

MISSISSIPPI.—The Revised Code of this state, published by authority in 1857, has the following provisions:

"Section xvii, Art. 190. No person, whether a party to the suit or otherwise, shall be incompetent to give evidence in any suit at law or in equity, by reason of any interest in the result thereof, or in the record as an instrument of evidence in other suits; but the deposition of such interested witness shall not be read in evidence; and the court or jury shall give such weight to the testimony of parties and interested witnesses, as in view of the situation of the witness and other circumstances, it may be fairly entitled to. Any party may, by subpœna, as in other cases, compel any other party to the suit to appear and give evidence. *Provided*, that no person shall be a witness in any suit, by or against himself, to establish his own claim to an amount exceeding fifty dollars, against the estate of a deceased person.

"Art. 191. No conviction of any person for any offence, except perjury, and subornation of perjury, shall disqualify such person as a witness, but such conviction may be given in evidence to impeach his credibility. No person convicted of perjury or subornation of perjury, shall afterwards be a competent witness in any case, although pardoned or punished for the same.

"Art. 192. All negroes, mulattoes, Indians, and persons of mixed blood, descended from negro, or negro and Indian ancestors, to the third generation inclusive, though one ancestor of each generation may have been a white person, shall be incapable of being witnesses in any case whatever, except for or against each other.

"Art. 193. In criminal cases, husband and wife shall be competent witnesses for each other." Code, page 510.

WISCONSIN.—Members of public corporations, such as towns, cities, road and mutual insurance companies, are competent witnesses. Either party in civil suits may call his adversary, and if

colonial court, or an affidavit, pleading, or other legal document filed or deposited in any such court, the authenticated copy, to be admissible in evidence, must purport either to be sealed with the seal of the foreign or colonial court to which the original document belongs, or, in the event of such court having no seal, to be signed by the judge, or if there be more than one judge, by any one of the judges of the said court, and such judge shall attach to his signature a statement, in writing, on the said copy, that the court whereof he is a judge has no seal; but if any of the aforesaid authenticated copies shall purport(1) to be sealed or signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement."

This enactment will greatly simplify and facilitate the proof of foreign judgments and other documents, which subject is treated of in the second volume of this work, Chap. 5, Sect 4.

The eighth section of the statute renders apothecaries' certificates admissible without proof of the seal of the corporation. It is as follows:

"Every certificate of the qualification of an apothecary, which shall purport to be under the common seal of the Society of the Art and Mys-

(1) See *post*, Vol. II.

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he fail to appear may himself be sworn as a witness. A party so called by his opponent may be examined on his own behalf in respect to any matter pertinent to the issue; and in respect to new matter not gone into by the adverse party, the party calling him may be examined. R. S. of Wisconsin, 522, 523.

The admission of a member of a corporation aggregate is not admissible against the corporation; but such member may be sworn as a witness against the corporation, not being himself named as a party to the action. Books of account containing original entries may be verified in certain cases by a party to the suit, or by a clerk or agent, and received as *prima facie* evidence of the charges there. Pages 526, 527.

The Code of Procedure adopted in Wisconsin, in the fall of 1856, is a transcript from the Code of New York, the provisions of which are noticed above.

MINNESOTA.—All persons are competent witnesses who are not expressly rendered incompetent; neither parties, nor persons interested in the event of an action or proceeding are excluded, nor persons convicted of crime; nor is any one rendered incompetent as a witness on account of his religious belief. Children under ten years of age, who are actually incapable, and persons of unsound mind, or who are intoxicated, are incompetent to testify. Besides the above, husband and wife are not competent for or against each other, except with the other's consent; nor can either, during the marriage or afterwards, without the consent of the other, testify in relation to any communication made between them during the marriage.

Communications made to an attorney, clergyman or priest, to a physician or surgeon, or to a public officer, in their official capacity, are also privileged, and may not be disclosed. A public officer is prevented from making disclosure only when the public interest would suffer by disclosure. Statutes of Minnesota, 478, &c. See, also, the late code of that state, closely resembling that of New York. Accounts may be proved as in Wisconsin.

tery of Apothecaries of the City of London, shall be received in evidence in any court of justice, and before any person having by law or by consent of parties authority to hear, receive and examine evidence, without any proof of the said seal or of the authenticity of the said certificate, and shall be deemed sufficient proof that the person named therein has been, from the date of the said certificate, duly qualified to practice as an apothecary in any part of England and Wales."

Previously to this statute, the seal of the Apothecaries' Company required to be proved.

The ninth section of the statute renders documents which are admissible in England or Wales, without proof of the seal or signature, equally admissible in Ireland. The tenth section renders documents which are admissible in a similar manner in Ireland equally admissible in England and Wales; and the eleventh section renders documents so admissible in England, Wales or Ireland, equally admissible in the colonies.

The twelfth section relates to the proof of registers of British vessels, and renders them, and certificates of registry, admissible as *prima facie* evidence of their contents, without proof of the signature thereto. It is as follows:

"Every register of a vessel kept under any of the acts relating to the registry of British vessels may be proved in any court of justice, or before any person having, by law or by consent of parties, authority to hear, receive and examine evidence, either by the production of the original or by an examined copy thereof, or by a copy thereof purporting to be certified under the hand of the person having the charge of the original, and which person is hereby required to furnish such certified copy to any person applying at a reasonable time for the same, upon payment of the sum of one shilling; and every such register, or such copy of a register, and also every certificate of registry, granted under any of the acts relating to the registry of British vessels, and purporting to be signed as required by law, shall be received in evidence in any court of justice, or before any

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Iowa.—Every human being of sufficient capacity to understand the obligation of an oath, is a competent witness in all cases both civil and criminal, except as herein otherwise declared. But an Indian, a negro, a mulatto or black person shall not be allowed to give testimony in any cause wherein a white person is a party. Code of Iowa, § 2388. Facts which have heretofore caused the exclusion of testimony, may still be shown for the purpose of lessening its credibility. § 2389.

A person who has a direct, certain, legal interest in the suit, is not a competent witness unless called on for that purpose by the opposite party, as hereinafter provided. § 2390.

Neither the husband nor wife can be a witness against the other, except for crime committed against him or her; but in criminal prosecutions they may be witnesses for each other (§ 2391); nor can they ever be called upon to reveal communications made by one to the other during the continuance of the marriage relation. § 2392.

Confidential communications made to an attorney, counselor, physician, surgeon, minister of the gospel, or priest, in the proper discharge of their duties, are not allowed to be disclosed

person having, by law or by consent of parties, authority to hear, receive and examine evidence, as *prima facie* proof of all the matters contained or recited in such register, when the register, or such copy thereof as aforesaid, is produced, and of all the matters contained, or recited in, or indorsed on such certificate of registry, when the said certificate is produced."(1)

The thirteenth section enacts, that, where it is necessary to prove the conviction or acquittal of any person charged, it shall not be necessary to produce the record, but the fact may be certified under the hand of the clerk of the court. The section is as follows:

"And whereas, it is expedient, as far as possible, to reduce the expense attendant upon the proof of criminal proceedings: be it enacted, that whenever, in any proceeding whatever, it may be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof, but it shall be sufficient that it be certified, or purport to be certified, under the hand of the clerk of the court, or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment or acquittal, as the case may be, omitting the formal parts thereof."

Before this enactment, it was necessary, in order to prove a conviction or acquittal, that the record itself should be produced, unless it could be proved to have been lost or destroyed.

Connected with this subject, it may be mentioned, that, by an earlier statute passed in the same session for the better prevention of offences,(2)

(1) See 8 & 9 Vict. c. 89, § 43; *Post*, Vol. II.

(2) 14 & 15 Vict. c. 19.

(§ 2393); unless the party making them waives the statutory prohibition. § 2394. Where a party is subpœnaed as a witness, and fails to appear, the party calling him may be a witness in his own favor. § 2422, Code of Iowa, adopted in 1851.

CALIFORNIA.—The Civil Practice of this state resembles that of New York, being in many respects founded upon it.

Art. 1126, § 391. All persons are competent witnesses who are not expressly excluded.

Section 392. Neither religious belief of any kind, nor interest in the event of the action or proceeding, disqualifies any person, except, 1. When he is a party to the action or proceeding, or the person for whose immediate benefit it is prosecuted or defended, 2. When his interest is present, certain and vested.

Art. 1127, § 393, states the true test of interest.

Art. 1128, § 394, specifies who are incompetent, namely, 1. insane persons, 2. children under ten who do not appear actually competent, 3. Indians or half Indians, negroes or half negroes, as against white persons, 4. convicts not pardoned.

Art. 1129, § 395. Neither the husband nor wife can be a witness for or against the other.

Neither an attorney or counselor, nor a clergyman or priest, nor a physician or surgeon, nor

the provisions of the 7 & 8 Geo. IV, c. 18, § 11, as to the proof of a previous conviction for felony by a certificate thereof in cases where the indictment stated a previous conviction, are extended to indictments for the misdemeanors created by that act (14 & 15 Vict. c. 19). The enactment is as follows:

"In any indictment for such misdemeanor committed after a previous conviction as aforesaid, it shall be sufficient to state that the offender was, at a certain time and place, convicted of felony or misdemeanor against "The Act for the better Prevention of Offences, 1851" (as the case may be), without otherwise describing the previous felony or misdemeanor; and a certificate, containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony or misdemeanor, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer (for which certificate a fee of five shillings and no more shall be demanded or taken), shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction, without proof of the signature or official character of the person appearing to have signed the same."

It may be mentioned also here, that by the twenty-second section of the 14 and 15 Vict. c. 100, it is enacted that upon a trial for perjury or subornation of perjury, relating to the trial of any indictment for felony or misdemeanor, a certificate of the trial of such indictment, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court, shall be sufficient evidence of such last-mentioned trial.

The fourteenth section of the Law of Evidence Amendment Act contains provisions for rendering examined copies of certain documents admissible in evidence. It is as follows:—

"Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a

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a public officer, can be called upon to disclose communications made to him, or give evidence of facts communicated to him in his official or professional capacity. §§ 396, 397, 398, 399.

Actions for a discovery are abolished, and each party may examine the adverse party as a witness, as under the Code of New York. See Wood's Cal. Digest, arts. 1154, 1155, §§ 421, 422.

ALABAMA.—In all suits upon contracts where the defendant has been personally served with process, and is a resident of the state, and the matter in controversy does not exceed three hundred dollars, the plaintiff is competent to prove the correctness of the demand by his own oath, unless the defendant in open court denies upon oath the truth of the facts proposed to be sworn to by the plaintiff. But the plaintiff must give the opposite party, or his attorney, five days' notice, or file notice with the clerk in certain cases of residence beyond the county, of his intention to prove the demand by his own oath. But such provisions do not apply when executors, administrators, trustees or guardians are defendants. Code of 1852, §§ 2313–2315.

GEORGIA.—In this state the act of 1847 authorizes parties to compel discoveries in suits at law, and specifies the manner in which interrogations may be put by either party to the other,

copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted, and which officer is hereby required to furnish such certified or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words."

This enactment extends the provisions of the Documentary Evidence Act,(1) and will greatly facilitate the proof of public writings, not being records of judicial proceedings, which subject is treated of in the sixth chapter of the second volume.

The fifteenth section of the statute makes the certifying a false document a misdemeanor.

The sixteenth section enacts that any court, judge, arbitrator, or other person having authority to hear evidence, may administer oaths to the witnesses.

Section seventeenth makes the forging of a seal, stamp, or signature of any document referred to in the act a felony.

The act does not extend to Scotland,(2) and it comes into operation on the 1st of November, 1851.(3)

(1) 8 & 9 Vict. c. 113, § 1. See Vol. II.
(2) Sect. 18.
(3) Sect. 20.

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and shall be answered on oath; declaring further that the answers so given may be used as evidence on the trial. See also the statute of 1850. But the common-law rule still prevails in the state; the witness is incompetent if the effect of his testimony will be to create or increase a fund in which he may be entitled to participate. The Governor, &c. v. The Justices, &c., 20 Geo. R. 359. And an administrator who is liable for costs is also incompetent, though he have an estate in his hands sufficient to pay the debt and costs if recovered, and notwithstanding he became interested after the party calling him had acquired a right to his testimony. Shannon Adm'r v. Fuller, Id. 566, decided in 1856.

ILLINOIS.—A statute of this state allows parties in trials before justices of the peace to call the opposite party to establish his demand, discount or set-off, and in case he refuses to appear and testify, permits him to be sworn as a witness, and prove it himself; it being first shown that he has no other witness by whom he can prove the demand. And the act is construed strictly. Pickering v. Misner, 11 Ill. 597. Under a similar statute, the same right is allowed to either party on appeal; but the party calling his adversary as a witness is not allowed afterwards to impeach his general character for truth and veracity, though he may show that he has testified or stated the matter differently on a former occasion. Drenner v. Lindsey, 15 Ark. 359.

INDIANA.—No person is rendered incompetent as a witness by reason of crime or interest; parties are not rendered competent, nor husband and wife for or against each other: and no want of religious belief renders a witness incompetent. Though as a general rule the party calling cannot impeach a witness, he may do so where he was compelled to call him, or was surprised into calling him. 2 R. S. of 1852, pp. 80–83.

Some of the provisions of two other acts passed in the last session(1) will now be noticed.

By the fifth section of the 14 and 15 Vict. c. 19, it is enacted, that on the trial of any indictment for *feloniously* cutting, stabbing or wounding, the jury may acquit the defendant of the felony, and find him guilty of the misdemeanor, or of *unlawfully* cutting, stabbing or wounding.

By the ninth section of the 14 and 15 Vict. c. 100, a party indicted for a felony or a misdemeanor, may be found guilty of an attempt to commit the same, and shall be liable to the same consequences as if charged with and convicted of the attempt only; and by the eleventh section, on the trial of an indictment for robbery, the jury may convict of an assault with intent to rob. In either case the defendant who has been tried for the major offence shall not be liable to be prosecuted for the misdemeanor or minor offence.

The twelfth section enacts, that any person tried for a misdemeanor shall not be acquitted if the offence turn out to be felony; but he shall not be liable to be afterwards prosecuted for felony on the same facts unless the court shall discharge the jury from giving any verdict as to the misdemeanor, and direct the defendant to be indicted for felony.

By the thirteenth section, any person indicted for embezzlement as a clerk or servant, is not to be acquitted if the offence turn out to be a larceny and *vice versa:* and in either case the person tried for the one offence shall not be liable to be afterwards prosecuted for the other offence upon the same facts.

(1) 14 & 15 Vict. c. 19, For the better Prevention of Offences; and 14 & 15 Vict. c. 100, For the Improvement of the Administration of Criminal Justice (Lord Campbell's Acts). The 2d section of the first-mentioned act, as to the proof of previous convictions, and the 22d section of the last-mentioned act, as to proof of the trial of an indictment, have been already noticed (*supra*, pp. xxvi, xxvii.) The 1st, 2d, and 3d sections of the last-mentioned act, also relating to amendments in criminal proceedings, will be found in the text of the work, Vol. I, Chap. 12. The provisions also of another statute relating to the expenses of prosecutions (14 & 15 Vict. c. 55) will also be found in Vol. II, Chap. 2.

New Hampshire.—Inhabitants of towns, and members of public corporations, and members of mutual insurance corporations are competent witnesses in cases affecting the interests of such corporations, and no person is disqualified as a witness on the trial of an indictment or information on account of his interest in a penalty to be recovered therein. Compiled Statutes of 1852, pp. 485, 539. Either party may examine his adversary in certain cases, where the action is referred. Lovejoy v. Jones, 10 Foster R. 164.

Virginia.—Persons liable to assessment by a county or corporation are not thereby disqualified as witnesses, nor are officers of such county or corporation, though parties to the suit and liable with others to contribute to pay the costs of suit, disqualified. And no trustee, executor, or other fiduciary, is incompetent as a witness in any case by reason only of his being a party thereto, or of his being liable to costs in respect thereof; but if liable for costs, he is not competent, unless some person undertake to pay the same. Code of 1849, p. 663.

By the fourteenth section, it is enacted, that upon an indictment for jointly receiving, persons guilty of separate receiving may be convicted.

These enactments materially and beneficially alter the law as laid down in that part of Chapter 1, Section 1, in Vol. II (Of the Admissibility and Effect of Judgments and Verdicts), relating to the effect of the plea of *autrefois acquit.*(1)

In the same section of this work, reference was made to the statute 7 Wm. IV, and 1 Vict. c. 85, § 11, whereby on an indictment for felony, including an assault, the defendant might be convicted for an assault only. But now, by the 14 and 15 Vict. c. 100, § 10, after reciting that great difficulties had arisen in the construction of the above mentioned enactment,(2) the same is repealed.(3)

The statute 7 and 8 Geo. IV, c. 28, contains provisions for the more exemplary punishment of offenders after a previous conviction. The 6 and 7 Wm. IV, c. 111, provides that a previous conviction is not to be given in charge or read to the jury until after the finding for the subsequent felony, except when evidence as to good character is given. The subsequent statutes, 12 and 13 Vict. c. 11, and 14 and 15 Vict. c. 19, con-

(1) The provisions of the above mentioned statute, which was before Parliament at the time that chapter went through the press, are referred to in Vol. II.

(2) See Vol. II.

(3) The provisions of the 5th section of the 14 & 15 Vict. c. 19, and of the 9th and 11th sections of the 14 & 15 Vict. c. 100 (*supra*), seem intended to be substituted for those of the 7 Wm. IV and 1 Vict. c. 85, § 11. See Vol. II.

TEXAS.—Children and insane persons are declared incompetent by the Code of Criminal Procedure recently adopted; a slave or free person of color cannot testify, except where the prosecution is against a person who is a slave or free person of color. § 644. Communications to an attorney are privileged (Art. 646), and the code does not allow the husband or wife to testify in relation to communications made by one to the other during the existence of the marriage relation; and they cannot testify against each other except as to offences by one against the other. Articles 647 and 648.

MAINE.—In this state, no person is deemed an incompetent witness on account of his religious belief; and any person who does not believe in the existence of a Supreme Being is permitted to testify under solemn affirmation, subject to all the pains and penalties of perjury.

No person is excused or excluded from being a witness in any civil suit or proceeding at law or in equity, by reason of his interest in the event thereof as party or otherwise; but his interest may be shown, and his want of religious faith, to affect his credibility; and parties are not rendered competent witnesses in actions that imply an offence against the criminal law, unless the defendant offers himself as a witness, nor is a party admitted as a witness in actions by or against executors or administrators. The above provisions were incorporated into the law of Maine by statutes passed in 1847 and 1856. See R. S. of the State, published by authority in 1857, p. 524.

MICHIGAN.—No person is excluded from giving evidence in any matter, suit or proceeding, civil or criminal, by reason of crime or interest in the matter, suit or proceeding, unless he is a party to the record; and any party to the suit or proceeding may (by filing an affidavit showing that any other party is acquainted with certain specified material facts, and that there is no

tain similar provisions as those contained in the 7 and 8 Geo. IV, c. 28; and the ninth section of the 14 and 15 Vict. c. 19, contains a similar provision as that contained in the 6 and 7 Wm. IV, c. 111.

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competent witness thereof), call and examine such party as a witness. Parties are also allowed to testify in certain cases before a justice of the peace or a county court. See R. S. of Michigan, published in 1857, Vol. II, pp. 1184, 1185.

RHODE ISLAND.—Parties to the suit or civil proceeding, and parties interested, are competent witnesses in this state; but husband and wife are not competent to testify for or against each other. See R. S. of 1857, p. 454.

ALPHABETICAL LIST

OF

AMERICAN AND IRISH BOOKS,

CONSULTED IN THE COURSE OF THESE NOTES.

THE COURTS TO WHICH THEY PERTAIN, AS WHETHER UNITED STATES OR STATES, WILL BE FOUND STATED IN THE PREFACE, MORE AT LENGTH.

[The editor of this edition has cited the later reports, but does not deem it important to insert them in this list.]

Names of Books.	*No. Vols.*
Addison's Rep. (Penn.)	1
Alabama Rep.	1
Admiralty Decision, (U. S.)	2
Aiken's Rep. (Verm.)	2
American Law Journal, (U. S.)	6
Anthon's N. P. Rep. (N. Y.)	1
Arkansas Rep.	5
Ashmead's Rep. (Penn.)	2
Appleton's Rep. (Me.)	2
Alabama Rep. (by the Judges)	13
Bailey's Rep. (S. C.)	2
Bailey's Equity Rep. (S. C.)	1
Baldwin's Rep. (U. S.)	1
Ball & Beatty's Rep. (Irish)	2
Bay's Rep. (S. C.)	2
Beatty's Rep. (Irish)	1
Bee's Admiralty Rep. (U. S.)	1
Bibb's Rep. (Ky.)	4
Binney's Rep. (Penn.)	6
Blackford's Rep. (Ind.)	7
Bland's Ch. Rep. (Md.)	3
Brayton's Rep.	1
Breese's Rep. (Ill.)	1
Brockenbrough's Rep. (U. S.)	2
Browne's Rep. (Penn.)	2
Burr's Trial	2
Batty's Rep. (Irish)	1
Brevard's Rep. (S. C.)	3
Barbour's Ch. Rep. (N. Y.)	3
Barbour's Law Rep. (N. Y.)	3
Barr's Rep. (Penn.)	9
Call's Rep. (Va.)	6
Cameron & Norwood's Rep. (N. C.)	1
Carolina Law Journal, (S. C.)	1
Charlton's Rep. (Geo.)	1
Chase's Trial, (U. S.)	1
Chipman, D.'s Rep. (Verm.)	2
" N.'s Rep. (Verm.)	1
City Hall Recorder, (N. Y.)	6
Coleman's Cases, (N. Y.)	1
Coleman & Caines' Cases, (N. Y.)	1
Caines' Cases in Error, (N. Y.)	2
" Rep.	3
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" Rep. Mills, (S. C.)	2
Cooke's Rep. (Tenn.)	1
Coxe's Rep. (N. J.)	1
Cranch's Rep. (U. S.)	9
Conroy's Rep. (Irish)	1
Connecticut Rep. (Conn.)	18
Clarke's Ch. Rep. (N. Y.)	1
Cheeves' Law and Equity Rep. (S. C.)	1
Charlton, R. M. Rep. (Geo.)	1
Comstock's Rep. (N. Y.)	1
Dallas' Rep. (Penn.)	4
Dane's Abridgment, (Mass.)	9
Dana's Rep. (Ky.)	9
Davies' Rep. (Irish)	1
Day's Rep. (Conn.)	5
Devereux Law Rep. (N. C.)	4
" Equity Rep. (N. C.)	2
" & Battle's Law Rep. (N. C.)	4
" " Equity Rep. (N. C.)	2
Dudley's Rep. (Geo.)	1
Dessaussure's Equity Rep. (S. C.)	4
Denio's Rep. (N. Y.)	4
Dudley's Law and Equity Rep. (S. C.)	1
Douglass' Rep. (Mich.)	2
Edwards' Ch. Rep. (N. Y.)	3
Fairfield's Rep. (Me.)	3
Fox & Smith's Rep. (Irish)	2
Freeman's Ch. Rep. (Miss.)	1
Gallison's Rep. (U. S.)	2
Gilbert's Rep. (Irish)	1
Griswold's Rep. (Ohio)	4
Gill & Johnson's Rep. (Md.)	12
Gill's Rep. (Md.)	3
Gilpin's Rep. (U. S.)	1
Green's Rep. (N. J.)	3
" Ch. Rep. (N. J.)	3
Greenleaf's Rep. (Me.)	9
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Hall's Rep. (N. Y.)	2
Halsted's Rep. (N. J.)	7
Hammond's Rep. (Ohio)	9
Hardin's Rep. (Ky.)	1
Harper's Equity and Law Rep. (S. C.)	2
Harrington's Rep. (Del.)	3
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" & M'Henry's Rep. (Md.)	4
Howard's Rep. (Miss.)	7
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Harrington's Ch. Rep. (Miss.)	1
Humphrey's Rep. (Tenn.)	8
Hill's Rep. (S. C.)	3
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Hawks' Rep. (N. C.)	4
Hayes' Rep. (Irish)	1
Haywood's Rep. (N. C.)	2
" Rep. Tenn.)	3
Henning & Munford's Rep. (Va.)	4
Hogan's Rep. (Irish)	2
Hopkins' Ch. Rep. (N. Y.)	1
Hudson & Brooke's Rep. (Irish)	2
Hughes' Rep. (Ky.)	1
Harris & Gill's Rep. (Md.)	2
Hoffman's Ch. Rep. (N. Y.)	1
Howard's U. S. D. C. Rep.	6
Howard's Practice Rep. (N. Y.)	3
Irish Term Rep. (Irish)	1
Iredell's Rep. (N. C.)	8
" Equity Rep. (N. C.)	5
Johnson's Cases, (N. Y.)	3
" Ch. Rep. (N. Y.)	7
" Rep. (N. Y.)	20
Jones' Rep. (Irish)	1
Journal of Jurisprudence, (U. S.)	1
Judicial Opinions of Mayor's Court, (N. Y.)	1
" Repository, (N. Y.)	1
Kent's Commentaries, (N. Y.)	4
Kirby's Rep. (Conn.)	1
Kelly's Rep. (Geo.)	4
Kentucky Decision, (Ky.)	2
Law Intelligencer, (U. S.)	3
Leigh's Rep. (Va.)	12
Littell's Rep. (Ky.)	5
" Select Cases, (Ky.)	1
Louisiana Rep. (La.)	19
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" J. J. Rep. (Ky.)	7
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" & Yerger's Rep. (Tenn.)	1
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Monroe's Rep. (Ky.)	7
Munford's Rep. (Va.)	6
Murphy's Rep. (N. C.)	3
Monroe's, Benj. Rep. (Ky.)	8
Metcalf's Rep. (Mass.)	11
McMullen's Rep. (S. C.)	2
" Equity Rep. (S. C.)	1
Meigs' Rep. (Tenn.)	1
Missouri Rep. (Mo.)	7
McLean's Rep. (U. S.)	3
Morris on Replevin	1
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North Carolina Law Repository	2
Nott & McCord's Rep. (S. C.)	2
North Carolina Term Rep.	1
Paige's Ch. Rep. (N. Y.)	11
Paine's Rep. (U. S.)	1
Peck's Rep. (Tenn.)	1
Pennington's Rep. (N. J.)	2
Penrose & Watts' Rep. (Penn.)	3
Peters C. C. Rep. (U. S.)	1
" " U. S. S. C. Rep.	16
Pickering's Rep. (Mass.)	24
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Rawle's Rep. (Penn.)	5
Revised Statutes, (N. Y.)	3
Ridgeway's Rep. (Irish)	3
Root's Rep. (Conn.)	2
Robinson's Rep. (Va.)	2
Riley's Law and Equity Rep. (S. C.)	2
Rice's Law Rep. (S. C.)	1
" Equity, (S. C.)	1
Richardson's Rep. (S. C.)	3
" Equity Rep. (S. C.)	2
Robinson's Rep. (La.)	12
Schoales & Lefroy's Rep. (Irish)	2
Sergeant & Rawle's Rep. (Penn.)	17
Smith & Batty's Rep. (Irish)	1
Southard's Rep. (N. J.)	2
Stewart's Rep. (Ala.)	3
" & Porter's Rep. (Ala.)	5
Sumner's Rep. (U. S.)	3
Story's Rep. (U. S.)	3
Smedes & Marshall's Rep. (Miss.)	11
Strobhart's Law Rep. (S. C.)	2
" Equity Rep. (S. C.)	1
Sedgwick on Damages	1
" on Evidence	1
Scammon's Rep. (Ill.)	4
Spear's Law Rep. (S. C.)	2
" Equity Rep. (S. C.)	1
Saxton's Ch. Rep. (N. J.)	1
Shipley's Rep. (Me.)	13
Shaw's Rep. (Vt.)	2
Slade's Rep. (Vt.)	1
Sandford's Ch. Rep. (N. Y.)	3
" Law Rep. (N. Y.)	1
Stanton's Rep. (Ohio)	3
Smedes & Marshall's Ch. Rep. (Miss.)	1
Taylor's Rep. (N. C.)	1
Tennessee Rep. (Overton)	2
Trial of Smith & Ogden, (U. S.)	1
Tyler's Rep. (Vt.)	2
Taylor's Evidence	2
Tamlyn's Evidence	
Trial of Frederick Eberle and others	1
United States Law Journal	1
" Register, (Griffith)	3
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Vernon & Scriven Rep. (Irish)	1
Van Ness' Prize Cases	1
Walker's Rep. (Miss.)	1
Wallace's Rep. (U. S.)	1
Washington's Rep. C. C. (U. S.)	4
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A TREATISE

ON

THE LAW OF EVIDENCE.

VOLUME THE FIRST.

WITH a view to assist the proceedings of Courts of Justice in the investigation of facts submitted for their decision, general rules have been laid down respecting the admissibility and effect of evidence, and the order in which the several proofs are to be adduced. These rules constitute the Law of Evidence, and are the subject of the following Treatise. In inquiries upon this subject, the great end and object ought always to be the ascertaining of the most convenient and surest means for the attainment of truth. The end sought is truth; the rules laid down are the means used for the attainment of that end.

The evidence adduced before juries upon controverted questions of fact is of two kinds; Parol Evidence, consisting of the *viva voce* examination of witnesses, and Written Evidence. In treating of these subjects, the following work will be divided into three parts. In the first part, it is proposed to consider the subject of proof by witnesses, and the principal rules relative to evidence in general; in the second part, to consider the subject of written evidence; and, in the third part, it is proposed to consider certain branches of the law of evidence, chiefly of a practical nature—such as the means of enforcing the attendance of witnesses, the

mode of examining witnesses, bills of exceptions and demurrers to evidence; and the consequences generally of the improper admission or rejection of evidence by a judge at the trial.

There are, moreover, certain matters which do not require proof; such as those which the judge or jury are presumed to be already acquainted with; these are said to be noticed judicially. Matters, also, that are admitted on the record or under a judge's order, do not require proof. These subjects will be treated of in the appropriate divisions of the following work.

PART THE FIRST.

CHAPTER I.

OF THE PROVINCE OF THE JUDGE TO DECIDE UPON THE ADMISSIBILITY OF EVIDENCE; AND OF THE SEVERAL CAUSES OF INCOMPETENCY OF WITNESSES.

THE parties to a suit are not permitted to adduce every description of evidence which, according to their own notions, may be supposed to elucidate the matter in dispute; if such a latitude were permitted, evidence might be often brought forward which would lead rather to error than to truth, the attention of the jury might be diverted by the introduction of irrelevant or immaterial evidence, and the investigation extended to a most inconvenient length. In order to guard against these evils, certain rules for limiting and regulating the admissibility of evidence have been established, from time to time, by the judges; few of this description of rules are the result of positive legislative enactment.(1)

It is the province of the judge presiding at the trial, to decide all questions on the admissibility of evidence; it will be for the judge also to decide any preliminary question of fact, however intricate, the solution of which may be necessary for enabling him to determine the other question of admissibility. Upon this subject, it has been said by Buller, J.,(2) that

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(1) See by Ld. Abinger, C. B., in R. v. Ryle, 9 M. & W. 239, and by Parke, B., Ibid. 244.

(2) Carpenter's Company v. Hayward, 1 Doug. 375; B. N. P. 297.

(Under recent statutes, in England and in this state, fewer objections are now allowed to the competency of witnesses than were permitted under the common law rule; but the former decisions are still important in many respects, and will therefore be cited as usual, especially where the principle to be illustrated applies with equal force to other cases of incompetency.)

NOTE 1.—In Pennsylvania, if, when a witness be offered, it be *perfectly clear* from the *testimony* given in relation to him, that he is interested, the court may reject him as incompetent; but if his interest be *in the least degree doubtful*, the court should permit him to be sworn, instructing the jury that if, in their opinion, he is interested, they are to pay no regard whatever to his testimony. Hart v. Heilner, 3 Rawle, 407.

Where a summary proceeding is instituted by statute to be conducted on proof, the law will hold the tribunal to the same rules of competency as prevail in the common law courts, unless a contrary rule be declared by the statute. The State v. Barrow, 3 Murph. 121.

Evidence received by a judge on the trial of a cause, as preliminary to the introduction of other evidence, (*e. g.* that one is a partner, so as to let in his admissions as evidence against another partner,) is not to be submitted to the jury. It is the province of the judge, and not of the jury, to pass on its sufficiency. Harris v. Wilson, 7 Wend. 57. See also Hartford v. Palmer, 16 John. Rep. 143; Livingston v. Kiersted, 10 John. Rep. 362; Lyon v. Daniels, 14 Penn. State R. 197.

That the jury are to decide on the sufficiency of evidence, there are many cases, among which these are a few: Wills v. Tucker, 3 Binn. 370, 372, 373; Hardway v. Monson, 2 Munf. 230; Shanks v. Fenwick, Id. 487; 1 Wash. Virg. Rep. 90; Roseboom v. Billington, 17 John. Rep. 182; Fisher's Ex'r v. Duncan, 1 Hen. & Munf. 563; Keel v. Herb, 1 Wash. Virg. Rep. 203; New York Firem. Ins. Co. v. Walden, 12 John. Rep. 513; Lessee of Fehl v. Good, 2 Binn. 495; Rogers v. Briley, 1 Haywood, 256.

Incompetent evidence should always be withheld from the jury. Lee v. Tapscott, 2 Wash. Virg. Rep. 276; Brown v. May, 1 Munf. 291; Penfield v. Carpender, 13 John. Rep. 350; Miller v. Starks, Id. 517.

Competency is presumed till the contrary is shown. And see the following cases: Hall v. Gittings, 2 Harr. & John. 112, 120 and 121, and the cases cited by Chase, C. J., at the last page; Stoddard v. Manning, 2 Harr. & Gill, 147; Callis v. Tolson's Ex'rs, 6 Gill & John. 80, 91; Saxton v. Boyce, 1 Bail. 66; Smith v. White, 5 Dana, 382, 383; Savage, C. J., in Jackson ex dem. Howell v. Delancy, 4 Cowen, 427, 430.

But the interest once being established, it should be clearly removed; and the witness leaving the question doubtful on the facts stated, and the judge at N. P. rejecting him, the court in bench refused to grant a new trial. Seymour v. Beach, 11 Conn. Rep. 275, 281, 282; McManagil v. Ross, 20 Pick. 99, 103. These cases, in short, with many others, (see Witter v. Latham, 12 Conn. Rep. 392, 400, and the cases there cited, especially Donelson v. Taylor, 8 Pick. 390; see Coleman v. Wolcott, 4 Day, 388, *contra*,) hold, that it is for the court alone to try and determine the question of competency, both as to the law and the fact, wherein it comes in place of a jury; and a new trial will not be granted where there is a fair conflict of evidence, even though the court may find against a slight preponderance. The rule here does not apply, that the court shall decide the law, and the jury find the facts. All this was also fully considered and expressly determined, in Townsend v. The State, 2 Blackf. 151, 162, and see High v. Stainback, 1 Stew. Rep. 24. And above all, error does not lie for a finding, one way or the other, upon the facts. Taylor v. Taylor, 2 Watts, 357, 358. After the court has determined the question, it is not proper to submit it to the jury. Witter v. Latham, *supra*. Though it is said that where the point depends on the decision of an intricate question of fact, judges occasionally, in practice, take the preliminary opinion of the jury. 8th ed. Phil. Ev. by Amos and Phillips, p. 2, and note there.

It is no ground for a new trial, that, on a preliminary examination as to the competency of a witness, the judge allows, in order to prove interest, improper evidence to be given in the presence of the jury; he, in the end, properly receiving the witness on the merits, and submitting his credit to the jury. Ackley v. Kellogg, 8 Cowen, 223.

Under what qualifications it shall be said that the jury are, on the merits, to find the law and fact, either in civil or criminal cases, was much and ably inquired, in Townsend v. The State, *supra*. The trial was on an indictment under the excise law, for selling spirituous liquor without license. A license was offered in evidence; but appearing on its face to be in consideration of a sum less than the statute required, (50 cents instead of $5,) the court pronounced it void, excluded the evidence, and directed the jury that it was not their province to determine the law. On error, it was held, that the jury are judges of the fact, both in civil and criminal matters, on such evidence as the court shall submit to them as competent; but they are not, in general, either in civil or criminal cases, judges of the law. They are bound to find the law, as it is propounded to them by the court. They may, indeed, find a general verdict, including both law and fact; but if, in such verdict, they find the law contrary to the instructions of the court, they thereby violate their oath.

The same thing was lately held by Story, J., in a capital case. United States v. Battiste, 2 Sumn. 240, 243. He stated it as the opinion of his whole professional life, that the jury are no more judges of the law in a capital or other criminal case, upon the plea of not guilty, than they are in every civil case, tried upon the general issue. He said, that in each case, they had the physical, but not the moral right to decide the law according to their own notions or pleasure.

whether there is any evidence is a question for the judge, but whether the evidence is sufficient is a question for the jury.(1)

This rule applies to the admissibility of every kind of evidence, written as well as oral; and in all cases, both civil and criminal.

There are certain conditions precedent which are required to be observed before evidence is to be submitted for the consideration of a jury. Thus an oath or its equivalent, and competency in a witness, are conditions precedent to admitting *viva voce* evidence;(2) so the fact of a person's expectation of immediate death, previously to the admission of proof of his dying declarations;(3) so, also, the proof of requisite search,

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That it is the duty of the court to instruct them as to the law; and of the jury to follow such instruction. That if the jury were to decide, it would render the law uncertain; it would be almost impracticable to learn what they did decide; the court would have no right to review their decision; that every person has a right to be tried according to the fixed law of the land. If he thought the jury were judges of the law, he should hold it his duty to abstain from stating the law to them. And to this it may be added, if the law give the right to the jury, why should it run into the inconsistency of requiring the court to determine the admissibility of evidence? But all the leading arguments and authorities on the question will be found fully and ably considered by Holman, J., in Townsend v. The State, 2 Blackf. 156, *et seq.* He cites Addison, J.'s charges, Suppl. Add. Rep. 53 to 63, No. 6; and Pennsylvania v. Bell, Add. Rep. 156; and The Same v. McFall, Id. 255, which go strongly to uphold the same doctrine. The learning of the question is perhaps exhausted in charge No. 6 of Judge Addison, p. 57, *et seq.*, and his arguments are such as it is difficult for the legal mind to resist.

NOTE 2.—The burden of making out that a witness is incompetent, lies on the party who makes the objection (per Bayley, J., in Marsden v. Stansfield, 7 Barnw. & Cress. 815; S. C., 1 Mann. & Ryl. 669, and *vid.* Watts v. Garrett, 3 Gill & John. 355); yet the case of a bankrupt, called in respect to the foundation of the commission, seems to form an exception. He, it is said, cannot be examined either to support or defeat the commission; for he often has an interest to do either, and is excluded, for that reason, in general practice. Sayer v. Garnett, 7 Bing. 103.

NOTE 3.—Utica Bank v. Hillard, 5 Cowen's Rep. 153; Cushman v. Loker, 2 Mass. Rep. 108; Commonwealth v. Snell, 3 Id. 82; Churchill v. Suter, 4 Id. 162. A witness is never holden incompetent merely on the ground that the fact that he is called to prove, is of such a nature that he cannot be convicted of perjury should he swear falsely. The People v. Ferguson, 8 Cowen's Rep. 102. Nor is it an objection to his competency that the facts to which he swears positively, are of such a nature that they could not be within his knowledge. Thompson v. Stewart, 3 Conn. Rep. 171. Seamen are considered in law credible as well as competent witnesses, and their testimony is to be weighed by the jury like that of other witnesses. United States v. Freeman, 4 Mason, 505.

(1) See also Bennison v. Jewison, 12 Jur. 485, Exch.

(2) See *infra*, ch. 3.

For this reason the declarations of a person of weak and feeble understanding, who cannot talk, cannot be received in evidence. He must be capable of testifying and sworn as a witness, otherwise his account of the transaction cannot be shown in evidence. The People v. McGee, 1 Denio Rep. 19.

(3) Major Campbell's Case, cited by Parke, B., in Bartlett v. Smith, 11 M. & W. 486. *Qy.* S. C. cited by Lord Ellenborough, in R. v. Hucks, 1 Stark. R. 523. In R. v. Woodcock, 1 Leach C. C. 504; S. C., cited 1 Stark. R. 523, *in notis*, Eyre, C. B., is said to have left the question to the jury.

To render the dying declarations of deceased admissible in evidence, it must be shown that he was actually in a dying condition, and conscious of the fact, when they were made. Campbell v. The State, 11 Geo. 353. It is the apprehension of immediate death which renders his decla-

previously to the admission of secondary evidence of lost writings;(1) and the proof of a stamp, prior to the admissibility of certain written documents;(2) and the proof of consanguinity or affinity in the declarant, prior to the admission of declarations of deceased relatives.(3) The judge alone has to decide whether such condition precedent has been fulfilled. If proof is offered by witnesses, he is to decide on their credibility. If counter evidence is proposed, he must receive it before he decides; and he has no right to ask the opinion of the jury on the fact as a condition precedent.(4)

The question, whether an ancient document is produced from the proper custody, is a preliminary question to be decided by the judge.(5) In like manner, where it is proposed to give in evidence declarations or admissions made by a party to the suit, and a question arises as to the identity of the party making such declarations, that question is a preliminary one for the decision of the judge.(6)

Neither the admissibility nor the effect of evidence will be altered by the circumstance that the fact which the judge is to decide as a condition precedent, is the same fact that is to be decided by a jury on the issue:

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ration competent evidence. The State v. Tilghman, 11 Ired. 513. Such testimony is admissible, notwithstanding the "prisoner's right to be confronted with the witnesses against him." Green v. The State, 13 Mis. 382.

(1) See by Alderson, B., in Bartlett v. Smith, *ut supra*, 486.

The party seeking to prove the contents of a lost paper must exhaust all the means of discovery which are accessible to him, and suggested by the nature of the case. Harper v. Scott, 12 Geo. 125. The necessary preliminary evidence of loss depends very much upon the nature of the instrument as well as the circumstances of the case. Waller v. The Eleventh School District, &c., 22 Conn. R. 326. When it is in the possession of a third person residing out of the jurisdiction of the court, its contents may be proved without previous notice to produce it, where it cannot be presumed to be in the possession of the opposite party. Shepard v. Giddings, 22 Conn. R. 282.

(2) Bartlett v. Smith, *ut supra*, 483.

(3) Doe d. Jenkins v. Davies, 10 Q. B. 314.

(4) *Per Cur.* 10 Q. B. 323.

In like manner where the plaintiff seeks to establish his case by introducing his books of account, he must first prove by witnesses who have dealt and settled with him, that he keeps honest and fair books of account, that the book presented is a book of original entries, that some of the articles charged have been delivered, and that he kept no clerk at the time the account was accruing. Vosburgh v. Thayer, 12 John. Rep. 461; Linnell v. Sutherland, 11 Wend. 568. This preliminary evidence being given, the books must be offered without condition (Winants v. Sherman, 3 Hill R. 74), must be scrutinized with care, and received with great caution. And this preliminary or introductory evidence is addressed to the court, to enable it to determine whether the books of account shall be received as evidence at all. Larue v. Rowland, 7 Barb. R. 107. If the books are impeached, as unworthy of credit, it is the duty of the court to reject the evidence as incompetent. Coggswell v. Dolliver, 2 Mass. R. 217; Eastman v. Moulton, 3 N. Hamp. R. 156. (The ground on which books are received in evidence, namely, from the necessity of the case, renders it questionable whether they are now admissible, since the passage of the act allowing parties to the suit to be sworn as witnesses in their own behalf.)

(5) Swinnerton v. Stafford (Marq.), 3 Taunt. 91; Michell v. Rabbetts, cited Ibid.; Meath (Bp.) v. Winchester (Marq.), 3 N. C. 183, 198.

(6) Corfield v. Parsons, 1 C. & M. 730.

as, where the declarations of an agent are admissible, he may first prove to the satisfaction of the judge that he is an agent, and his evidence therefore admissible, though the question at issue turns upon the fact whether he be agent or not, and the jury have ultimately to decide that question.(1)

The law excludes some descriptions of evidence as wholly improper to be submitted to the jury, and rejects the testimony of certain persons, who are on this account termed incompetent witnesses. Where the question as to the admissibility of evidence depends upon oral testimony, such testimony must necessarily be given in the hearing of the jury; but where it depends upon written evidence, the proper course appears to be, that the writing should not be read aloud, but that it should be handed to the judge for his consideration.(2)

The rules respecting the incompetency of witnesses are chiefly founded on the consideration, that, in the generality of instances, the testimony of those witnesses, whom the law deems incompetent, would mislead juries; and it is obvious that the propriety of the exclusion in each particular case must be judged of, according to the constitution of the tribunal to which the evidence is submitted, and with reference to the mode of proceeding before it. For this purpose, it is necessary to refer to the difference which exists between judicial investigations and the ordinary transactions of life, more especially with regard to the space of time allowed for decision, the temptations to deceive, the facilities of deception, and the consequences of deciding incorrectly.

There are three cases, in which a witness is deemed incompetent to give any evidence at all, viz: 1st, When the witness labors under a defect of understanding; 2dly, Where he refuses to take an oath, or from defect of religious principle does not acknowledge its sanction; and 3dly, Where he is interested in the matter in issue, either as a party to the action, or as being the person in whose immediate behalf the action is brought or defended. Every person not affected by any of these objections, will now be competent to give evidence.(3)

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(1) By Erle, J., 10 Q. B. 320.

(2) Smith v. Sleap, 1 Car. & Kir. 48.

(3) NOTE 3.—There is still another class of cases where an objection to competency will lie, grounded upon principles of policy.

A juror is incompetent to prove the misconduct of his fellow jurors, in order to impeach the verdict. State v. Freeman, 5 Conn. Rep. 348. So, a grand juror, to prove that a witness, who has been examined before the petit jury, swore differently before the grand jury. Imlay v. Rogers, 2 Halsted, 347. But a juror may be admitted to prove improper attempts, by a party, to influence the minds of the jury. Denn ex dem. Chews v. Driver, Coxe, 166. And in New York, by statute, a grand juror is bound to testify as to any consistency or inconsistency between what a witness swore before the grand and petit jury; and to disclose testimony given before the grand jury, on a complaint against or trial of a witness for perjury; but is expressly restrained as to the manner in which he or any of his fellows voted, or what were their expressed opinions. 2 R. S., part 4, ch. 2, tit. 4, § 31, p. 724.

An arbitrator is a competent witness to show the time when and the circumstances in which he made his award. Woodbury v. Northy, 3 Greenl. Rep. 85.

Until a very recent period, there were two other causes of incompetency in a witness, viz: 1st, Where his character was infamous in consequence of conviction of some crime; and 2dly, Where he was interested to any extent, no matter how trifling, in the matter in issue. This latter class included the one thirdly above enumerated, which is still incompetent. The expediency of the rule establishing these two causes of incompetency,

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Whether slaves were witnesses at common law does not seem settled. In this country they are generally incompetent by statute.

In the Duke of Norfolk's Case (1 St. Tr. 113) the duke objected to the Bishop of Ross and others as incompetent witnesses against him, they being strangers, and cited *Bracton*. *Catlin* (who was then chief justice of England) answered: "Bracton, indeed, is an old writer of our law, and by Bracton he may be a witness; a stranger, a bondman may be a witness. Ask you all the judges here." The book proceeds: "And the judges affirmed that he may." They were all present, as this was a trial before the lord high steward. So it seems to have been declared, or at least assented to, by men who had deliberated upon and understood the subject, and that too in the 14 Eliz., when villenage was but recently if yet entirely done away, that a bondman (slave) may be a witness at the common law. Macnally's Ev. 156, S. P. But in Respublica v. Mulatto Bob (4 Dall. 145, note 1), M'Kean, Ch. J., said it was a settled point at common law that a slave could not be a witness, because of the unbounded influence of his master over him, which was at least equal to duress; that the act of assembly was in aid of the common law. Formerly there was a statute of New York forbidding a slave to be a witness, except for or against another slave in criminal cases. 2 R. L. 207, sess. 36, ch. 88, § 19. But slavery is now abolished in this state (1 R. S. 659, § 16), and all slaves coming here, except fugitives from another of the United States, are declared free. 1 R. S. 835, 1836, 3d ed. There is now, however, no statute regulation as to the competency of slaves to testify—at least, none which the editor has found in the new statutes. This is left as at common law. A free black man was always competent to prove facts happening while he was a slave. Gurnee v. Dessies, 1 John. Rep. 508. So a slave manumitted by an infant, for such act is not void, but voidable only on the infant coming of age—a contingency which shall be allowed to go only to his credibility. Rogers' Ex'rs v. Berry, 10 Id. 132. But in Maryland a free black man is an incompetent witness in a suit between free white Christians. Rusk v. Sowerwine, 3 Har. & John. 97. So in South Carolina. White v. Helmes, 1 M'Cord, 430.

The condition of the American slave seems to be quite different from the villein, or English slave, who might exercise many of the powers of a freeman. *Vid.* 4 Reeve's Hist. 309, 2d ed. They were considered as persons. The American slave is considered as a thing. *Vid.* Chinn v. Repass, 1 Monroe, 25, 28. He is on the footing of the Greek or Roman slave. Per Ch. Dessaussure, in Bynum v. Bostick, 4 Des. 267. The condition of the Roman slave may be seen in Tayl. Elem. Civ. Law, 429, which is transcribed in Coop. Just. 411, where the author also notices the condition of the Greek slave. It is said, however, by Johnson, J., in Hall v. Mullin (5 Har. & John. 193), that the condition of slaves in Maryland depends neither on the civil nor feudal law exclusively, but may perhaps rest in part on both, subject to changes in the state law.

A man charged as putative father of a bastard child, by a mother of the mixed blood, cannot be convicted by her testimony, as she is excluded from testifying by a proper construction of the North Carolina statute. The State v. Barrow, 3 Murph. 121. And see Williams v. Blincoe, 5 Litt. 171; Tumey v. Knox, 7 Monroe, 91; Gray v. The State of Ohio, 4 Hamm. Ohio Rep. 353.

(But it has been held, that the declarations of a slave in respect to his health are admissible, to show the effects of a blow upon his head (Biles v. Holmes, 11 Ired. 16); and the general rule undoubtedly is that slaves are not competent witnesses.)

It may also be proper to mention here another case, which does not range itself under any of the heads in the text. It has been seriously questioned whether, where a single judge constitutes the court, his testimony is receivable; and it would seem not to be. Ross v. Bughler, 2 Mart. Lou. Rep. (N. S.) 312. See also People v. Miller, 2 Parker C. R. 197.

that namely, arising from conviction of crime and that arising from general interest in the cause, has been from time to time, and especially of late years, much questioned; but both these grounds of incompetency have been at length entirely abrogated by the statute 6 & 7 Vict. c. 85, (Lord Denman's Act,) the provisions of which will be more fully adverted to hereafter.

CHAPTER II.

OF INCOMPETENCY FROM DEFECT OF UNDERSTANDING.

It is proposed now to examine separately the several causes of incompetency which have been mentioned. And 1st, of incompetency from defect of understanding.

Persons who have not the use of reason are from their infirmity utterly incapable of giving evidence, and are therefore excluded as incompetent witnesses. Incompetency from defect of understanding may arise, where there is a natural deficiency of the intellect, as in the case of idiots; or where the intellect has become disordered, as in the case of insane persons; or where the intellect is immature, as in the case of children.

An idiot is one who, from his nativity, is by a perpetual infirmity *non compos mentis*;(1) such a person is wholly incapable of giving evidence. But persons born deaf and dumb, (although it has been said that in presumption of law they are to be considered as idiots,)(2) are not on this

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(1) Co. Lit. 247, *a*.

Note 4.—Livingston v. Kiersted, 10 John. Rep. 362. When a witness is objected to as incompetent on the ground of mental derangement, the party objecting has the right to call witnesses and prove the fact. The want of reason renders the person incompetent; but this incapacity must be shown to the court by proof, like any other charge of incompetency. But when a person is called as a witness, who is at the time in a state of intoxication, the court have the power to decide from their own view of the situation of the witness offered, whether he be intoxicated to such a degree that he ought not to be heard. Hartford v. Palmer, 16 John. Rep. 143.

A person totally deprived of memory or understanding, or who is suffering under a temporary privation of them when produced to be sworn, is not an admissible witness. Not having the present use of his faculties, he is not capable of retaining in his memory the facts or events in relation to which he is called to testify, nor is he capable of taking upon himself the obligation of an oath. But if he have a present capacity, he is not incompetent, though he has been judicially declared an habitual drunkard, and his estate committed to trustees. Gebhard v. Shindle, 15 Serg. & Rawle, 235. It is enough if he be competent at the time of examination. Id. 238. And it is sufficient to exclude him, if he be at the time drunk, insane, an idiot, or a lunatic. Ellis, J., in Phebe v. Prince, Walk. Rep. 131. The party objecting must, in general, prove the incompetency of the witness (The State v. Holloway, 8 Blackf. 45); and it has been held that he cannot prove the witness's intemperate habits in order to impeach him (Thayer v. Boyle, 30 Maine R. 475); and that it is no objection to the competency or credibility of a witness that he is subject to fits of derangement, if he is sane at the time of giving testimony. Evans v. Hallock, 7 Wheat. 453; James v. Stonebanks, Code Rep. 227.

(2) 1 Hale P. C. 34.

account incompetent: and if it appear, that they have sufficient understanding and know the nature of an oath, they may give evidence by signs, through the medium of an interpreter;(1) or if they are able to write, their testimony will be taken in writing, as the more certain mode.(2) A person, however, who is born deaf, dumb and blind, is still looked upon by the law as in the same state as an idiot, being supposed incapable of any understanding, as wanting all those senses which furnish the human mind with ideas.(3)

Persons who have become permanently deranged in intellect, are incompetent; but lunatics, and persons afflicted only with occasional fits of insanity, although incompetent while under the influence of their malady, may yet be witnesses in their lucid intervals, if it be satisfactorily shown that they have sufficiently recovered the use of their understanding.(4)

There is no precise age fixed, at which children are excluded from giving evidence. At one time, indeed, their age was considered as the criterion of their competency, and it was a general rule that none could be admitted under the age of nine years, very few under ten;(5) which in

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(1) Rushton's Case, 1 Leach C. C. 455.

NOTE 5.—Though the person cannot talk, he may be sworn as a witness if it appear that he is able to communicate facts and circumstances by arbitrary signs and motions, and has sufficient understanding. But the declarations of an injured female, of sufficient age (on an indictment for rape), who cannot talk, but communicates her ideas to others by signs, and is a competent witness though of a weak understanding, cannot be given in evidence by the prosecution to prove the offence committed. The People v. McGee, 1 Denio Rep. 19. Declarations made by her immediately after the alleged offence may be proved, after she has been sworn and given her testimony; not as confirmatory of the truth or falsity of her evidence, but as affecting the credibility of her testimony. The rule is, that when the person upon whom the offence is charged to have been committed, is incompetent, by reason of infancy, idiocy, insanity and the like, to be sworn and give evidence as a witness, no evidence of the assertions or declarations of such person, descriptive of the offence or the offender, can be received in evidence. Reg. v. Guttridge, 9 Carr. & Payne, 471; Reg. v. Megson, Id. 428: 1 Denio R. 24.

(2) Morrison v. Lennard, 3 Car. & P. 127.

(3) 1 Bl. Com. 304; 2 Steph. Com. 530.

(4) Com. Dig. tit. Testmoigne, A. 1.

(5) R. v. Travers, 2 Stra. 700, and cases in East P. C. 442; 1 Hale P. C. 302; 2 Hale P. C. 278. See *infra.*

NOTE 7.—There is no particular age at which a witness must have arrived to render him competent to testify; if he appear, on examination by the court, to have a sufficient sense of the wickedness of false swearing, he may be sworn, although of never so tender an age, and the jury are to judge of his credit. Commonwealth v. Hutchinson, 10 Mass. Rep. 225; The King v. Rose Kelly, Macnally, 154; Swift's Ev. 46. In order to test the capacity of infants to give evidence, and their understanding of the nature and obligation of an oath, the court may examine them as to their religious knowledge or belief. Jackson ex dem. Tuttle v. Gridley, 18 John. Rep. 98; 2 Rev. Stat. of N. Y. 408, § 89. If the witness be fourteen years of age, he is not interrogated respecting his capacity, but is presumed to have sufficient knowledge and discretion to be sworn, unless some circumstances creating suspicion be shown. Den v. Van Cleve, 2 South. Rep. 589; State v. Doherty, 2 Tenn. Rep. 80. But if he is under that age, it is a subject of discretion in the court to admit him or not. Van Pelt v. Van Pelt, 2 Penning. Rep. 657. The testimony of an infant seven years old, corroborated by circumstances, has been held sufficient to

some cases would operate to deprive them of the protection of law against acts of violence.(1) A more reasonable rule has since been adopted, and the competency of children is now regulated, not by their age, but by the degree of understanding which they appear to possess. In Brazier's Case, on an indictment for assaulting an infant five years old with intent to ravish her, all the judges agreed, that children of any age might be examined upon oath, if capable of distinguishing between good and evil, and possessing sufficient knowledge of the nature and consequences of an oath; but that they could not in any case be examined without oath.(2) This is now the established rule, as well in criminal as in civil cases, and it applies equally to capital offences and to offences of an inferior nature. It may be presumed, however, that this rule, that a child cannot be examined without oath, would not be strictly applied in cases where the legislature has permitted evidence to be given upon affirmation, as in the instances of Quakers, Separatists, and some other non-conformists. In such cases it cannot be doubted that a child, if shown to have been duly educated in the religious tenets of its parents, would be permitted to make affirmation, upon the same principle as the parents themselves.

According to this rule, the admissibility of children depends not merely upon their possessing a competent degree of understanding, but also, in part, upon their having received such a degree of religious instruction as not to be ignorant of the nature of an oath, or of the consequences of false-

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justify a conviction for a capital offence. State v. Le Blanc, 1 Const. Rep. 354. But a child only four years old cannot have that idea of a future state which would make it a competent witness. Rex v. Pike, 3 Carr. & Payne, 598. The credit of a witness, which is greatly impaired by his age, is to be judged of by the jury from his manner of testifying and other circumstances. Commonwealth v. Hutchinson, 10 Mass. Rep. 225; State v. Doherty, 2 Tenn. Rep. 80.

NOTE 8.—In one case, where a child nine years old, though very intelligent, did not understand the nature of an oath nor the moral penalty of false swearing, the court instructed her on the spot, and then allowed her to be sworn. Jenner's Case, before Radcliff, Mayor, 2 C. H. Rec. 147, 148, 149.

A child eight years old being called, it appeared that, to within sixteen weeks of the trial, she had never heard of a God, or of a future state of rewards and punishments; that she never prayed or knew the nature of an oath; but since, a clergyman had twice visited and instructed her in the nature of an oath. Patteson, J., rejected her, saying he must be satisfied that she felt the binding obligation of an oath from the general course of her religious education; that the effect of an oath upon the conscience of the child should arise from religious feelings of a permanent nature, and not merely from instructions confined to the nature of an oath recently communicated for the purpose of the trial. Rex v. Williams, 7 Carr. & Payne, 320. (But in this case, it appeared clearly that the child did not comprehend the nature of an oath, nor rightly apprehend what was meant by a future state. In Regina v. Perkins, (33 Eng. Com. Law Rep. 168,) the dying declarations of a boy a little over ten years of age were received in evidence, it appearing that he was aware he would be punished if he stated what was untrue, and that he was not likely to live till morning. 9 Carr. & P. 395. The age of the child is immaterial; but if he be of tender years, it is the duty of the court to examine him as to his knowledge of the nature and obligation of an oath. The People v. McNair, 21 Wend. 608.)

(1) B. N. P. 293.

(2) 1 Leach C. C. 199; 1 East P. C. 443; B. N. P. 293. See also R. v. Perkin, 2 Moo. C. C. 139.

hood. In one case, where a child aged eight years was called as a witness, who, up to the time of the event to which she came to speak, had received no religious instruction, nor had ever even heard of a God; and who, in the interval before the trial, a period of about sixteen weeks, had been twice visited and instructed by a clergyman as to the nature and obligation of an oath, yet, at the time of the trial, appeared still to have no real understanding on the subject of religion or a future state, Patteson, J., rejected her testimony.(1)

In criminal cases, where a child, who is a necessary witness for the prosecution, appears not sufficiently to understand the nature and obligation of an oath, it is competent to the judge to postpone the trial, that the child may be in the meantime properly instructed.(2) But an application to postpone the trial upon this ground ought properly to be made before the child is examined by the grand jury; at all events before the trial has commenced; for if the jury are sworn, and the prisoner is put upon his trial before the incompetency of the witness is discovered, the judge cannot discharge the jury, but should direct an acquittal.(3)

The postponement of a trial for this purpose rests entirely in the discretion of the judge. In a recent case,(4) where a prisoner was indicted for committing a rape upon a girl under six years of age, Pollock, C. B., refused to postpone the trial in order that the child, who appeared to be wholly unacquainted with the nature of an oath, might receive proper religious instruction, saying, "I can conceive that there may be cases where the intellect of the child is much more ripened, as in the case of children of nine, ten or twelve years old, for example, where their education has been so utterly neglected that they are wholly ignorant on religious subjects. In those cases a postponement of the trial may be very proper; but where the infirmity arises from no neglect, but from the child being too young to have been taught,(5) I doubt whether the loss in point of memory would not more than countervail the gain in point of religious instruction. I lay down no general rule, as there may be cases where a postponement would be proper." In a still later case,(6) where a father was charged with the violating of his daughter, aged twelve, Alderson, B., refused to postpone the trial for the purpose of her being taught the nature of an oath, stating that all the judges were now

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(1) R. v. Williams, 7 C. & P. 320.

(2) 1 Leach, 430, n.

The judge may, in his discretion, postpone the trial, in order that the witness may be instructed as to the nature of an oath; but where the child is wholly destitute of religious education, he cannot be rendered competent by being superficially instructed just before a trial, with a view to qualify him; and the current of opinion is against the practice. Powell's Law of Ev. 19.

(3) R. v. Wade, 1 Ry. & Mo. C. C. 86. In this case the witness was an *adult* possessed of sufficient intellect, but wholly without religious instruction.

(4) R. v. Nicholas, 2 C. & Kir. 246.

(5) See R. v. Pike, 3 C. & P. 598.

(6) R. v. Hall, O. B., 30 Nov. 1849.

of opinion that it was an incorrect proceeding; that it was like preparing or getting up a witness for a particular purpose, and on that ground was very objectionable.(1)

Where a child is unfit to be sworn, it follows, as a necessary consequence, that any account of the transaction, which it may have given to others, ought not to be admitted. On an indictment, therefore, for a rape on a child five years old, where the child was not admitted as witness, but an account of what she had told her mother about three weeks after the transaction, was given in evidence by the mother, and the jury convicted the prisoner, principally, as was supposed, on that evidence, the judges, in a case reserved for their opinion, thought the evidence clearly inadmissible, and the prisoner was accordingly pardoned:(2) for the principle of the admissibility of such a statement is, that it is confirmatory of the testimony of the witness. In Brazier's Case,(3) a different rule was laid down, but at that time the law was not so well settled as it has since been.(4)

With regard to the weight and effect of the testimony of children, Sir W. Blackstone observes,(5) "that when the evidence of children is admitted, it is much to be wished, in order to render the evidence credible, that there should be some concurrent testimony of time, place and circumstances, in order to make out the fact; and that a conviction should not be grounded on the unsupported accusation of an infant under years of discretion." In many cases, undoubtedly, the statements of children are to be received with great caution; but it is clear a prisoner may be legally convicted upon such evidence alone and unsupported; and whether the account of a child requires to be corroborated in any part, or to what extent, is a question exclusively for the jury, to be determined by them on a review of all the circumstances of the case, and especially of the manner in which the evidence of the child has been given.

It may be observed, the preliminary inquiry, usually made for ascer-

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(1) The prisoner was in consequence acquitted. By the strict application of this rule, a parent by neglecting his moral duty as to the education of his child, may thus obtain an immunity for the commission of a heinous crime.

(2) R. v. Tucker, 1808, MS.; R. v. Guttridge, 9 C. & P. 472; R. v. Megson, Ibid. 420; R. v. Nicholas, 2 C. & Kir. 426.

Declarations as to the health or physical condition of the child may be admissible. Biles v. Holmes, 11 Ired. 10. But such declarations cannot be proved to establish the offence. The People v. McGee, 1 Denio R. 19.

(3) 1 Leach C. C. 199; *Supra*, p. 11.

(4) See by Parke, B., in R. v. Guttridge, *ut supra.*

(5) 4 Com. 214.

Whether the child should be received as a witness, is for the court to decide; but the weight and credibility of his testimony is to be determined by the jury, as in other cases. And since no religious opinions will disqualify a person to be sworn as a witness in this state, the true inquiry is whether the child understands the nature of an oath, or has sufficient intelligence to understand the consequences of false swearing. If that appears affirmatively, the child should be sworn, and his evidence submitted to the jury. See Constitution of N. Y., Art. 1, § 3.

taining their competency, is not always of the most satisfactory nature, and sometimes is of such a description that, merely by a very slight practicing of the memory, a child might be made to appear competent and qualified as a witness. The inquiry is commonly confined to the ascertaining of the fact, whether the child has a conception of Divine punishment being a consequence of falsehood; it seldom extends so far as to ascertain the child's notions of the nature of an oath, and scarcely ever relates to the legal punishment of perjury. It has been held, however, that the effect of the oath on the conscience of a child should arise from religious feelings of a permanent nature, and not merely from instructions confined to the nature of an oath, which have been communicated with reference to the trial.(1) Independently of the sanction of an oath, the testimony of children, after they have been subjected to cross-examination, is often entitled to as much credit as that of grown persons; what is wanted in the perfection of the intellectual faculties, is sometimes more than compensated by the absence of motives to deceive.

In a late case,(2) Wilde, C. J., is reported to have said, that it would be always desirable, where a person of weak intellect is examined before a magistrate in a case of felony, that the magistrate's clerk should take down in the depositions the questions put by the magistrate, and the answers given by the witness, as to the capacity of the latter to take an oath. In that case the witness, who was twenty-eight years old, was of weak intellect, and at the trial appeared not at all to understand the nature of an oath, nor to have an idea of a future state; but the depositions were in the usual form, and did not show that any inquiry had taken place into the competency of the witness in point of intellect.

CHAPTER III.

OF INCOMPETENCY FROM DEFECT OF RELIGIOUS PRINCIPLE.

Witness must be sworn.

IT is an established rule, that all witnesses who are examined upon any trial, civil or criminal, must give their evidence under the sanction of an oath. This rule is laid down as an acknowledged proposition by some of our earliest writers;(3) and it appears to be of universal application,

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(1) R. v. Williams, 7 C. & P. 320.
(2) R. v. Painter, 2 C. & Kir. 319.
(3) Shep. Abridg. tit. Tryal.

except in the few cases in which a solemn affirmation has been allowed by statute in the place of an oath. No exemption from this obligation can be claimed in consequence of the rank or station of a witness. A peer cannot give evidence unless sworn;(1) and the same appears to be the case in regard to the king himself,(2) although in one case King James the First certified to the chancellor, under his sign manual, the substance of the promise made by the defendant to the king, and the certificate was admitted without objection.(3) But Willes, C. B.,(4) states that, except in that case, the king's certificate, under his sign manual, has always been refused.(5) The rule also holds even in the case of a judge,(6) or juryman,(7) who happens to be cognizant of any fact material to be communicated in the course of a trial. And although the jury are entitled to use that general knowledge, which any man may bring to the subject, (as in the instance of the value of any article,) yet if any one of the jurors has any particular knowledge on the subject, arising from his being in a certain trade or otherwise, he ought to be sworn and examined as a witness.(8)

A striking exception to this rule formerly prevailed in the case of witnesses for prisoners accused of treason or felony, who were not permitted to give evidence upon oath; but this unreasonable and unjust distinction was abolished soon after the revolution.(9)

At one time it was thought that a child, who was incapable of understanding the nature of an oath, might be examined without being sworn,(10) but it is now settled, as shown in the preceding chapter, that the statement of a child cannot be received except upon oath, and that where the child is incapable of understanding the nature and obligation of an oath, its testimony will be rejected.

A witness, in taking an oath, must be understood to make a formal and solemn appeal to the Supreme Being for the truth of the evidence which

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(1) Ld. Shaftesbury v. Ld. Digby, 3 Keb. 631; R. v. Ld. Preston, 1 Salk. 278. See also How. St. Tr. 772, n.; 7 Id. 874, 1458; 11 Id. 459; 16 Id. 1252. But a peer may put in his answer to a bill in chancery upon his honor (Meers v. Ld. Stourton, 2 Salk. 512; S. C., 1 P. Wms. 146); in the same manner as he gives his verdict in the House of Lords; 2 Inst. 49.

(2) 2 Roll. Ab. 686.

(3) Abigny v. Clifford, Hob. 213.

(4) In Omichund v. Barker, Willes' Rep. 550.

(5) See further upon this subject, Lord Campbell's Lives of the Chancellors, Vol. 2, pp. 510, 511.

(6) Kel. 12, Trial of the Regicides. See also 5 How. St. Tr. 1181, n.

(7) Bennett v. Hertford (Hundred), Sty. 233; Fitzjames v. Moys, 1 Sid. 133; Kitchen v. Manwaring, cit. And. 321, and see R. v. Sutton, 4 M. & S. 532, 537, n.; 6 How. St. Tr. 1612, n.; 18 Id. 123.

(8) R. v. Rosser, 7 C. & P. 648. See also Manley v. Shaw, C. & Marsh. 361.

(9) See 7 & 8 Wm. III, c. 3; 1 Ann. st. 2, c. 9. See 3 Inst. 79; 2 Hale P. C. 283; 4 Bl. Com. 359.

(10) 1 Hale P. C. 634.

he is about to give, and further, to imprecate the Divine vengeance on his head, if what he shall say be false.(1)

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(1) By Lord Hardwicke, 1 Atk. 49. For the definition of an oath by our old writers, Bracton, Britton, Fleta and others, see 1 Atk. 22.

NOTE 9.—A witness who declines swearing on the New Testament, though he profess Christianity, may be allowed to swear on the Old Testament, if he considers that mode binding on his conscience. Edmonds v. Rowe, Ry. & Mood. N. P. Rep. 77. In New York, the legislature have made the following provisions in regard to the ceremony, or form of administering an oath: 1. The usual mode of administering an oath shall be by the person who swears, laying his hand upon, and kissing the Gospels. 2 Rev. Stat. 407, § 82. 2. Every person who shall desire it, may be permitted to swear in the following form: "You do swear in the presence of the ever living God;" and while so swearing, such person may, or may not, hold up his hand, at his discretion. Id. § 83. 3. Every person who shall declare that he has conscientious scruples against taking any oath, or swearing in any form, shall be permitted to make his solemn declaration or affirmation, in the following form: "You do solemnly, sincerely, and truly, declare and affirm." Id. § 84. 4. Whenever the court is satisfied that the witness has any peculiar mode of swearing, connected with, or in addition to, the laying of his hand upon the Gospels, and kissing the same, which is more solemn and obligatory in the opinion of the witness, the court may adopt such mode of swearing him. Id. § 85. 5. Every person believing in any other than the Christian religion, shall be sworn according to the peculiar ceremonies of his religion, if there be any such ceremonies, instead of the modes above prescribed. Id. 408, § 86. The court may interrogate the witness as to the form. Id. § 89. See Vail v. Nickerson, 6 Mass. Rep. 262, and United States v. Coolidge, 2 Gall. Rep. 364.

NOTE 10.—This subject came before the Supreme Court of the state of New York, in the case of Jackson ex dem. Tuttle v. Gridley, (18 John. Rep. 103.) In that case it was proved that a person offered as a witness, had within three months before the trial, often, deliberately and publicly, declared his disbelief in the existence of a God, and a future state of rewards and punishments, and the rule adopted by the court was, that all who did not believe in a God, or if they did, did not think that he would either *reward or punish them in the world to come*, were incompetent witnesses, in any case, or under any circumstances, because an oath could not be any tie or obligation upon them. In a subsequent case, the true test of a witness's competency, on the ground of his religious principles, is said to be, "whether he believes in the existence of a God who will punish him if he swears falsely." Butts v. Swartwood, 2 Cowen's Rep. 431. Within this rule are comprehended those who believe future punishments not to be eternal. In The People v. Matteson, tried before Walworth, circuit judge (2 Cowen's Rep. 432, in note *a*), and in an anonymous case, before Williams, circuit judge (2 Cowen's Rep. 572), it was held, that all persons who believe in the existence of a God, and in future punishments by him, either *in this world*, or in that to come, are competent witnesses. The same doctrine is held by the Supreme Court of Massachusetts. Hunscomb v. Hunscomb, 15 Mass. Rep. 184. And this is the rule now established in New York by statute. 2 Rev. Stat. 408, § 87. In Connecticut and Tennessee, a person who does not believe in the obligation of an oath, and in a future state of rewards and punishments, or any accountability after death, is inadmissible as a witness. Curtis v. Strong, 4 Day, 51; S. C., Swift's Ev. 48; State v. Doherty, 2 Tenn. Rep. 80; State v. Cooper, Id. 96. And within this rule a Universalist is incompetent. Atwood v. Wetton, 7 Conn. Rep. 66. One witness had often declared he did not believe in the existence of a God or a future state; another had declared that he did not believe in the latter, had read Tom Paine's works, and did not know whether he (the witness) believed anything. Story, J., rejected both as incompetent. Wakefield v. Ross, 5 Mason, 16, 18, 19, note. See Christian's note to 3 Bl. Com. 369, and Swift's Ev. 49, 50.

We have noticed, *ante*, the character of religious belief essential to a witness, and the mode of proof. The courts in New Hampshire cited and adopted the principle of the New York cases, cited in Norton v. Ladd, 4 New Hamp. Rep. 444. It was in proof by third persons, that the witness had several times, and shortly before the trial, deliberately disavowed his belief in the exist-

An examination upon oath implies that the witness should go through a ceremony of particular import. But the particular form or ceremony, which is quite distinct from the substance of the oath itself, varies in different countries, and according to different forms of religion. In England, the customary form in which an oath is administered to Christians consists, as is well known, in calling upon the witness to declare the truth, the whole truth and nothing but the truth, as he may be helped by God, and requiring him to touch with his right hand and to kiss the four Gospels.

Form not material, if oath binding on conscience.

If the same form of oath were required in all cases, without reference to the religious opinions of witnesses, some might refuse to comply with it from conscientious scruples, and their evidence would be excluded; while others might attach no binding force to the prescribed form; thus the object of the law in requiring a religious sanction would be entirely defeated. The rule of our law, therefore, is, that witnesses may be sworn according to the peculiar ceremonies of their own religion, or in such manner as they consider binding on their consciences.(1) Jews have accordingly been sworn in our courts from a very early period on the Pentateuch, and they take the oath with the head covered.(2) A Mahometan is sworn upon the Koran.(3) The deposition of a Gentoo has been received, who touched with his hand the foot of a Bramin.(4) A Chinese has been sworn by the ceremony of his breaking a saucer, and declaring that if he did not speak the truth his soul would be cracked like the saucer.(5) A Scotch cove-

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ence of a God. He was rejected as incompetent. It was doubted in Ohio, whether a defect in religious belief should go to the competency or merely the credibility of the witness. The objection was raised, and it was shown by third persons, that the witness's creed, so far as collectible from his conversation, was as follows: he said he did not believe in the existence of a God; but added that he saw God in trees, bushes, herbage, and everything he saw; that a man would be punished for falsehood by his conscience, and in this life only; that a man is bound to speak true at all times, and an oath imposes no additional obligation. The court held, that it was unnecessary to inquire whether, in Ohio, the same rule should prevail as in England; for, if it should, the witness was competent. Wright, J., said, the court thought his declarations equivalent to an avowal of belief in the existence of a God. "He sees him in all created nature." Easterday v. Kilborn, 1 Wright, 345, 346. A person who does not believe in future rewards and punishments, but that our evil deeds will all be punished in this world, and that we shall exist immortal in a future state, exempted from punishment for deeds done in the body, is a competent witness. Farnandis v. Henderson, in chancery before Ch. Dessaussure, Aug. 1827, South Car. Law Journal, 202.

(1) This was so at common law (see Omychund v. Barker, 1 Atk. 21), and it is now expressly so enacted by stat. 1 & 2 Vict. c. 105.

(2) 1 Atk. 40, 42; Willes, 543; Cowp. 389.

(3) Morgan's Case, 1 Leach C. C. 64, by Gould, J., delivering the opinion of all the judges; Cowp. 390; Fachina v. Sabine, 2 Stra. 1104.

(4) See Omychund v. Barker, 1 Atk. 21.

(5) R. v. Entrehman, C. & Marsh. 249; R. v. Alsley, O. B. Sess. 1801; Peake Evid. 141, n. (5th ed.)

nanter, and a member of the Kirk, have been allowed to take the oath, by holding up their hands without kissing the book.(1) Whatever be the form, the meaning of the oath is the same. It is an appeal to God, calling upon him to witness what we say, and invoking his vengeance, if what we say be false.(2)

The same indulgence that is allowed in the case of different religions and sects of religion, has also been extended to the conscientious scruples of individuals, who have objected to be sworn in the manner usually adopted by persons of their own religion or sect. Thus, in an old case, where a witness, who was vice-chancellor of Oxford, refused to be sworn in the usual form by laying his right hand on the book and kissing it, Glin, C. J., ruled, that he might be sworn by having the book laid open before him, and holding up his right hand.(3) "In my opinion," said the chief jus-

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(1) By Gould, J., in Mildrone's Case, 1 Leach C. C. 459; Walker's Case, Id. 498; Mee v. Reid, 1 Peake N. P. C. 22.

(2) Forma jusjurandi verbis differt, re convenit; hunc enim sensum habere debet, ut Deus invocetur. Grotius, L. 2, c. 13, § 10.

NOTE 11.—(A person who does not believe in the existence of a God is an incompetent witness. Thurston v. Whitney, 2 Cush. 104. But the objection to his competency should be taken before he is sworn; though his disbelief may be shown after he has testified, to affect his credibility. The People v. M'Garren, 17 Wend. 460. And the incompetency of the witness from defect of religious belief, may be shown by proving his conversations or declarations on the subject. Barthelemy v. The People, 2 Hill R. 248.

It is not necessary that a person should believe in a future state of rewards and punishments to render him a competent witness. It is enough if he believes in the existence of a God who will punish him if he swear falsely. Butts v. Swartwood, 2 Cowen R. 431. And hence an infidel who believes in a God, and that he will reward and punish him in this world, but does not believe in a future state, may be examined upon oath. Omichund v. Barker, Willes, 550; 2 Cowen, 431.)

A witness cannot be compelled to declare his belief (2 Revised Statutes of N. Y. 408, § 88), but this may be proved by other witnesses. Id. Jackson ex dem. Tuttle v. Gridley, 18 John. Rep. 98; Butts v. Swartwood, 2 Cowen's Rep. 431; Curtis v. Strong, 4 Day, 51; Beardsley v. Foot, 2 Root's Rep. 399; Bow v. Parsons, 1 Id. 480; State v. Cooper, 2 Tenn. Rep. 96. Slight or unguarded expressions will not, however, be sufficient to exclude a witness. State v. Cooper, 2 Tenn. Rep. 96. After the incompetency of the witness from defect of religious belief, is satisfactorily established, by proof of his declarations out of court, he will not be permitted to deny or explain such declarations or his opinions, or to state his recantation of them, when called to be sworn. But he may be restored to his competency, on giving satisfactory proof of a change of opinion before the trial, so as to repel any presumption, arising from his previous declarations of infidelity. Jackson ex dem. Tuttle v. Gridley, 18 John. Rep. 98; Curtis v. Strong, 4 Day, 51. In Wakefield v. Ross, the defendant made out a case of defective religious belief against two witnesses, when the plaintiff's counsel suggested that they might be personally examined; but Story, J., said the defendant's counsel were not bound to rely on the testimony of these persons for proof of incompetency. Wakefield v. Ross, 5 Mason, 19, note. The above doctrines are, in substance, adopted by the Revised Statutes of New York. 2 R. S. 408, § 88. But a person, apparently of weak understanding, may be examined as to the extent of his religious knowledge. Id. § 89. See Swift's Ev. 49, 50, and Christian's note to 3 Bl. Com. 369.

(In this state, no person can be rendered incompetent to be a witness on account of his opinions on matters of religious belief. Art. 1, § 3 of the Constitution of 1846. And the same rule has been adopted very generally in the other states.)

(3) Dutton v. Colt, 2 Sid. 6.

tice, "he has taken as strong an oath as any other witness." In one case, a witness who professed Christianity, but objected to be sworn on the Gospels, was allowed to be sworn on the Old Testament, on his stating that he considered an oath so administered to be binding on his conscience.(1) A Jew who has made no formal renunciation of Judaism, but professes himself to be a Christian, may be sworn on the Gospels.(2) And in a case where a new trial was moved for, on the ground that a witness, who had been sworn on the Gospels in the usual manner, had since been discovered to be a Jew, the Court of Common Pleas refused the rule, and were unanimously of opinion, that the oath taken was binding on the witness, both as a moral and religious sanction.(3)

Religious belief.

The law requires that the witness should acknowledge the force of an oath in imposing a religious obligation upon him to speak the truth. It is therefore essential to the admissibility of a witness, that he should believe in the existence of a God, by whom truth is enjoined and falsehood punished. Without such belief, one sanction, which the law regards as a material security for truth, namely, the fear of Divine punishment invoked by the witness upon himself, is wanting. It is not sufficient, that a witness believes himself bound to speak the truth from a regard to character or to the common interests of society, or from a fear of the punishment which the law inflicts upon persons guilty of perjury.(4) Such motives have indeed their influence, but they are not considered as affording a sufficient safeguard for the strict observance of truth: our law, in common with the law of most civilized countries, requires the additional security afforded by the religious sanction implied by an oath, and, as a necessary consequence, rejects all witnesses who are incapable of giving this security.

Atheists, therefore, and such infidels as profess not any religion that can bind their consciences to speak truth, are excluded from being witnesses.(5) Doubts formerly existed with respect to Jews and the inhabitants of countries professing religions different from Christianity. Lord Coke says generally, that it is an objection to a witness if he be an infidel,(6) under which denomination he intended to comprise Jews as well as heathens.(7) And Sergeant Hawkins thought, that a witness who be-

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(1) Edmonds v. Rowe, Ry. & Mo. N. P. C. 77.

(2) R. v. Gilham, 1 Esp. N. P. C. 285.

(3) Sells v. Hoare, 3 Bro. & B. 232.

(4) Rushton's Case, 1 Leach C. C. 455.

(5) Bul. N. P. 292; Gilb. Evid. 129; 1 Atk. 40, 45, 48.

(6) Co. Lit. 6, *b*.

(7) 2 Inst. 506; 3 Inst. 165; 1 Atk. 43; Willes, 541. It was formerly laid down, on the authority of Sir E. Coke, that excommunicated persons were not competent; on the ground that being excluded from the church, they could not be under the influence of any religion. Att

lieved in neither the Old nor the New Testament, was incompetent.(1) But Lord Hale was of a different opinion, and strongly points out the unreasonableness of excluding indiscriminately all heathens from giving evidence.(2) All doubts on this subject have long since been set at rest, and it may now be considered as an established rule, that not only Jews, but infidels of any country, believing in a God who enjoins truth and punishes falsehood, ought to be received as witnesses;(3) and they are to be sworn, as we have already seen, according to the form which is authorized by their country or their religion.

The only means of ascertaining the competency of a witness, with reference to religious principle, is by examining the party himself. The proper mode of examining for this purpose, it is said, is not to question the witness as to his particular opinions, but to inquire generally whether he believes in the existence of a God and in a future state.(4) In a case before Buller, J., where it was proposed to ask a witness, who had been sworn in the usual way, whether he believed in the Gospels on which he had been sworn, the question is said to have been overruled.(5) So in a recent case, where a negro called as a witness stated that he was a Christian and had been baptized, the judge would not allow any further questions to be put to him.(6) But although a witness may not be questioned as to his particular religious opinions, he may be asked, whether he considers the form of administering the oath to be such as will be binding on his conscience.

The most correct and proper time for asking a witness whether the form of administering the oath is such as will be binding upon his conscience, is previous to the administration of the oath. But as it may occasionally happen that the oath is administered in the usual form, unobserved by the court or the counsel, the question in such case may properly be asked afterwards. And if, in answer to the question, the witness shall declare in the affirmative, namely, that he considers the oath, taken by him, to be binding upon his conscience, it would be irrelevant to ask further whether there be any other mode of swearing that would be more binding than that which has been used.(7) If the witness says he considers the oath to

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Gen. v. Griffith, 2 Bulstr. 155. See B. N. P. 292; Gilb. Evid. 130, (6th ed.) But this disability, if it ever existed, has been entirely removed by stat. 58 Geo. III, c. 127, §§ 2, 3, which enacts that persons excommunicated shall in no case incur any civil penalty or disability.

(1) Hawk. P. C. b. 2, c. 46, § 143.

(2) 2 Hale P. C. 279.

(3) See Omichund v. Barker, 1 Atk. 21; S. C., 1 Wils. 84; Willes, 538.

(4) It seems, however, that an infidel who believes in a God, and that he will reward and punish him in this world, though he does not believe in a future state, may be examined upon oath. By Willes, C. J., Omichund v. Barker, Willes, 550.

(5) R. v. Taylor, Peake N. P. C. 11.

(6) R. v. Serva, 2 C. & Kir. 53, 56, before Platt, B.

(7) Resolution of the judges, delivered by Abbott, C. J., in the proceedings on the Bill of Pains

be binding upon his conscience, he affirms in effect, that in taking that oath he has called the Supreme Being to witness that what he shall say will be the truth, and that he has imprecated the Divine vengeance upon his head if what he shall afterwards say is false; and when this is done, it would be perfectly unnecessary and irrelevant to ask any further questions.(1) Such an acceptance of the oath not only imposes upon the witness all its religious obligation, but, should he violate its sanctions, subjects him also to the temporal penalties consequent on the crime of perjury. And the fact of a witness having assumed a false name, and swearing in the common form upon the Gospels, but discovered after the trial to be a Jew, is therefore not a ground for a new trial.(2)

The evidence of Quakers and members of other sects who refused to take a formal oath in any shape, was for a long time held inadmissible. Before the revolution, Quakers, who refused to take a legal oath, were treated as obstinate offenders and subject to penalties.(3) These hardships were removed by the Toleration Act,(4) which first allowed them to make a declaration of their fidelity to the state, instead of taking an oath of allegiance, and exempted them from all pains and penalties on their making, if required, certain other declarations there prescribed. And by another statute, which passed about six years after,(5) their solemn affirmation in courts of justice was admitted, in civil cases, to have the same effect as an oath; but they continued to be excluded from giving evidence in criminal cases(6) until a very recent period. This disability has now been entirely removed by the legislature,(7) and Quakers and Moravians are now allowed to give evidence upon their solemn affirmation in all cases, criminal

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and Penalties, August 24, 1820. In the case of the witness Gargiulo, p. 116 of the printed evidence. 2 B. & B. 284.

(1) By Abbott, C. J., on the same occasion.

(2) Sells v. Hoare, 3 B. & B. 232.

(3) 13 Car. II, c. 1.

(4) 1 Wm. & M. c. 18, § 13.

(5) 7 & 8 Wm. III, c. 34.

(6) See 8 Geo. I, c. 6; 22 Geo. II, c. 46, § 36.

(7) 9 Geo. IV, c. 32.

NOTE 12.—Under this statute, Quakers and Moravians are now competent in all cases, on the same affirmation as is allowed in New York. One who was not a Quaker, refusing to be sworn, on the ground of conscientious scruples, arising from a declaration formerly made, that he would not take an oath, was committed for contempt, the liberty to affirm being strictly confined to Quakers, by the laws and practice of Massachusetts. United States v. Coolidge, 2 Gallis. 364.

(By 17 and 18 Vict. c. 125, § 20, it is enacted, "If any person called as a witness, or required to make an affidavit or deposition, shall refuse or be unwilling, from alleged conscientious motives, to be sworn, it shall be lawful for the court or judge, or other presiding officer or person qualified to take affidavits or depositions, upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration." And this affirmation begins by declaring the opinion of the witness that the taking of an oath is not lawful, and concludes in very nearly the same language used in this state. By another section of the act, a false affirmation is declared the crime of perjury, to be punished in the same manner. § 89.)

as well as civil. Their affirmation is to be of the same force and effect as an oath in the usual form, in all cases where an oath is by law required.(1) A similar statutory provision has been made in favor of a religious sect called Separatists.(2) A still more recent statute(3) provides, that any person who has been a Quaker or Moravian, and who entertains conscientious objections to the taking of an oath, shall be allowed to make solemn affirmation and declaration in lieu of taking an oath, as fully as he might be allowed to do in case he still remained a member of either of these denominations of Christians, and this affirmation or declaration is made of the same force and effect as if an oath had been taken in the usual form.

In a late case,(4) where a special juryman objected to be sworn, upon the ground that he was of the persuasion of a Quaker, though he was not a member of the Society of Friends, Lord Abinger, C. B., allowed him to affirm; and it is to be presumed, he would have adopted a similar course in the case of a witness.(5)

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(1) 3 & 4 Wm. IV, c. 49.

(2) 3 & 4 Wm. IV, c. 82.

(3) 1 & 2 Vict. c. 77. See Doran's Case, 2 Moo. C. C. 37.

(4) Emmett v. Norton, 8 C. & P. 506.

(5) OF INCOMPETENCY FROM CONVICTION OF CRIME.—The former edition of this work contained a chapter on this subject, laying down the general rule in these terms: The conviction of an infamous crime, followed by judgment, disqualifies a person from giving evidence in our courts of justice; and persons rejected for this cause, are said to be incompetent on account of the infamy of their character. Vol. I, p. 14. Of the crimes which incapacitate, the general description includes treason and felony, and every species of the *crimen falsi*. Thus, a conviction for forgery will disqualify, as will also all offences tending to pervert the administration of justice, by falsehood or fraud. Of this nature are perjury, and subornation of perjury; attaint of false verdict; bribing a witness to absent himself, in order that he may not give evidence; conspiring to procure the absence of a witness; conspiring to accuse another person of a capital offence; barratry. Id. 17. See also 1 Greenl. on Ev. § 373.

But in order to exclude the witness as incompetent, his incapacity must be established by the production or proof of a judgment of a court of competent jurisdiction; for it is the judgment which is received as the legal and conclusive evidence of his guilt. Id. § 375.

Having attested a written instrument as a subscribing witness before conviction, his handwriting may be proved afterwards, the same as if he were dead. Jones v. Mason, 1 Stra. 833. And though the general rule is that in actions between third persons his testimony must be excluded (In re Sawyer, 2 Ad. & El. (N. S.) 721), he is allowed in cases where he is a party, to make affidavits in exculpation or defence of himself, or for relief against an irregular judgment. Davis and Carter's Case, 2 Salk. 461; Rex v. Gardiner, 2 Burr. 1117.

The competency of the witness may in general be restored, by reversal of the judgment, or by a pardon. The reversal of the judgment is proved in the same manner as the judgment itself; and the pardon is proved by its production under seal. 1 Phillipps on Ev. 21, 6th Amer. from 9th London ed. If the pardon be conditional, the performance of the condition must be shown. Brevidge's Case, 3 P. Wms. 485.

The pardon restores the party to all his rights, and is said to make the witness a new creature and give him a new capacity. And this is clearly so, where the incompetency is the consequence of the conviction and judgment; but where the disability is annexed to the conviction of a particular offence by the express words of a statute, the general rule is that a pardon will not restore his competency. Thus, if a man be found guilty on an indictment for perjury at com-

mon law, a pardon will make him a good witness: but if he be convicted of perjury, or subornation of perjury, on the statute of 5 Eliz. c. 9, he will not be rendered competent by a pardon; for the statute expressly provides that he shall never be admitted to give evidence in any court of record, until the judgment be reversed. 1 Phillipps on Ev. 21. The same statute has been adopted in New York. 2 R. S. 681. See Holridge v. Gillespie, 2 John. Ch. Rep. 35, note.

The present edition of this work, coming out as it did after the passage of Lord Denman's Act (6 & 7 Vict. c. 85), leaves out the former chapter on the subject; for by that act it is declared that no person offered as a witness shall hereafter be excluded by reason of incapacity from crime or interest. In this state, the statute provides that no witness can be excluded by reason of *his interest* in the event of the suit (Code of Procedure, §§ 398, 399), leaving the disqualification of persons sentenced upon a conviction for felony as it stood under the former statute. 2 R. S. 788, (3d ed.) See Carpenter v. Nixon, 5 Hill, 260, as to what crimes come within the statute. So that with us, as well as in this country generally, the law remains as it stood before, and the former decisions still continue pertinent. Greenl. Ev. §§ 372–378.

NOTE 13.—It is the nature of the crime, and not the punishment, which determines whether a convict is an admissible witness. A conviction of treason, felony, or any of the *crimen falsi*, renders the witness incompetent. People v. Whipple, 9 Cowen's Rep. 707; Clark's Lessee v. Hall, 2 Har. & M'Hen. Rep. 378; People v. Herrick, 13 John. Rep. 82; Cushman v. Loker, 2 Mass. Rep. 118. All persons convicted, and adjudged guilty of perjury, or subornation of perjury, are, by statute in New York, absolutely disqualified from giving testimony, in any matter or cause whatever, until the judgment be reversed. 2 Rev. Stat. 681, §§ 1, 4. And no person, sentenced upon a conviction for felony, shall be competent to testify in any cause, matter or proceeding, civil or criminal, unless he be pardoned by the governor, or the legislature, except in special cases which are provided by law; but no sentence upon a conviction for any offence, other than a felony, shall disqualify a witness. Id. 701, § 23. A felony by the same statute, is defined to be an offence for which the offender shall be liable to be punished by death, or by imprisonment in the state prison. Id. 702, § 30. Offenders against the act to prevent duelling, are declared to be competent to testify against any other person offending in the same transaction, and are compellable to testify in the same manner as other persons. Id. 686, § 3. Convicts imprisoned in the state prison are competent to testify against any other convict, for any offence committed whilst the accused and witness are both confined in prison. Id. 774, § 8. It is no objection to the competency of a witness, that he has been convicted of an assault and battery, with intent to commit murder, and has been sentenced to fine and imprisonment. United States v. Brockins, 3 Wash. C. C. Rep. 99. Otherwise in New York; for there it is a felony. 2 R. S. 666, § 39, in connection with Id. 702, § 30, cited *supra*. A person convicted of forgery, or other infamous crime, in one state, was held incompetent in another, within the provisions of the constitution of the United States, and the act of Congress declaring the effect of the records of one state in every other. State v. Candler, 3 Hawks, 393; State v. Ridgely, 2 Har. & M'Hen. 120; Clark's Lessee v. Hall, Id. 378; Cole's Lessee v. Cole, 1 Har. & John. 378. But it should appear that the foreign offence would disqualify at common law, or by some statute of the country. Clark's Lessee v. Hall, 2 Har. & M'Hen. 378. The above cases from the Maryland Reports, Har. & M'Hen. and Har. & John., hold the same as to any foreign conviction. A different doctrine prevails in Massachusetts, even as to a neighboring state. Commonwealth v. Green, 17 Mass. Rep. 514. At common law, a conviction of petit larceny disqualified; but whether this is so under the peculiar enactments of Ohio in 1832, *quere*. James v. Bostwick, 1 Wright, 142, 143.

NOTE 14.—The conviction for an infamous crime, cannot be proved by the witness, on his *voir dire*, he not being bound to answer, nor would his answer be the best evidence of which the case is susceptible. People v. Herrick, 13 John. Rep. 82. Nor is parol testimony of the conviction admissible in any case, but the party objecting must have a copy of the record of conviction, ready to produce in court. Id.; Hilts v. Colvin, 14 John. Rep. 182. And it is not only necessary to show the conviction, but also the judgment, in order to disqualify the witness. People v. Whipple, 9 Cowen's Rep. 707; Castellano v. Peillon, 2 Mart. Lou. Rep. (N. S.) 466; Cushman v. Loker, 2 Mass. Rep. 108; Skinner v. Perot, 1 Ashm. Rep. 57. But where a witness admitted, on his cross-examination, that he had been convicted of a felony, the court charged the jury that if he had not been corroborated, they should reject the evidence entirely. Orr's Case,

CHAPTER IV.

OF INCOMPETENCY BY REASON OF INTEREST.

THE third ground of incompetency is by reason of the witness being interested as a party to the action, or as the person in whose immediate and individual behalf the action is brought or defended.

It was formerly the general rule that all persons interested, to however small a degree, in the event of a cause, should be excluded from giving evidence in favor of that party to whom their interest inclined them.

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before Colden, Mayor, 5 C. H. Rec. 181. It was also held, in Maryland, to be incumbent on the party objecting, to show that the witness did not serve the full term for which he was sentenced, such full service being adjudged to restore his competency. Cole's Lessee v. Cole, 1 Har. & John. 572; State v. Ridgely, 2 Har. & M'Hen. 120. It should be noted that these decisions have reference to the English statutes cited in the text. The court, in The State v. Ridgely, cited *supra*, and in Clark's Lessee v. Hall (2 Har. & M'Hen. 378), also determined, that parol evidence was admissible to prove the conviction and sentence, as well as all other circumstances necessary to render the witness incompetent. But a witness, though convicted and attainted, is not incompetent to make an affidavit to resist a motion (Davis v. Carter, 2 Salk. 461), or to found a motion. Skinner v. Perot, 1 Ashm. Rep. 57. So, it seems, his oath is admissible on a charge of assault and battery, and for surety of the peace, &c., or to hold to bail, or he would be utterly out of the protection of the law. Skinner v. Perot, 1 Ashm. Rep. 57.

NOTE 15.—Competency may be restored by pardon, after the witness shall have served out the term of his imprisonment in the state prison; yet no credit is due to him, unless he be corroborated by others, or by the circumstances of the case. United States v. Tom Jones, 2 Wheel. Cr. Cas. 451, 454, 455, 460, 461, before Thompson, J., case of piracy.

The effect of a pardon is to acquit the offender of all the penalties annexed to the conviction, and to give him a new credit and capacity. Matter of Deming, 10 John. Rep. 232.

A person having been convicted of forgery, and sentenced to the state prison for life, was pardoned by the governor. The pardon contained a proviso, that nothing in it should be construed "so as to relieve the prisoner of and from the legal disabilities to him, from the conviction, sentence and imprisonment, other than the said imprisonment." This proviso was held to be repugnant to the pardon itself, and was rejected, and it was held that the prisoner was freed from all legal disabilities, and was a competent witness. The People v. Pease, 3 John. Cas. 333.

NOTE 17.—Where a prisoner had been pardoned on condition of leaving the state for a specified time, and the condition was not complied with, the court, after the expiration of the time, held the pardon to be void, and passed sentence. State v. Fuller, 1 M'Cord, 178. But where, in such case, it appeared that the prisoner had been insane, after the conditional pardon was granted, the court, upon his being seized and brought up for sentence, discharged him, upon condition of his departing within the same period originally limited in the pardon. The People v. James, 2 Caines' Rep. 57. For form of pardon, see Hoffman v. Coster, 2 Whart. 453, 468, 469.

NOTE 18.—"It does not seem clear whether the restoration to competency, by suffering a sentence, has proceeded on the ground of incompetency being in the nature of punishment, or on the ground of a regenerating effect of punishment upon the moral feelings of the offender: in either point of view, the principle is not justified by sound reasoning or experience. On the general subject of incompetency of witnesses from infamy, see a treatise on the incompetency of witnesses by R. Whitcomb, Esq., A. D. 1824." Phil. Ev. 8th ed. 25, note 1.

See Cole's Lessee v. Cole, 1 Har. & John. 572; State v. Ridgely, 2 Har. & M'Hen. 120.

This rule was founded upon a presumed want of impartiality in the interested witness.

The exclusion of witnesses on account of interest was, under the old state of our law, much more frequent than for any of the other grounds of incompetency. The policy of the law on this subject was for a long time considered very questionable. It was the opinion of many eminent jurists that the pretended principle of the rule was neither just nor sound, and they insisted that there was no just ground for inferring that, in the generality of instances, persons interested in the subject in controversy would be disposed, from a mere regard to their interest, to violate the duties of morality and religion, or to incur the penalties of the law by committing perjury; and that, if they should be so disposed, they would probably not be successful in imposing upon the judge and jury, after strict cross-examination, before the public, in open court; especially if the judge and jury acted upon that supposed principle of human nature, which is said, by Chief Baron Gilbert, to be the foundation of the rule, namely, that "there is more reason to distrust such biased testimony, than to believe it;"(1) for where jealousy and distrust were likely to be so strong, the

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(1) Gilb. Ev. 722, (3d edit.)

The changes lately made in the law of evidence have been similar in this state to those made in England; and as they have been effected here and there also by degrees, as experience seemed to call for and justify them, it will be sufficient to note a few of the decisions on the several statutes, in the order of their passage, concluding with a summary of the common law rule.

The rule of incompetency, on the ground of interest, was swept away in this state some ten years ago. N. Y. Session Laws of 1848, p. 560.

§ 351. "No person offered as a witness, shall be excluded, by reason of his interest in the event of the action.

§ 352. "The last section shall not apply to a party to the action, nor to any person for whose immediate benefit it is prosecuted or defended, nor to any assignor of a thing in action, assigned for the purpose of making him a witness." See amendment to this section in 1851.

The codifiers, proposing the above sections, make the following remarks in respect to the principle adopted by them, in their report to the legislature: "The abrogation of the rule which excludes a witness who has an interest in the event of the action, has been frequently proposed and discussed in this state. We think the time has come for effecting it. The rule appears to us to rest upon a principle altogether unsound; that is, that the situation of the witness will tempt him to perjury. The reason strikes at the foundation of human testimony. The only just inquiry is this: whether the chances of obtaining the truth are greater from the admission or exclusion of the witness? Who that has any respect for the society in which he lives, can doubt that, upon this principle, the witness should be admitted? The contrary rule implies that, in the majority of instances, men are so corrupted by their interest, that they will perjure themselves for it, and that besides being corrupt, they will be so adroit as to deceive courts and juries. This is contrary to all experience. In the great majority of instances the witnesses are honest, however much interested, and in most cases of dishonesty the falsehood of the testimony is detected, and deceives none. Absolutely to exclude an interested witness, is, therefore, as unsound in theory as it is inconsistent in practice. It is inconsistent, because the law admits witnesses, far more likely to be biased in favor of the party, than he who has merely a pecuniary interest. A father may testify for his son; a child living with his father, and dependent upon his bounty, may appear as his witness, nay, as his only witness, without question. Is the immediate gain of a dollar, by the result of a cause, so potent to outweigh integrity, while affection, consanguinity, dependence, are put down as dust in the balance? There is not another rule in the law of evi-

danger of being deceived would not be great. It was urged, also, that it was not reasonable, and scarcely consistent, to exclude some witnesses on account of a trifling pecuniary interest, so small, perhaps, as not to be supposed capable of producing a bias on their minds, when others were admitted without objection, though subject to the powerful influence of relationship, friendship, passion or feeling; and that, at all events, the possibility of occasional risk in judicial inquiries, from the admission of interested witnesses, was a much less evil than that of counteracting and frustrating, in a multitude of cases, the great object to which all rules of evidence ought to be directed, namely, the discovery of truth. In proportion as the means of inquiry and information are shut out, the discovery and enforcement of truth becomes more difficult. The inconveniences, also, necessarily arising out of the application of such a rule, were not, it was said, to be overlooked. Of this nature were the difficulties and uncertainty occasioned by frequent reference to a great variety of decisions, which required considerable research, abounded with many subtle distinctions, and occasionally by their contrariety created much legal doubt. It was also remarked, that the numerous exceptions to the general rule which had been introduced (especially in the administration of criminal justice, where offers of reward on conviction, though a very strong pecuniary interest, would not disqualify a witness for the prosecution), were arguments against the policy of such restrictions, and were not reconcilable with the principle of the rule itself. For these reasons, it was strongly pressed, as the wiser and better course, to admit the evidence of interested witnesses without exception, and to allow the objection to be used against their credit, not against their competency.

This view has at length been adopted by the legislature, and carried into effect by Lord Denman's Act;(1) of which it may be truly said that, of all the acts in our statute book, it contains in the smallest compass the greatest amount of good. It settles the law upon an intelligible, reasonable and satisfactory basis; puts an end to some of the most intricate per-

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dence so prolific of disputes, uncertainties, and delays, as that we are considering. Not a circuit is held, but question after question is raised upon it; nor a term where exceptions growing out of it are not debated. Some of the foregoing reasons apply also to the exclusion of a person sentenced for felony. It is wiser, we cannot doubt, to place the witness on the stand, and let the jury judge of his testimony."

Following out this reasoning, the legislature of 1857 has declared even parties to the action competent witnesses in their own behalf. If a third person, not a party to the suit, such as a stockholder in a bank which is plaintiff in the action, may be permitted to testify, notwithstanding his interest in the event of the suit, why, it was said, should not a member of a firm be permitted to testify in its behalf? See Montgomery County Bank v. Marsh, 3 Seld. 481. If the *interest* of the witness does not disqualify him, why should he be excluded on the ground that he is named as a party to the action? Finding no answer to these questions, the Parliament of England, by an act passed in 1851 (14 & 15 Vict. c. 99), declared parties competent and compellable to give evidence; as we have already noticed on a former page.

(1) 6 & 7 Vict. c. 85, Lord Denman's Act.

plexities of the law, and rejects a principle which was unsound in theory, and in practice often led to results most unfavorable to the due administration of justice.

This statute, after reciting that "the inquiry after truth in courts of justice is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue, both in criminal and in civil cases, should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced, and on the truth of their testimony;" proceeds to enact,(1) "that no person offered as a witness shall hereafter be excluded, by reason of incapacity from crime or interest, from giving evidence, either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action or proceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer or person having by law or by consent of parties authority to hear, receive and examine evidence; but that every person so offered may and shall be admitted to give evidence on oath, or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question or *inquiry*, or of the suit, action or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence: *Provided* that this act shall not render competent any party to any suit, action or proceeding individually named in the record; or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment; or the landlord or other person in whose right any defendant in replevin may make cognizance; or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part; or the husband or wife of such persons respectively: *Provided, also*, that this act shall not repeal any provision in a certain act passed in the session of Parliament holden in the seventh year of the reign of his late Majesty, and in the first year of the reign of her present Majesty, intituled 'An act for the amendment of the laws with respect to wills:' *Provided* that, in courts of equity, any defendant to any cause pending in any such court may be examined as a witness on the behalf of the plaintiff or of any co-defendant in any such cause,

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(1) Sect. 1.

The first proviso to this act is repealed by section 1 of 14 & 15 Vict. c. 99, excepting the last clause, *or the husband or wife of such persons respectively*. And the second section of that act, 14 & 15 Vict. c. 99, declares parties competent witnesses, with certain exceptions therein specified, and previously noticed. And now, by 16 & 17 Vict. c. 83, husbands and wives are rendered competent and compellable to give evidence in all civil cases, except in cases of adultery, provided that neither shall be competent or compellable to disclose any *communication* made to him or her by the other during marriage.

saving just exceptions; and that any interest which such defendant so to be examined may have in the matters, or any of the matters in question in the cause, shall not be deemed a just exception to the testimony of such defendant, but shall only be considered as affecting or tending to affect the credit of such defendant as a witness."

This statute renders competent every person whose testimony would formerly have been excluded upon the ground of his having an interest in the matter in question, or in the event of the suit.(1) But it does not render competent certain persons, therein enumerated, with respect to whose competency the rule of law continues the same as it was before this act passed. It is material to remark the form in which the act is drawn; it contains no *exception* of persons who are not to have the benefit of the act; for instance, it does not *except* parties *individually named* in the record; but it *provides* that they are not *thereby rendered competent.* Thus, with regard to parties to a suit *individually named in the record*, it leaves the law as it was before; but parties *not individually named* in the record, however they may be substantially interested as parties, are within the beneficial clause, and are not to be excluded by reason of interest.

The persons particularly mentioned in the provision, are as follows:

1st, Any party to any suit, action or proceeding, individually named in the record. But with regard to these, it is provided, that in suits in equity any defendant may be examined as a witness, *saving just exceptions;* any *interest*, however, which such defendant may have in the matters in question, is not to be deemed a just exception, but only as tending to affect his credit as a witness.(2)

2dly, Any lessor of the plaintiff in ejectment.

3dly, Any tenant of the premises sought to be recovered in ejectment.

4thly, The landlord or other person in whose right any defendant in replevin may make cognizance.

5thly, Any person, in whose immediate and individual behalf any action may be brought or defended, either wholly or in part: and

Lastly, The husband or wife of any such persons respectively.

It is proposed to consider the question of competency as to these persons, in the following order:

1st, As to the parties to the suit, action or proceeding individually named in the record.

2dly, As a subdivision of this head, the rule as to parties in criminal proceedings will be considered.

3dly, As to the persons in whose immediate behalf an action is brought or defended. This class will comprehend the several persons specified in the second, third and fourth classes above mentioned.

4thly, As to the husband or wife of any such person.

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(1) See Cupper v. Newark, 2 C. & Kir. 24.

(2) See Carmichael v. Carmichael, 2 Coll. 1.

SECTION I.

Of the Rule of Incompetency Considered with reference to Parties Individually Named in the Record in Civil Proceedings.

The general rule formerly was, that a party to the record, in a civil suit, could not be a witness at the trial, for himself or for a joint suitor, against the adverse party.(1) The late act of 6 & 7 Vict. c. 85, for

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(1) 1 Vernon, 230; 1 P. Wms. 596; Gilb. Evid. 116.

NOTE 19.—It is a general rule in all common law courts, that a party on the record cannot be received to testify, either in his own favor, if objected to by the opposite party, or against himself, if he object. Haswell v. Bussing, 10 John. Rep. 128; Sharp v. Thatcher, 2 Dall. 77; Supervisors of Chenango v. Birdsall, 4 Wend. 453; Nason v. Thatcher, 7 Mass. Rep. 398; Fox v. Whitney, 16 Id. 118; Adams v. Leland, 7 Pick 62; Sears v. Dillingham, 12 Mass. Rep. 358; Hunter v. Hunter, Charlton's Rep. 303; Lampton v. Lampton's Executors, 6 Monroe, 616, 617; Robinson v. Neal, 5 Monroe, 212, 214, 215; Thomas v. Ferqueran, 2 J. J. Marshall, 28; Worrall v. Jones, 7 Bing. 395; Butler's Ex'r v. Brown, 4 M'Cord, 24; Kimball v. Lamson, 2 Verm. Rep. 143; Commonwealth v. Marsh, 10 Pick. 57, 58.

Whether, in the common law courts, he shall ever be received to testify upon the merits, even after all interest is removed, or where he is willing to testify in favor of the opposite side, on being called for the latter purpose, depends mainly on the question whether the rule of exclusion go upon the mere abstract objection that he is a party, or that he must have some interest connected with that relation.

(Parties to the record are held incompetent witnesses on the general ground that they are interested in the event of the suit; and the practice has been to exclude nominal as well as real parties, even where they have no personal interest in the result of the action. Benjamin v. Coventry, 19 Wend. 353; Fort v. Gooding, 9 Barb. Rep. 371; Owings v. Emery, 7 Gill, 405; Patterson v. Cobb, 4 Florida, 481. But a person who is a party to the suit, but not a party to the issue on trial, is a competent witness. Safford v. Lawrence, 6 Barb. R. 566. And it has been held, that a naked trustee, not responsible for the costs of the suit, and having no interest in it, is a competent witness; it appearing that the action might just as well have been brought in the name of the real parties. Keim v. Taylor, 11 Penn. State Rep. 163. So, where one of two defendants puts in no defence, he has been held a competent witness for the plaintiff in the action. Kincaid v. Purcel, 1 Smith, 164. And in an action on a joint contract, where a plea of infancy interposed by one of the defendants, has been found in his favor, he is a competent witness. Rohrer v. Morningstar, 18 Ohio, 579. But the common law rule as held in this state, does not permit one of the parties to the record to give evidence for another. Oakley v. Aspinwall, 2 Sand R. 7; 4 Wend. 453.)

On this question different courts have had their different views. Lampton v. Lampton's Ex'rs, 6 Monroe, 617, per Mills, J. They all seem to concur that though the party be an administrator, executor, trustee, guardian, prochein amy, or otherwise stand *in auter droit*, he is not competent to testify in favor of the interest he represents, because, on failure, he is liable for costs; and the most complete and certain remedy over to reimburse himself, has not yet in any case been considered as countervailing his interest. Sears v. Dillingham, 12 Mass. Rep. 358; Fox v. Whitney, 16 Id. 118; Durant v. Starr, 11 Id. 527; Butler's Ex'r v. Brown, 4 M'Cord, 24, 2 Day, 404; Beard's Ex'r v. Cowman's Ex'r, 2 Har. & M'Henry, 152; Van Sant v. Boileau, 1 Bin. 444; Heckert v. Haine, 6 Bin. 16. And see next note. No; not even if he resign his trust during the pendency of the action; for he is still liable for costs. Adams v. Leland, 7 Pick. Rep. 62. And though the party be misnamed, or (in actions arising *ex contractu*, against several) one of the defendants be returned *non est inventus*, still, in the first case his real name may be shown, and in the latter he shall be deemed a party, and in both excluded. Robinson v. Neal, 5 Monroe,

214, 215; Van Norden v. Striker, 9 Wend. 286. So a lessor of the plaintiff in ejectment, whether he have any interest in the land or not. Prandt ex dem. Van Cortlandt v. Klein, 17 John R. 335; Robinson v. Neal, 5 Monroe, 212, 214. So the assignee of the chose in action on which the suit is brought. Frear v. Everston, 20 John. Rep. 142; The People ex rel. M'Call v. Irving, 1 Wend. 20, 21; Mauran v. Lamb, 7 Cowen's Rep. 174, 178.

In New York, the rule excludes the party as a witness on either side, without regard to the question whether he be interested or not. It is enough that he be a party, in all cases except where defendants, in actions for torts, are without cause brought into court. Supervisors of Chenango v. Birdsall, 4 Wend. 453, 457; Schermerhorn v. Schermerhorn, 1 Wend. 119, cited and explained by Marcy, J., 4 Wend. 457; Mauran v. Lamb, 7 Cowen's Rep. 174, 177; Hopkins v. Banks, 7 Cowen's Rep. 650; Frear v. Everston, 20 John Rep. 142; The People ex rel. M'Call v. Irving, 1 Wend. 20, 21. So in Massachusetts. Fox v. Whitney, 16 Mass. Rep. 118, 121. This doctrine is also strongly insisted on in De Wolf v. Johnson (12 Wheat, 367, 384, 385), even as to a court of chancery. *Quere.* This case is stated *infra.*

In England the doctrine of the jurists has certainly fluctuated as to the reason of the rule. Starkie, in his treatise on evidence, considers the reason a mixed one—partly founded on interest, and partly on policy—as where the party is called in his own favor, being interested, and tempted to commit perjury; and on policy, as where the party refuses to be sworn, being called by the other side. 3 Stark. Ev. 1061. And it will be seen, by the cases cited in the text of Phillipps, that they can hardly be sustained without the aid of this double principle. Indeed, in a still later case, a plaintiff on record, though a mere trustee, and plainly destitute of all interest, was excluded by Lord Tenterden, C. J., at Nisi Prius. Whitmore v. Wilks, 1 Mood. & Malk. 214, 220, 221. But a still more recent case seems much to have shaken that principle, and to have approximated to the doctrines of the Court of Chancery and of some American courts of law. It underwent much consideration by the Common Pleas; and seems to put the question of policy entirely out of the case, provided the party consent to be examined; and to rest the whole inquiry upon interest alone. The action was against Jones and his sureties W. B. and J. J., on a bond conditioned that Jones should pay rent pursuant to a certain agreement. Jones and J. J. suffered judgment by default, but W. B. insisted by plea that the tenancy under the agreement had ceased at a certain time, up to which all the rent had been paid. On the trial the plaintiff offered Jones, one of the defendants, as a witness, to negative the plea of W. B., his co-defendant; and, though objected to by W. B., he was received. On motion for a new trial the court, after taking time to consider the question, refused the motion. Tindall, C. J., said that Jones was not interested in favor of the plaintiff; for, being the principal debtor, he could not call for contribution from the other defendants, but must himself be ultimately liable both for damages and costs. He did not object to being examined. No case had been cited, nor can any be found, in which a witness has been refused upon the objection, in the abstract, that he was a party to the suit. On the contrary, many have been brought forward in which parties to the suit, who have suffered judgment by default, have been admitted as witnesses against their own interest; and the only inquiry seems to have been, in a majority of the cases, whether they were interested in the event or not. He insists that the party can be excluded on the ground of interest only, and adds: "That a party to the record should not be *compelled* against his consent to become a witness in a court of law, is a rule founded in good sense and sound policy. It forms the point in the decision in the case of The King v. Woodburn (10 East, 395); and the decision of that case leads to the necessary inference that, if the party consents to be examined, he is then an admissible witness." Worrall v. Jones, 7 Bing. 395.

In Massachusetts and New York the objection to a party being sworn is rested on policy, and he cannot be sworn even by his own consent if his co-defendants object. Per Wilde, J., in Commonwealth v. Marsh, 10 Pick. 58; Supervisors of Chenango v. Birdsall, 4 Wend. 453, 456, 457; Schermerhorn v. Schermerhorn, 1 Wend. 119. But *quere.* See Miller v. Starks, 13 John. Rep. 517, and Hopkins v. Banks, 7 Cowen's Rep. 650, 653. This ground of policy, in the exclusion of parties, was also disregarded in Bate v. Russell (1 Mood. & Malk. 332), and Affalo v. Fourdrinier (Id. 334, note; S. C., 6 Bing. 306), where a bankrupt co-defendant was, in the first case, on being acquitted by the jury and released by his co-defendants, and in the last, on his

releasing his surplus and a *nolle prosequi* being entered as to him, received as a witness for his co-defendants.

In New York the plaintiff is compellable to testify against himself, where the chose in action on which the suit is brought has been illegally assigned for prosecution to an attorney, counselor or solicitor, in order to prove such fact. 2 R. S. 288, 289.

The cases which follow will exhibit farther the views of the American courts on this question.

One joint appellee cannot be received as a witness for his co-appellees, either upon his releasing to them his interest in the subject in controversy, or upon his or their depositing with the clerk a sufficient sum of money to cover the costs. Cogbill v. Cogbill, 2 Hen. & Munf. 467. The reason assigned by one judge was that he was still liable to his adversary for costs. Id. 479, 482. But a majority of the court seemed to think that had this difficulty been obviated, still he would not have been competent. Id. 482 to 484. And where a bill for the foreclosure of a mortgage was filed against the mortgagor, his assignee of the equity of redemption, and a purchaser in possession from the assignee, it appeared that the mortgagor was insolvent, and no relief could be had against him; held, that though he was not necessarily made a party, yet being a party to the record, he could not be examined as a witness. De Wolf v. Johnson, 10 Wheat. 367. Yet, in chancery, a party totally disinterested is constantly received as a competent witness. Sharp v. Morrow, 6 Monroe, 304, 305. But see Thomas v. Ferqueran, 2 J. J. Marsh. 28. One partner is not a witness for another on a bill by a third partner for an account. Sharp v. Morrow, 6 Monroe, 304, 305; Waggoner v. Gray's Adm'rs, 2 Hen. & Munf. 603. But after he is dismissed as a party, he may be a witness. Id. Till dismissed, he is interested as a party; for the decree will affect his rights. Id.

W., F. and K. brought an action against C. to recover damages for breach of a contract to deliver goods of a certain description and quality. After the commencement of the suit, but before the trial, K. executed to W. and F. an assignment of all his interest in the claim against the defendant, for which the suit was brought, and of whatsoever sum might be recovered in the action, with a power to them to use his name in prosecuting the action. W. and F. also released him from all claims on him for the costs which had or might accrue, and for any claims for contribution to any sum which the defendant might recover, and also executed to him a covenant to indemnify him against all costs, charges and damages, which might accrue in prosecuting the suit. On the trial, W. and F. paid to the clerk all costs which had accrued, and made a deposit sufficient to cover all costs which could accrue during the progress of the cause, and offered to deposit with the clerk such further sum as the counsel of the defendant might require, and to give satisfactory security for the payment of all the costs of the suit. The action was marked in the clerk's docket, to be for the use of W. and F., who then offered to introduce H. as a witness. By the court, Washington, J. The general rule of law certainly is, that a party to a suit cannot be a competent witness. But it is equally so, that the interest which that party has in the event of the suit, both as to costs and the subject in dispute, lies at the foundation of the rule, and when that interest is removed, the objection ceases to exist. In this case, the assignment has terminated the interest of H. in the subject for which the suit is brought. As to the costs, they are paid by the assignees, now the only real plaintiffs on record. Willings v. Consequa, 1 Pet. C. C. Rep. 301. Upon this question, whether interest is the foundation of precluding the party, see the remarks of Mills, J., in Lampton v. Lampton's Ex'rs, 6 Monroe, 617, 618. He concludes that it is.

In South Carolina, where a third person brings a suit on an administration bond in the name of the ordinary, indorsing his name on the record, and acknowledging himself liable for costs, the ordinary is a competent witness to prove the bond. Price v. Gregory, 4 M'Cord, 261. Said, as the reason, that the plaintiff is a public officer, and his name made use of only to enable the real plaintiff to sustain the action. He is not liable for costs, nor is the record evidence to affect him in his individual rights. Id. 262.

In Pennsylvania, two plaintiffs brought assumpsit as indorsees of a promissory note; and one of them assigned all his interest in the note to the other, who paid into court all the costs of suit, and the assignor was then allowed as a competent witness for the plaintiff to whom he had assigned. Hart v. Heilner, 3 Rawle, 407. But this decision is put by the court on the ground that in Pennsylvania there is no court of chancery; and that courts of law have followed the

rules of chancery. Drum v. Simpson's Lessee, 6 Binn. 481. And see Steele v. Phœnix Ins. Co., 3 Binn. 306; M'Clenachan v. Scott, 2 Dall. 172, note; M'Ewen v. Gibbs, 4 Dall. 137.

In Connecticut, all parties are witnesses on a matter of accounting in a court of probate. Fairman v. Bacon, 8 Conn. Rep. 418. And in Massachusetts, referees may examine witnesses who would be incompetent in court, on the ground of interest. Fuller v. Wheelock, 10 Pick. 135. In New York, parties are examinable by referees in the action of account. 2 R. S. 385, § 50.

In South Carolina, *semb.* a nominal plaintiff is a witness in a cause. Canty v. Sumter, 2 Bay, 93. But in Knight v. Packard (3 M'Cord, 71), this is denied, and it is there said that Canty v. Sumter must have been misreported upon this point.

Parties and persons interested are competent to prove the loss of a written instrument, or that it is in the power of the other party, and notice to him to produce it on the trial, or other circumstances necessary to authorize the introduction of secondary evidence of its contents; and to prove the death of a subscribing witness, or other facts, in order to the admission of proof of his handwriting. Such preliminary testimony is addressed to the court, upon a collateral point, and it is not a subject on which the jury are to pass. This is the law in New York. Jackson ex dem. Livingston v. Frier, 16 John. Rep. 193; Chamberlain v. Gorham, 20 Id. 144; Butler v. Warren, 11 Id. 57, overruled; Schermerhorn v. Schermerhorn, 1 Wend. Rep. 119; Jackson ex dem. Van Schaick v. Davis, 5 Cowen's Rep. 123; Betts v. Jackson ex dem. Brown, 6 Wend. 173. So in New Hampshire. M'Neil v. M'Clintock, 5 N. H. Rep. 345. So in Massachusetts. Davis v. Spooner, 3 Pick. Rep. 284; Chase v. Lincoln, 3 Mass. Rep. 236; Taunton Bank v. Richardson, 5 Pick. Rep. 406; Adams v. Leland, 7 Id. 62. So in Pennsylvania. Douglass' Lessee v. Sanderson, 2 Dall. 116; Meeker v. Jackson, 3 Yeates, 442; Jordan v. Cooper, 3 Serg. & Rawle, 575; Kidd v. Riddle, 2 Yeates, 444; 1 Yeates, 15; Levans' Lessee v. Hart, cited 1 Yeates, 16; Lenox v. Dehaas, 2 Yeates, 37. So in North Carolina. Blanton v. Miller, 1 Hayw. 4; Seekright ex dem. Wright v. Bogan, Id. 178, note; Park v. Cocheran, Id. 410; Id. 54, note *a;* Garland v. Goodloe, 2 Hayw. 351. But see Cotton v. Beasley, 1 N. Car. Law Repos. 239. So in Virginia. Ben v. Peete, 2 Rand. 539; Givens v. Mans, 6 Munf. 201. In Pennsylvania, it has been held, that the party may be sworn as to a witness's inability to attend, in order to let in his deposition taken *de bene esse.* Morris v. Flora, cited 2 Dall. 117, 1 Yeates, 16. Otherwise in North Carolina. Willis v. Brown, Mart. Rep. 52; Anon. v. Brown, 1 Hayw. 227. In South Carolina and Connecticut, the testimony of the party has been denied to prove the loss of a material paper and the proper search. Sims v. Sims, 2 Rep. Const. Court, 225; Coleman v. Wolcott, 4 Day, 388. In New York, where one party is received to prove the loss of a paper, the opposite party may be sworn to disprove the loss, and account for the paper. 2 R. S. 406, § 74.

A party to the record cannot be a witness, even when he is a mere nominal party having no interest, without the consent of the real party in interest. Thus, where an action was brought by the assignee of a chose in action, in the name of the assignor, the defendant offered to call the nominal plaintiff as a witness to prove his set-off. Held, that he was inadmissible. His being a party to the record, was sufficient to exclude him, without the consent of the real party in interest. Frear v. Evertson, 20 John. Rep. 142. And see The People ex rel. M'Call v. Irving, 1 Wend. 20, S. P.

An executor cannot be a witness in an action against him: for the record would be evidence to charge him personally in an action for a devastavit. Lampton v. Lampton's Ex'rs, 6 Monroe, 616, 619. But he was received to testify on probate; for in that he has no interest. M'Daniel's Will, 2 J. J. Marsh. 332.

An executor plaintiff, on an issue of *devisavit vel non*, was not allowed to testify, though he took nothing under the will. Vinyard v. Brown, 4 M'Cord, 24.

But though in general, neither a party in interest, nor a party merely nominal, can either be received as a witness in his own favor nor in favor of others on the same side, nor compelled to testify against himself, or against others on the same side, many exceptions have been made by the courts of law; and still more by courts of equity—sometimes where the party proposed as a witness is interested, at others, where he is either free from interest, in the same sense with any other witness, or where his interest is removed at the trial. We shall consider most of the additional cases respecting his restoration to competency, which in some states has become as common an expedient, as a similar restoration of other witnesses. The general doctrine that a party, nominal or real, is incompetent, with some of its qualifications, has already been considered, to

which may be added several cases not before cited. Higdon's Heirs v. Higdon's Devisees, 6 J. J. Marsh. 53; Duncan, J., in Gebhardt v. Shindle, 15 Serg. & Rawle, 239; Bullare, J., in Gravier's Curator v. Cullion, 11 Lou. Rep. (Curry) 276; Bill v. Scott, Kirby, 62; Hawkins v. Hawkins, 2 North Car. Law Repos. 627; Williams v. Beard, 3 Dana, 158; Levy v. Burley, 2 Sumn. 355, 361; Scott v. Lloyd, 12 Pet. 145, 149; Bradley v. Root, 5 Paige, 638, 639; Norton v. Woods, 5 Paige, 249; Jones v. Bullock, 2 Dev. Eq. Rep. 638, 639; Davis v. Morgan, 1 Tyrwh. 457; 1 Compt. & Jerv. 87.

The doctrine extends to a *prochein ami*. Sproule v. Botts, 5 J. J. Marsh. 162, 163.

The courts in Pennsylvania are very liberal in allowing the restoration of the competency of a party to the record. But his interest must be fully extinguished. An executor plaintiff in trover, on his own possession, was excluded, though he offered to pay all past costs, and to deposit what the court should think sufficient to cover the residue; for the costs may be recovered back. In this case, they were not paid and relinquished absolutely. Beside, he did not release his right to commissions. Gebhardt v. Shindle, 15 Serg. & Rawle, 235, 239, and 240. So, generally, of an executor plaintiff, though he sue in mere right of the intestate. Cochran v. Cochran, 1 Yeates, 134; Anderson v. Neff, 11 Serg. & Rawle, 208. An executor or administrator defendant cannot be rendered competent, as if he were plaintiff, by paying costs, releasing, &c.; for the verdict is evidence to charge him in various ways, *e. g.* for a devastavit, and this especially if he has admitted assets by his plea. Conrad v. Keyser, 7 Serg. & Rawle, 370, 371. See also, per Duncan, J., in Wood v. Ludwig, 5 Serg. & Rawle, 447. *A fortiori* without a release, &c. Dehuff v. Turbett, 3 Yeates, 157; Sinks v. English, 3 Blackf. 138. A garnishee in a foreign attachment, being liable for costs, if he contests the plaintiff's claim, is not a competent witness against the plaintiff, even though he pay the debt due from him into court. Wood v. Ludwig, 5 Serg. & Rawle, 446, 447. A party defendant sued with others as a partner, is not competent for the plaintiff, to prove the partnership, though willing to be sworn; for his testimony discharges himself for so much as he throws upon the other defendants. Miller v. McClenachan, 1 Yeates, 144. One of several defendants in chancery, conveyed all his interest *pendente lite*, taking an indemnity from his grantee against the costs in the cause, and was then offered as a witness for the defendants; but was held incompetent. Shelby v. Smith's Heirs, 2 A. K. Marsh. 504, 507. Where a judgment confessed was opened, at the instance of junior judgment creditors, and a trial awarded, the defendant was held admissible for either party. Summer v. Summer, 1 Watts, 303. In debt by a vendor against both his vendee and the assignee of the latter, brought in on notice as a terre-tenant, in order to fix him with the original purchase money, as being an equitable lien on the land, the defendant, the vendee, was held incompetent for the plaintiff, because, though a defendant, and in that sense a witness against himself, yet he might throw the whole upon his assignee, who it appeared had no remedy over. Long v. Long, 1 Watts, 265, 270. In a case in Pennsylvania, it was held that one defendant was inadmissible for the other, the plaintiff objecting, even though his interest in amount were against the party calling him, and in favor of the plaintiff. The action was ejectment. Lies v. Stub, 6 Watts, 48, 51. The court say no such interest could countervail the immediate one which he had to testify in his own favor. Id. 51. In such case, though he disclaim and abandon the possession, and all costs to be paid to the time of disclaimer, he is still liable to a suit for mesne profits, in which the record will be evidence against him. Therefore he is not competent for his co-defendant. Stub v. Leis, 7 Watts, 43. In Connecticut, it has recently been held, after much consideration, by the Supreme Court of Errors, that a nominal plaintiff being willing to testify, was admissible for the defendant, although the real plaintiff, the assignee, objected. Johnson v. Blackman, 11 Conn. Rep. 342, 346. So of a real plaintiff, not named as such, *e. g.* a lessor in ejectment, may if he will, be received, and testify for the defendant, the other lessors objecting. Stanberry's Lessee v. Nelson, 1 Wright, Ohio, 766. But he cannot be compelled. Id. And such is the general rule in regard to a real or nominal party plaintiff or defendant, not being interested to testify in favor of the opposite party. And if he be willing, the right to object does not lie with any nominal or real party on the same side. Per White, J., in Whatley v. Johnson, 1 Stew. Rep. 488, 489; Prewett v. Marsh, 1 Stew. & Port. 17, 18, 19; Owings v. Henderson, 5 Gill & John. 134, 146; Albers v. Wilkinson, 6 Gill & John. 358; Hain v. Martin, 5 Watts, 179, 180; Gravier's Curator v. Cullion, 11 Lou. Rep. (Curry) 269, 276.

The rule is about the same in chancery. Douglass v. Holbert, 7 J. J. Marsh. 2; O'Neall, J., in

Capehart v. Adm'rs of Huey, 1 Hill's Ch. Rep. 408. Even there, a party cannot be compelled to be a witness against himself independent of his answer A decree against him cannot be founded, in whole or in part, on his testimony before an examiner. Palmer v. Van Doren, 2 Edw. Ch. Rep. 192. One of several complainants, though disinterested, cannot be a witness for the complainants. The only way to make him competent, is, if the nature of the proceeding will admit of it, to obtain an order to strike out his name as a complainant, and make him a defendant. Neither a sole nor joint complainant can be examined as a witness against the defendant. Eckford v. De Kay, 6 Paige, 565.

The general rule we have spoken of, which receives a party in a court of law, must of course be understood as not extending to those courts which absolutely exclude parties as witnesses on the merits, irrespective of their interest. That there are several such courts, we have already seen. Other cases may be added. Page v. Page, 15 Pick. 368, 373; Norton v. Woods, 5 Paige, 249; Gilmore v. Bowden, 3 Fairf. 412, 413; Kennedy v. Niles, 2 Shepl. 54; Jackson ex. dem. Titus v. Myers, 11 Wend. 533, 537, per Savage, C. J. And see per Shaw, C. J., in Columbian Manuf. Co. v. Dutch, 13 Pick. 127; Benjamin v. Coventry, 19 Wend. 353. The rule, however, seems to be undergoing a course of relaxation in Massachusetts. Beardslee v. Neal, 16 Pick. 501. In Jackson ex dem. Titus v. Myers (*supra*), the landlord of a defendant in ejectment was said to be a real party within the rule which would preclude the right of the plaintiff to call him. Therefore, his declarations were received against the defendant, In Page v. Page (*supra*), an executor plaintiff, though indemnified by his *cestui que trust* against costs, and though released by the defendant, was still held incompetent for the latter.

The sturdy rejection of a party, though entirely disinterested, by the courts in New York, has operated to extend the jurisdiction of chancery there. In a cause by three persons as nominal plaintiffs, though only one was interested, tried before Cowen, J., at the Washington circuit, the defendant offered B., one of the plaintiffs, who was willing to be sworn, as a witness, against the real plaintiff. The latter objecting to this, and the witness being rejected, the chancellor sustained a bill, filed with the view to be relieved against the rule; and, in his court, gave the defendant the benefit of the more liberal rule which prevails there. Norton v. Woods, 5 Paige, 249, 251.

If a party be, in truth, interested, all the books agree that he cannot, if objected to, be received in favor of his interest, even under the more liberal rules of a court of equity. As if he be offered in a cause wherein he has been properly made a party, and therefore may be subject to costs, even though he be not interested in the subject matter. Ormsby's Adm'rs v. Bakewell, 7 Ham. Rep. pt. 1, p. 112; Dwight v. Brown, 9 Conn. Rep. 83.

In Tennessee, the rule sanctioned by many cases in Pennsylvania, that a nominal plaintiff, who assigned before suit brought, is competent to prove the demand, is denied, though there is a statute in that state expressly exempting the assignor from all liability for costs in such a case. Anderson v. Bradie, 7 Yerg. 297.

A party may, of course, be made a competent witness by statute, either in his own favor or against himself; as to prove usury, &c. Watkins v. Watkins, 2 Stew. Rep. 485; Laws of N. Y. sess. of 1837, p. 487, ch. 430, § 2.

In assumpsit, in the name of the assignor of a chose in action, for the benefit of the assignee, the nominal plaintiff being offered as a witness by the defendant, the Supreme Judicial Court of Maine held him incompetent, and said: "The common law rule is, that a party to the record cannot be a witness, unless in actions of *tort*. In no other case can a party to the record give evidence to go to the jury on the merits of a cause." Hackett v. Martin, 8 Greenl. 77, 79.

A party or interested witness is competent to give evidence, preliminary to the introduction of secondary evidence. Shrowders v. Harper, 1 Harringt. 444; Schuylkill, &c., Navigation Co. v. Diffeback, 1 Yeates, 367; Woods' Lessee v. Pindall, 1 Wright, 507; Drake's Adm'rs v. Vaughan, 6 J. J. Marsh. 145. An administrator was received to show that the book of his intestate was a book of original entries, it appearing that no other evidence of that fact could be obtained. Ash v. Patton, 3 Serg. & Rawle, 300, 303. The plaintiff, in an action to recover a lottery prize, was received to show the loss of the ticket (Snyder v. Wolfley, 8 Serg. & Rawle, 328); but not till he had proved possession of the ticket in himself by other evidence, which, it was said, might, however, be inferred from his purchasing it. Id. 330, 331. A stockholder was held competent for his bank, to show that he was the depositary of the corporate muniments. Union Bank, &c. v.

Ridgely, 1 Har. & Gill, 324, 408. In an action against a bank, on its notes, held that the plaintiff might himself testify to their loss by fire; but not to their contents. Burridge v. Geauga Bank, 1 Wright, 688. A clerk, who has kept the books of the plaintiff's testator, though interested in favor of the plaintiff, was yet received to state the circumstances, in order to let in the books themselves as secondary evidence. Van Horne's Ex'r v. Brady, 1 Wright, 452.

But this exception to the general rule, which precluded a party, does not prevail in Vermont, where the court refused to receive the plaintiff as a witness to prove the loss of a bond (Penfield v. Cook, 1 Aik. 79); nor in South Carolina, where he was rejected as incompetent to prove the loss of a note. Davis v. Benbow, 2 Bail. 427. The court said that chancery, which possesses the power to decree an indemnity, is the best jurisdiction to be resorted to in such cases. The evil of the former practice, in a court of law, has been felt in New York, as to negotiable paper; and power accordingly given to the courts of law to require indemnity, before permitting the party to recover, on his own oath of loss. 2 R. S, 327, 328, §§ 95, 96, (2d ed.)

It was said in Drake's Adm'rs v. Vaughan (6 J. J. Marsh. 145), that the party's testimony of loss of a paper should be confined to such as are in his possession, or under his control. But of this, *quere.*

There are two cases in Pennsylvania, in one of which the party in ejectment, and in another an interested witness, were received to testify to the jury as to what were called *collateral facts*, viz: to identify a certificate of marriage (Davis v. Houston, 2 Yeates, 289), and to identify the blocks cut from marked trees. Coxe's Lessee v. Ewing, 4 Yeates, 429. But the testimony of a party was denied to prove that he found a paper produced, in a certain place, though said it would have been otherwise, if the court had required information of the place, as a warrant or preliminary to receiving the paper in evidence. Lodge v. Phipher, 11 Serg. & Rawle, 333, 385. And to the latter point, see Union Bank, &c. v. Ridgely, 1 Har. & Gill, 324, 408; Edwards v. Nichols, 3 Day, 16; and Seekright v. Bogan, 1 Hayw. 178, note. See also Porter v. The Hundred of Regland, Peake's Add. Cas. 203.

A person is not disqualified as a witness merely because he happens to be a party to the cause in his corporate capacity, as if he be mayor, president, alderman, director, trustee, or one of the company or commonalty of the corporation suing or sued. But he is still competent, even though interested as a corporator, if the corporation be public or municipal, and equally so as to a private corporation, if he had no interest, but stands as a mere trustee. In short, he comes within the reason of the rules illustrated by many cases in these notes, *passim*, in respect to receiving corporators, independent of the question whether they be parties to the record or not. Randel v. The Chesapeake and Delaware Canal Company, 1 Harringt. 233, 395; Middletown Savings Bank v. Bates, 11 Conn. Rep. 519, 592; Van Wormer v. The Mayor, Aldermen and Commonalty of the City of Albany, 15 Wend. 262, 263; Methodist Church v. Wood, 1 Wright, 12. And see Selectmen of Bennington v. M'Gennes, 1 N. Chipm. 45.

The rule has been considered, *ante*, that one of two joint wrongdoers, against whom nothing is proved, may be acquitted and sworn for his co-defendants. There is no dispute of the rule. Rigdon's Heirs v. Rigdon's Devisees, 6 J. J. Marsh. 53. And some books hold that the courts are bound, in a proper case, to direct an acquittal, even where the defendants have joined in a plea, unless it be one of justification. Bates v. Conkling, 10 Wend. 389, 392, and the cases there cited, though others say it is matter of discretion. Weston, C. J., in Gilmore v. Bowden, 3 Fairf. 412, 414, and the cases there cited; Sawyer v. Merrill, 10 Pick. 18.

But we have seen, *ante*, that there was some difficulty as to the time when the acquittal should be directed—whether at the close of the plaintiff's proof, or not till the other evidence for the defence be closed. The English judges have recently adopted the former stage. Child v. Chamberlain, 6 Carr. & Payne, 213. In a trial of replevin under distinct cognizances as to several defendants, the plaintiff having consented that one defendant should be acquitted, this was considered equivalent to an actual acquittal of the person under whom the cognizance was made, and he was received as a witness for the defendant. King v. Baker, 2 Adolph. & Ellis, 333. In tort against three, the jury found two guilty and acquitted one. On a motion for a new trial by the two, on the ground of a newly acquired witness in A., by reason of his acquittal, the court allowed that he would be competent on the new trial, though the plaintiff moved for a new trial against him. Ranny v. Church, 2 Root, 420. Though one of several defendants sued for a wrong be acquitted in a justice's court, yet, if the opposite party appeal,

improving the law of evidence (Lord Denman's Act), expressly provides, that it shall not render competent any party to any suit, action or proceeding, *individually named in the record.* The rule, as to the competency of such parties, remains therefore the same as before that act passed: if they were incompetent then, they are not now rendered competent.

Ground of incompetency.

The incompetency of the parties to the record to give evidence in their own behalf, appears to have been founded upon the sole ground of their being interested in the event. Thus Gilbert, C. B., after stating the general rule, as it formerly stood, that no man interested in the matter in question could be a witness for himself, observes, that it is a corollary to be deduced from this rule "that the plaintiff or defendant cannot be a witness in his own cause, for these are the persons who have a most immediate interest."(1) And Tindal, C. J., in delivering the judgment of the Court of Common Pleas in Worrall v. Jones,(2) said: "No case has been cited, nor can any be found, in which a witness has been refused upon the objection, in the abstract, that he was a party to the suit. On the contrary, many have been brought forward, in which parties to the suit, who suffered judgment by default, have been admitted as witnesses against their own interest: and the only inquiry seems to have been, in a majority of cases, whether the party called was interested in the event or not: the admission or rejection of the witness has depended upon this inquiry." The Court of Common Pleas decided that case, upon the principle that a party to the suit, who has suffered judgment by default, and consents to be examined, and who is called against his own interest, is competent: "There is no ground," said Tindal, C. J., "either on principle or authority, for rejecting him."

The parties to the record in civil suits being in general interested both in the question at issue in the cause, and in the question of costs, which commonly depends upon the event of the cause, it was considered that if they were interested, in either point of view they were incompetent wit-

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the former is not therefore a competent witness in the trial of the appeal. Bates v. Conkling, 10 Wend. 389.

Whether a witness competent as to part of the matter in dispute, should be rejected for the whole, the cases are conflicting. And see also per Hosmer, C. J., in Beers v. Broome, 4 Conn. Rep. 256. The plaintiff called a witness, and by him proved a fact for which he was competent. The defendant then proposed to prove a distinct fact in his own favor, to show which, the witness would have been, if originally introduced by the defendant, incompetent, by reason of interest. The plaintiff objecting, the court held him incompetent. Shields' Lessee v. Miller, 4 Harr. & John. 1, 6, 9. *Quere.* A witness was offered for the defendants, without excepting any of them, and acknowledging that he was not competent for all, being interested in favor of some, was rejected. Held proper. Norton v. Sanders, 1 Dana, 18.

(1) Gilb. Evid. 132, (3d edit.) See also by Lord Hardwicke, 3 Atk. 401.

(2) 7 Bing. 395, 398, 399.

nesses; it seldom, therefore, happened, that they were competent to give evidence; and the general rule, as it used to be laid down, was, that a plaintiff or defendant could not be a witness in his own cause.

As a corollary to this general rule, it follows that statements made by a party are not admissible on his own behalf, as proof of the facts therein stated.

It might often be much safer for the purposes of justice to allow a party to be called as a witness for himself, than to admit his statements out of court as evidence in his own favor.

It has always been considered a strict rule of evidence, that statements made by a party to a suit, having a direct interest therein, cannot be admitted as proof of the facts stated, against the adverse party, either for himself or for a party jointly sued or suing with him. The reason for this rule must be, that reliance cannot safely be placed in the statements of the party, and that they are not free from the suspicion of their having been made for his own use, and in support of his own interest. When a party has not a direct interest in the suit, so as not to be within the proviso of Lord Denman's Act, he is an admissible witness, and may be called to give evidence: but his statements made out of court would not be admissible; his evidence on oath being preferable, and a higher species of proof.

The recent case of Sutherland v. M'Laughlin,(1) affords a good illustration of this branch of the rule. That case was as follows: A. had brought an action against B., to recover compensation for an injury occasioned by B.'s carriage, and on the trial called C., a surgeon, as a witness to prove the extent of the injury; C. afterwards sued A. for compensation for his professional services. Cresswell, J., ruled, on the trial of this action, that what C. had stated as a witness in the former trial was not admissible as evidence in his own favor in the pending trial. It was possible that his statement might have been made in contemplation of a suit to be brought by himself; it was, at least, strongly for his own interest. The learned judge considered the statement to be inadmissible, on the ground that a party should not be allowed to make evidence for himself by what he might say in another suit. In this case, it will be observed, the statement made by the plaintiff on the former occasion was held to be inadmissible, though it had been made upon oath.

It may be material in some cases to prove the demeanor or conduct, the design or intention, of one party to another: in such cases the statement of a party may be admissible as indicative of the mind; not as proof of any fact which he may have mentioned in his statement—for as such it could not be admitted,—but merely as tending to show what was the disposition, intention or mind of the party. In that point of view, statements by parties have been admitted in many cases, civil as well as criminal.

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(1) Car. & M. 429.

The case of Shrewsbury v. Blount and others(1) will supply an illustration upon this subject. That was an action against several defendants for false and fraudulent representations alleged to have been made by them as directors of a joint stock company: on the trial, a conversation between two of the defendants, and another conversation between one of the defendants and a third person, were held to be admissible in evidence, for the purpose of showing the *bona fides* of the defendants. An objection being taken to this evidence, Erskine, J., said, that if the only question between the parties were whether the representations stated in the pleadings were made by the defendants, and whether they were true, then any conversations between the defendants would be inadmissible; but that the plaintiff was bound to show that the representations were fraudulent, and that another main question in the cause would probably be the *bona fides* with which the representations were made; and he was of opinion that every information which the defendants received before they made such representations, would be matter to be taken into consideration with reference to that point. Upon this ground he admitted the proposed evidence: and the Court of Common Pleas afterwards, on a motion for a new trial, in which the point was briefly mentioned, confirmed his opinion.

The statements made by the third person to one of the defendants appear to be admissible, as tending to show that he believed, or at least that he had some ground for believing, that the representations made by them (which agreed with these statements), were true: and the statements made by the defendant to his co-defendant were admissible, in the same point of view, on behalf of the latter. If it could be inferred from the conversations that the defendant *actually believed* the statements to be true, it would be clear that they were admissible: it could only be from some doubt as to their actual belief, that the evidence was at all questionable.

In an action for a malicious prosecution before a magistrate, charging the plaintiff with a felony, a deposition made by the defendant, the prosecutor, would not be admissible in his defence as proof of a felony committed, or as proof of any facts sworn to by the defendant; but it might be admissible as showing the grounds on which he acted, and that he was not acting from malice. This seems to have been the opinion of Tindal, C. J., in the case of Jackson v. Bull,(2) which was an action of that description. The chief justice is there reported to have said: "In prosecutions, the party for the purpose of public justice is bound to give his evidence on oath, and in such an action as this, such oath is evidence for him, as *showing the grounds on which he acted.*" And so it is laid down in Buller's Nisi Prius,(3) that "In an action for a malicious prosecution, for the

(1) 2 M. & G. 475; S. C., 2 Scott, 588.

(2) 2 M. & Rob. 176.

(3) P. 14, citing Cobb v. Car, Midd. Mich. 1746. In p. 15, of the same book, it is said that such evidence may be given *to prove the felony.* But, it should seem, this would not now be admitted.

purpose of *the defendant's showing a probable cause*, proof of the evidence given by the defendant on the indictment is good."

In connection with this subject the case of Jones v. Morrell(1) may be mentioned. That was an action for false imprisonment, in which the defendant pleaded a justification, that the plaintiff, being his servant, had been guilty of embezzlement. The plaintiff had been taken before a magistrate on this charge, and the defendant and his witnesses had made depositions, and the plaintiff had made a statement in answer; and it was ruled that these depositions were receivable in evidence, as being matters stated in the presence of the plaintiff, to which he made an answer; but that they were not proof of any fact therein stated.

A few examples will now be given of cases formerly decided, which under Lord Denman's Act would be decided differently; as well for the purpose of contrasting the present with the past state of the law, as also to show the operation of the new act.

Members of corporations and others.

The same principles, which render parties to the record incompetent, when suing or sued in their individual capacities, were formerly held to apply to members of a corporation suing or sued in its corporate name. Thus, in ejectment for lands of a corporation, a member of the corporation was deemed an incompetent witness, if interested either in the lands sought to be recovered, or in the general funds of the corporation which were liable to the costs of the action.(2) But as Lord Denman's Act provides that the operation of this act is not to extend to any party to a suit *individually named in the record* (the words are, "such person shall not be rendered competent"), it impliedly enacts, that all parties *not individually named* are within the beneficial clause, and shall not be excluded by reason of interest. There can be no doubt, therefore, that members of a corporation, although interested, if not individually named in the record, are now rendered admissible. It was probably with a view to cases of this nature that the provision referred to in the statute is limited to parties *individually* named in the record; a provision which will not apply where the members of a corporate body sue, or are sued, in its corporate or aggregate name.

In proceedings against the inhabitants of parishes and other districts, relative to settlements or repairs of highways and bridges, and in other cases affecting the rates of particular districts (the proceedings being

(1) 2 C. & Kir. 266.

(2) Doe v. Tooth, 3 Y. & J. 19; Godmanchester (Bailiffs) v. Phillips, 4 A. & E. 550. In Weller v. Foundling Hospital (Governors) (Peake N. P. C.), an action against parties sued in a corporate capacity, Lord Kenyon admitted several persons as witnesses for defendants, not having an individual interest in the question, and who were *not personally liable to costs*. If they had been so personally liable, Lord Kenyon would have rejected them. But under Lord Denman's Act they would be admissible.

nominally by or against all the inhabitants of the district, and not against any individually), rated inhabitants were formerly adjudged to be incompetent, by reason of their interest in the event of the suit;(1) though in-

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(1) See Doe d. Harrison v. Murrell, 8 C & P. 124.

Inhabitants of an incorporated village are competent witnesses at common law, in an action against the corporation, to recover real property; their interest as corporators is too remote and contingent to disqualify them. Hunter v. Trustees of Sandy Hill, 6 Hill R. 407.

NOTE 20.—On a complaint by a woman against a man, pursuant to the statute, charging him with being the father of a bastard child, of which she had been delivered, the complainant is a competent witness, although interested; but as a prerequisite to her admission, her credit must be fortified by her having charged the defendant in the time of her travail, which is a time of distress and danger, when it may be supposed she would speak the truth; and it is not sufficient that she charge him about the time of her travail: she must also have continued constant in her accusation, or at least it must not appear that she has been inconstant; and she must have been examined on oath before a justice, on the several circumstances of her complaint, necessary for the discovery of the truth. But, in such cases, the complainant is not a competent witness to prove that these prerequisites have been complied with; for her testimony cannot be received to facts equally within the knowledge of other persons, who are disinterested. Drowne v. Stimson, 2 Mass. Rep. 441; Commonwealth v. Cole, 5 Id. 517.

In Connecticut, a female may (by statute) maintain an action for seducing and getting her with child, and is admissible as a witness to support it. *Vide* 6 Conn. Rep. 44. And on this statute, it being stated by one of the defendant's witnesses that she had admitted that the defendant was not the father of her child, she was received as a witness to contradict him. Judson v. Blanchard, 4 Conn. Rep. 55. It is essential that she should be sworn in this action, though otherwise of a suit in behalf of the town. Chaplin v. Hartshorne, 6 Conn. Rep. 41.

An inhabitant of the place is a witness against the surety of the collector, *ex necessitate*, though liable to be re-assessed if the surety should fail. Middleton v. Frost, 4 Carr. & Payne, 16.

In an action against an innkeeper for money lost in his house, it was doubted whether the plaintiff was competent to prove the contents of the bag delivered to be kept for him. Sneider v. Geiss, 1 Yeates, 34. Though the court strongly inclined to receive the evidence on the authority of 12 Vin. 24, pl. 34; and in Herman v. Drinkwater (1 Greenl. Rep. 27), the owner of goods was received to prove the delivery of his trunk and its violation, in a similar action by him against the master of a vessel.

The case above cited from 12 Vin. 24, pl. 34, is thus stated: "On a trial at Bodmyn Coram, Montague, B., against a common carrier, a question arose about the things in a box; and he declared that this was one of those cases where the party himself might be a witness, *propter necessitatem rei*. For every one did not show what he put into his box.

By a statute in South Carolina, the defendant's testimony is received to prove the defence of usury, unless the plaintiff will deny on oath the facts to which the defendant proposes to depose. Layten v. Haygood, 2 Bay, 177. So by a statute in Massachusetts, the usury may be proved by the defendant's oath against the original creditor. Binney v. Merchant, 6 Mass. Rep. 190.

* * Provision has been made, by statute, in New York, for examining parties to the record, as witnesses, in a variety of cases. A party may be called by his adversary to prove usury. Laws of N. Y., sess. of 1837, p. 487, § 2. By another statute (Laws of N. Y., sess. of 1847, p. 630, § 1), "Any party in any civil suit or proceeding, either in law or equity, had before any court or officer, may require any adverse party, whether complainant, plaintiff, petitioner or defendant, or any one of said adverse party, and every person who is beneficially interested in said suit or proceeding, though not nominally a party, to give testimony under oath in such suit or proceeding; and such adverse party may be examined orally, or under a commission, in the same manner as persons not parties to such suit or proceeding, and who are competent witnesses therein." But a still more sweeping change has recently been made by the legislature, upon the recommendation of the codifiers of the Pleadings and Practice. Laws of N. Y., sess. of 1848, p. 559, 560, §§ 343 to 350, both inclusive. Suits for a discovery, "in aid of the prosecution or defence

habitants not rated were considered competent. Under Lord Denman's Act, they would not have been excluded on the ground of interest. But before the act, rated inhabitants had been rendered competent by statute.(1)

Where the party to an action was sued as a mere trustee for another person, though he had no interest in the question in dispute, he was, nevertheless, liable to costs; and on that ground was, before Lord Denman's Act, considered incompetent as a witness.(2) Thus a *prochein ami*, or guardian, suing for an infant, was incompetent upon this ground.(3) But it has been decided, since Lord Denman's Act, that a *prochein ami* suing for an infant is admissible.(4) It was contended that he came within the provision therein, as being a party to the action individually named in the record; the court, however, decided that he was not a party to the suit, any more than the attorney on the record in an ordinary case; and that any objection to him as a witness, on the ground of liability to costs, was removed by the general enactment of Lord Denman's Act.

In a case which occurred before Lord Denman's Act,(5) where parochial trustees were empowered by statute to sue in the name of their treasurer or clerk, and the act contained a provision for reimbursing such treasurer or clerk his costs out of the rates, Lord Tenterden, C. J., appears to have considered that, in an action brought in the name of the treasurer, a trus-

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of another action," are abolished. A party may call and examine his adversary "as any other witness, to testify, either at the trial, or conditionally, or upon commission;" and the adverse party may be examined, prior to the trial, on a five days' notice, before a county judge, or judge of the court where the cause is pending. "A party examined by an adverse party, as in this chapter provided, may be examined on his own behalf, in respect to any matter pertinent to the issue. But if he testify to any new matters, not responsive to the inquiries put to him by the adverse party, such adverse party may offer himself as a witness on his own behalf, in respect to the new matter, and shall be so received." Id. § 349. "A person for whose immediate benefit the action is prosecuted or defended, though not a party to the action, may be examined as a witness in the same manner, and subject to the same rules of examination, as if he were named as a party." Id. § 350.

(And a party may be examined on behalf of his co-plaintiff or co-defendant as to any matter in which he is not jointly interested, or liable with such co-plaintiff or co-defendant, and as to which a separate and not joint verdict or judgment may be rendered. Amendments of 1851 & 1852; Beal v. Finch, 1 Kernan R. 128. And now by chapter 353 of the law of 1857, the parties to the suit are made competent witnesses in their own behalf, due notice having been given of the intention to examine them. This puts an end, in this state, to all questions of competency in regard to interest, and is a much more sweeping provision than that made by the English statutes.)

(1) The incompetency of rated inhabitants was removed, partially, by the 54 Geo. III, c. 170, § 9, and some other statutes, and entirely by the 3 & 4 Vict. c. 26.

(2) *Per Cur.*, Dowdeswell v. Nott, 2 Vern. 317; Davis v. Morgan, 1 Tyrwh. 457; S. C., 1 C. & J. 87; Bauerman v. Radenius, 7 T. R. 668; Phillips v. Buckingham (Duke), 1 Vern. 230. See also the cases cited 13 Price, 512.

(3) Clutterbuck v. Huntingtower (Lord), 1 Stra. 505; James v. Hatfield, 1 Stra. 548; Hopkins v. Neal, 2 Stra. 1025; Gilb. Evid. 107.

(4) Sinclair v. Sinclair, 13 M. & W. 640.

(5) Whitmore v. Wilks, M. & M., N. P. C. 214.

tee was an incompetent witness for the plaintiff, although the trustees took no benefit under the statute, and rated parishioners were thereby made competent witnesses. The ground of this opinion seems to have been, that the trustees were the substantial plaintiffs. But it would now be an answer to such an objection, that the trustees were not individually named as parties in the record, and therefore were not to be excluded by reason of interest. In a case in the Court of Exchequer,(1) which was

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(1) Fletcher v. Greenwell, 5 Tyrwh. 316.

NOTE 21.—So the trustees of a charitable society are competent witnesses in support of a will under which they take as legatees or devisees in trust for the benefit of the institution. Nason v. Thatcher, 7 Mass. Rep. 398; Cornwell v. Isham, 4 Day, 35. In England there seems to be no general rule adopted when the members of corporations shall be admitted or refused as witnesses in actions for or against corporations; but every case seems to stand upon its own circumstances; that is, whether the interest be so valuable that it may be presumed to occasion partiality. Swift's Ev. 57. But in Connecticut this general rule has been adopted; that in all case where the corporations which are of a public nature, and comprehend the divisions of the state, such as counties, towns, societies and school districts, are parties on record, or interested in the suit, the members of the corporations are competent witnesses; for they are not considered as having a personal, but a corporate interest, which ought to go to the credit, and not to the competency, and there are many instances where, if they were excluded, no testimony could be obtained. Id.; Smith v. Barber, 1 Root, 207. But with regard to corporations of a private nature, instituted for special purposes, as banks and turnpike companies, their interest is so direct, and there being no necessity that they should be witnesses, they have not been allowed to testify. Swift's Ev. 57. And see Skelton v. Tomlinson, 2 Root, 132. It will be seen, probably, to be the result of the cases there cited, that members of public corporations are receivable, while those of corporations, whose main object is private, shall be excluded.

It has accordingly been holden in New Jersey, that the inhabitants of a town are good witnesses, in a cause in which the town is interested and virtually a party. Schenck v. Corshen, 1 Coxe's Rep. 189; Overseers of Orange v. Overseers of Springfield, 1 South. Rep. 186. And see Schenck v. Stevenson, 1 Penning. Rep. 387.

In Pennsylvania a distinction was made in one case between a taxable inhabitant of a public corporation, and one actually rated; the former being held competent, the latter not. Commonwealth v. Baird, 4 Serg. & Rawle, 141. An inhabitant of the place is a witness against the surety of the collecter, *ex necessitate*, though liable to be re-assessed if the surety should fail. Middleton v. Frost, 4 Carr. & Payne, 16.

Upon an issue whether a certain messuage is situated within a chapelry, a person who occupies ratable property within the chapelry, is a competent witness to prove that it is. Though his testimony might increase the number of contributors, yet it might also increase his burden by increasing the number of claimants for seats and sepulture. But it was held to be a case also within the statute 54 Geo. III, c. 170, § 9. Marsdon v. Stansfield, 7 Barnw. & Cresw. 815; S. C., 1 Mann. & Ryl. 669. On a justification in trespass, that the *locus in quo* is a free wharf for the inhabitants of O., one of those inhabitants is not competent for the defendant, unless the justification be waived. Prewitt v. Tilly, 1 Carr. & Payne, 140.

In New York, it was held that the interest arising from being a ratable inhabitant, is too remote to prevent his being a witness for the town, as in actions on bastardy bonds (Falls v. Belknap, 1 John. Rep. 486), or for penalties in *qui tam* actions. Corwein v. Hames, 11 John. Rep. 76; Bloodgood v. Overseers of Jamaica, 12 Id. 285. And see particularly, The City Council v. King, 4 M'Cord, 487. It will be seen by these notes that we stand, by common law, very nearly on the footing of England upon the statute 54 Geo. III, c. 170, § 9, cited in the text, and which is given at length in a note to Marsdon v. Stansfield, *supra*, 1 Mann. & Ryl. 670.

An inhabitant of a state, where the state is a party, is a competent witness for the state, notwithstanding any interest he may have, as such inhabitant, in the event of the suit. The State

of Connecticut v. Bradish, 14 Mass. Rep. 296. And see Gould v. James, 6 Cowen's Rep. 369, S. P.

By a decided balance of the cases it will be perceived that a corporator of a state, county, town, village, or other corporation formed for municipal purposes, is a competent witness in behalf of his corporation, in respect to corporate claims, or liabilities of all kinds, if he have no personal interest beyond that of a corporator. The rule is well expresssed, with its principle, in Willcock on Municipal Corporations, p. 146, § 350. And see per Walworth, C., In the Matter of Kip, 1 Paige, 601, 613. The doctrine has been applied, by the following cases, to the corporator of a town: Canning v. Pinkam, 1 N. Hamp. Rep. 353; Smith v. Barber, 1 Root, 207, 208; Eustis v. Parker, 1 N. Hamp. Rep. 273, which refers to and considers numerous English and American cases; to an inhabitant of an incorporated village (Trustees of Watertown v. Cowen, 4 Paige, 510, 513); again, to a corporator of a town (Orange v. Springfield, 1 South. 186; Schenck v. Corshen, County Collector, 1 Coxe,189; Fuller v. Hampton, 5 Conn. Rep. 416; Pond q. t. v. Sage, 1 D. Chipm. 250; Mayor and Aldermen of Jonesboro' v. M'Kee, 2 Yerg. 167; Doe ex dem. Jackson v. Commissioners of Hillsborough, 1 Dev. & Batt. 177); to members of charitable corporations (Methodist Church v. Wood, 1 Wright, 12;) of a civil district charged with the support of the poor (State v. Davidson, 1 Bail. 35;) to inhabitants of a county (Board of Justices of Burlington v. Fennimore, late county collector, 1 Coxe, 190); to the inhabitants of a city (Mayor, &c. v. Wright, 2 Porter, 230; Maysville v. Shultz, 3 Dana, 10; Van Wormer v. The Mayor, &c., of Albany, 15 Wend. 262); and to corporators of parishes and school districts. Congregational Society, &c. v. Perry, 6 N. Hamp. Rep. 164. The contrary doctrine was formerly held in Vermont. Chester v. Rockingham, Brayt. 239.

In consequence of the doctrine being left questionable by the cases at common law, as in Pennsylvania (Commonwealth v. Keighler, Whart. Dig. 330, pl. 710, (2d ed.); Commonwealth v. Baird, 4 Serg. & Rawle, 141), it is sometimes declared by statute. Thornbury v. Directors of the Poor, &c., 12 Serg. & Rawle, 110; M'Farland v. Commissioners of Moyamensing, 12 Serg. & Rawle, 297; Van Wormer v. The Mayor, &c., of Albany, 15 Wend. 262, 263; 1 R. S. 376, (2d ed.) § 4; Doe ex dem. Higgs v. Cockell, 6 Carr. & Payne, 525.

In an action by a road commissioner, in his own name, on a bond for work given to his predecessor, the latter was held a competent witness for the plaintiff. Cox v. Way, 3 Blackf. 143, 145.

The general result of the cases is well expressed by the Supreme Court of Ohio, in Methodist Episcopal Church of Cincinnati v. Wood (5 Ham. 583, 584). "In cases where corporations of a *public nature*, comprehending the divisions of the state, or institutions for charitable or pious purposes, such as counties, towns, school districts, religious or charitable societies, are parties to the record, or interested, the members of the corporation, having no individual interest, are competent witnesses." And see per Hitchcock, J., in Mayor, &c. v. Wright, 2 Porter, 235. Those adjudged cases which present any difficulty in reaching this result, are well considered by Johnson, J., in State v. Davidson (1 Bail. 35, 36 to 38). See also Lancum v. Lovell, 6 Bing. 465, though the English cases are by no means to be considered as going the length of the above doctrine. *Rated* inhabitants or members of municipal corporations, are still excluded there independently of certain statutes. Tothill v. Hooper, 1 Mood. & Rob. 392; Oxenden v. Palmer, 2 Barn. & Adolph. 236; Rex v. Bishop Auckland, 1 Adolph. & Ellis, 744; Davis v. Morgan, 1 Tyrwh. 457. They are, as heretofore, admissible if not *actually rated;* but merely *liable* to be so. Per Bayley, J., in Marsdon v. Stansfield, 7 Barn. & Cress. 815; Doe ex dem. Hobbs v. Cockell, 4 Adolph. & Ellis, 478.

If the corporation be for private purposes, as a bank, turnpike company, &c. (Robertson, C. J., in Maysville v. Shultz, 3 Dana, 13, 14; Methodist Church v. Wood, 1 Wright, 12), or the corporator be offered to establish some private right, beneficial to himself, he is incompetent in behalf of his corporation. See the cases in the same notes above cited, *passim*. *Per cur.* in Eustis v. Parker, 1 N. Hamp. Rep. 275; Williams, J., in Mayor of Jonesboro' v. Roe, 2 Yerg. 167, 169. This doctrine was applied to the corporator of a turnpike company, though he had sold his stock, for he had guarantied that it should bring the *par* price to the vendee. Grayble v. York, &c., Co., 10 Serg. & Rawle, 269. It was held generally applicable to the stockholder of a bank, though held that he might be sworn to prove himself the past or present depository of the corporate muniments. Union Bank, &c., v. Ridgely, 1 Harr. & Gill, 324, 408. So the rule is applicable

also before Lord Denman's Act, it was decided, that a parochial director was competent, under circumstances similar to those of the preceding case: and this decision was upheld in a later case.(1)

In an action of tort, where a particular person is named in the declaration, as having been engaged, together with the defendant, in committing the alleged injury, but has not been made a defendant in the suit, he will be a competent witness. This was so decided at Nisi Prius under the old law.(2) And it is clear that he would be competent under the new act. For though the person offered as witness is individually named in the record, he is not individually named therein as party to the suit, and therefore is within the enacting clause of the new act.

The effect of a judgment by default, of a *nolle prosequi* and of a separate verdict, will now be considered.

Questions with regard to the competency of parties on the record have frequently arisen in actions against several defendants, one of whom has been placed in a different situation on the record from that of his co-defendants, in consequence of a judgment by default, or *nolle prosequi*, or a separate verdict on the trial. In these cases the inquiry has been, whether the effect of the particular proceeding with regard to the party offered as a witness, has been to remove his interest at the trial; if such appeared to be the case, he was considered competent: but if he still appeared to have an interest in the determination of the cause in favor of the party on whose behalf he was offered as a witness, he was rejected as incompetent. The competency of these parties, who are individually named in the record, is not affected by Lord Denman's Act, and the law

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to the incorporated society of Shakers, for whom the deacons are trustees. Yet to disqualify a member, the act in respect to which he is called to testify must have been performed by them as trustees. And in a case where they are sued as sureties for one member of the society for her private debt, another may be a witness for them. Richardson v. Freeman, 6 Greenl. 57, 58, 59. A mere trustee of a savings bank, not being either a stockholder or depositor, was held a competent witness for the institution. Middletown Savings Bank v. Bates, 11 Conn. Rep. 519. But the trustee and corporator of a private incorporation for embanking meadows, was held incompetent for the plaintiffs in an action to recover an assessment. Crozer v. Leland, 4 Whart. 12.

The result of the cases, as to the competency of private corporators, is well summed up by the Supreme Court of Ohio in Methodist Church of Cincinnati v. Wood, *supra*. "Where corporations of a private nature instituted for special purposes and private emolument, such as banks, insurance, turnpike and canal companies, bring suit, the interest of the corporators is direct, and they are incompetent to testify in support of their claim." Of course, it is the same where the corporation is a defendant.

(The following decisions under our code, permitting a co-plaintiff or co-defendant to be called and sworn as a witness in the cause in cases where a separate judgment might be rendered, may be referred to as illustrating the common-law rule, as well as the principles of construction applicable to statutes of this kind—enabling statutes: Thompson v. Blanchard, 4 Comst. 303; Labar v. Koplin, 4 Comst. 546; Ladue v. Van Vechten, 8 Barb. 664; Parsons v. Pierce, 8 Barb. 655; Fort v. Gooding, 9 Barb. 371; Rich v. Husson, 4 Sand. 115; 11 Barb. 645; Munson v. Hegeman, 10 Barb. 112; Finch v. Cleveland, 10 Barb. 290; Beal v. Finch, 1 Kernan, 128.)

(1) M'Gahey v. Alston, 2 M. & W. 206.

(2) Poplett v. James, B. N. P. 286.

respecting their admissibility is not altered. For that statute, as has been before observed, enacts, "that no person offered as a witness shall hereafter be excluded by reason of incapacity from interest;" and afterwards provides, that the act "shall not *render competent* any party to any suit, &c., individually named in the record." The statute does not enact that parties to the suit shall *not* be competent, but, by the enacting clause, which abolishes the general incapacity on the ground of interest, merely that they shall not be rendered competent. Consequently, where, by the rule of law as it existed before the passing of that act, such parties were competent, they still are so: the new act with respect to them having made no alteration of the law.(1)

First, Of the effect of a judgment by default.

There has been heretofore much contrariety of opinions and decisions upon the effect of a judgment by default, respecting the admissibility of a co-defendant. But, within a few years, some well considered judgments have been delivered upon these questions, and the law is now in a more settled state. The points to be considered relate, first, to the admissibility of defendants for or against co-defendants, in actions on contract; and secondly, to their admissibility for or against co-defendants in actions on tort.

First, of the admissibility of a co-defendant in an action on contract.

Action on contract.

In an action against two defendants on a joint contract, it was ruled by Lord Kenyon, C. J., that one of them who had suffered judgment by default was incompetent as a witness for the other, for the purpose of negativing the contract; for if negatived as to one, the contract failed as to the other, and the plaintiff could make no use of his judgment by default

(1) This has been so ruled by Cresswell J., at Nisi Prius (Dresser v. Clarke, 1 C. & Kir. 569); and though a bill of exceptions was tendered to this ruling, the case does not seem to have been carried further. The judge subsequently granted a certificate for speedy execution notwithstanding the bill of exceptions. Id. p. 752.

Under the statute of this state allowing co-plaintiffs and co-defendants to be called as witnesses for each other, in cases where a separate judgment might be rendered, it has been held that in an action for a tort—*i. e.*, an assault and battery—the defendants having put in separate answers, are each of them competent witnesses for the others. Beal v. Finch and others, 1 Kernan R. 128; Parsons v. Pierce and others, 8 Barb. 655. But a party was not held a competent witness for his co-plaintiff or co-defendant in an action on a joint contract, though he was held competent in cases where the contract was both joint and several. Ladue v. Van Vechten, 8 Barb. 664. In other words, the statute obviated the technical objection to the witness arising from the fact of his being a party to the record; but did not make him competent, where he was otherwise disqualified. Rich v. Husson, 4 Sand. 115. And therefore it was held that one of several defendants sued for a tort and offered as a witness, must be sworn, and the objection to his evidence made when offered. 4 Duer Rep. 53.

Under the 6th and 7th Victoria, the testimony of a defendant in favor of a co-defendant was rejected as inadmissible where it proved his own defence. Triston v. Hardey, 7 Eng. Law and Eq. R. 204.

against the witness, who was consequently interested in obtaining a verdict for the defendant.(1)

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(1) Brown v. Fox, MS. Ex. Ass. 1789; cited by Dallas, J., 8 Taunt. 141. See also in Bell v. Banks, 3 M. & G. 261.

See Triston v. Hardey, *supra*, 7 Eng. Law and Eq. R. 204; under our code see Ladue v. Van Vechten, 8 Barb. 664. The plaintiff may, it seems, in an action of assumpsit, call a defendant who has put no defence, and has no interest in favor of the plaintiff, on the trial of the issue raised by his co-defendant (Kincaid v. Purcel, 1 Smith, 164); and where one of the defendants pleads infancy, the court may allow the court to pass upon that issue first, and then, it being found in his favor, allow him to be sworn and examined as a witness in the cause. Rohrer v. Morningstar, 18 Ohio, 579. But a defendant sued on a joint contract or liability is not in general a competent witness in the action. Oakley v. Aspinwall, 2 Sand. R. 7; Slegg v. Phillipps, 31 Com. Law R. 374.

NOTE 22.—Where, in an action on a promissory note, it appeared that J. and K., two of the defendants, had been discharged under the insolvent act, and a release from the other defendants was produced, releasing J. and K. from all claims that might arise out of the prosecution of this suit, the defendants moved that the jury be directed to acquit J., so that the the other defendants might have the benefit of his testimony; it was held, that in cases arising on contract this could not be done, and that there was no rule of evidence which permitted a party to the record in such cases to testify. Woodworth, J., who delivered the opinion of the court, said the objection rested on his being a party to the record, and argued that the rule excluding a party did not depend wholly on interest, but that motives of policy were called in for the purpose of resisting the testimony in such cases, and thereby prevent the consequences supposed to result from its admission. Schermerhorn, v. Schermerhorn, 1 Wend. 119. But in Affalo v. Fourdrinier (6 Bing. 306), and Bate v. Russell (1 Mood. & Malk. 332), the decisions were directly opposed to the above New York case, though the latter case was sanctioned in Supervisors of Chenango v. Birdsall (4 Wend. 453). The amount of the two English cases last cited is, that where the defence is matter of personal discharge for the co-defendant, and is fully made out, and he stripped of his interest, he may be received the same as in tort. In one of these cases, the witness was first acquitted by verdict, and in the other a *nolle prosequi* was first entered as to him. Kimball v. Lamson (2 Verm. Rep. 138, 143) sanctions the principle of these cases. And see Hartness v. Thompson, 5 John Rep. 160. In the case just cited from 2 Verm. Rep., it was held that one defendant in assumpsit, having suffered a default, could not be called as a witness for the other. So in a suit against two on contract, though one be misnamed (George for Gabriel F.) and returned *non est inventus*, he is not admissible for the other. Van Norden v. Striker, 9 Wend. 286. Whether, in an action *ex contractu* against several defendants, some of whom plead matter negativing the action with respect to all, and the other pleads his bankruptcy only, on which the jury find a verdict for him, he is a competent witness, after that verdict returned, to prove the plea of the other defendants. *Quere.* Bate v. Russell, 1 Mood. & Malk. 332.

And see the case of The People v. Bill; also per Wilde, J., in Commonwealth v. Marsh, 10 Pick. 57, 58, and Campbell v. The Commonwealth, 2 Virg. Cas. 314.

The first case seems rather to question Rex v. Fletcher, and to sanction Rex v. Lafone, cited in the text; the second to recognize Rex v. Fletcher, and to deny Rex v. Lafone. The last, without questioning Rex v. Fletcher, recognizes Rex v. Lafone.

Rex v. Lafone has been disregarded in practice in Massachusetts. Per Wilde, J., 10 Pick. 58. The defendant was indicted jointly with another person for an assault and battery. The defendants pleaded separately, not guilty. One defendant elected to be tried separately, and his trial came on first. The prosecutor and the two defendants were the only persons present at the time of the fray. After the testimony for the prosecution had been produced, the defendant now on trial offered to prove his defence by the other person named in the indictment. *Per Curiam.* It appears to be a technical rule of evidence, and one well settled, that a party in the same suit or indictment cannot be a witness for his co-defendant until he has been first acquitted, or at least convicted. Whether the defendants be tried jointly or separately, does not vary the rule. It is his being a party to the record which renders him incompetent; and the practice is, when

It has been held, however, that a defendant who had suffered judgment by default was competent to produce, on behalf of a co-defendant, a partnership deed under which they had been acting in their dealings with the plaintiff.(1)

In the cases of Brown v. Brown,(2) Green v. Sutton,(3) and Mant v. Manwaring,(4) it was decided, in actions against several defendants on a joint contract, that one defendant who had suffered judgment by default was not competent as a witness for the plaintiff against his co-defendants; because, if the plaintiff should succeed in the action, the witness would be entitled to contribution from his co defendant; but if the plaintiff should fail, the witness would himself be liable for the whole demand. But in the later cases of Worrall v. Jones,(5) and Pipe v. Steel,(6) the decisions have been different; it was adjudged that a defendant in that situation was admissible, and the older cases, above mentioned, are overruled.

In the case of Worrall v. Jones,(5) which was an action on a bond against a principal and two sureties, the Court of Common Pleas decided that a defendant, the principal in the bond, who had suffered judgment by default, would be a competent witness against the other defendants. In giving judgment in this case, Tindal, C. J., said, no objection could arise on the ground that the witness was interested to procure a verdict for the plaintiff, inasmuch as, being the principal debtor, he could not call for contribution from the other defendants, but was himself ultimately liable to all the damages and costs recovered in the action; and that there

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nothing appears against one of the defendants, for the court to direct his immediate acquittal, so that the other defendant may use him as a witness. People v. Bill, 10 John. Rep. 95; Campbell v. The Commonwealth, 2 Virg. Cas. 314, S. P. on the authority of People v. Bill, among other cases. See State v. Carr, 1 Coxe, 1, *contra*. But, to warrant his acquittal, no evidence whatever should appear against him. Bowerhan's Case, 4 C. H. Rec. 136, before Colden, Mayor; Pennsylvania v. Leach, Addis. 352.

Where two were jointly indicted for uttering a forged note, and the trial of one was postponed; held, that he could not for that cause be called as a witness for the other. Commonwealth v. Marsh, 10 Pick. 57.

Where, by mistake, the name of one of two criminals intended to be indicted by the grand jury, was omitted in the body of the indictment, but his name was in the indorsement of the title beneath, which was written "a true bill," and the jury were sworn to try both; held, that the one whose name was so omitted was not of course competent for the other; but no evidence coming out against him, he is competent. Van Orden's Case, 1 C. H. Rec. 62.

(1) Colley v. Smith, 4 N. C. 285.

(2) 4 Taunt. 752.

(3) 2 Moo. & Rob. 270.

(4) 8 Taunt. 139.

NOTE 23.—Kimball v. Lamson, 2 Verm. Rep. 144, recognizes Brown v. Brown, cited in the text. The case of Mant v. Manwaring, is placed much on the ground of non-consent by the co-defendant. As to this objection, it is entirely overruled by Worrall v. Jones (7 Bing. 395), which is in every particular the very reverse of Mant v. Manwaring. And see several cases cited in the text, where the admission of the party seems to stand on the ground of interest alone.

(5) 7 Bing. 395.

(6) 2 Q. B. 733.

was no case which decided that a witness would be disqualified merely from being a party to the suit, if he was not interested in giving his testimony.

In the other case of Pipe v. Steel,(1) the question whether one defendant who had suffered judgment by default was a competent witness for the plaintiff, in an action upon a contract, was decided by the Court of Queen's Bench. Lord Denman, C. J., in delivering the judgment of the court, said: "The objection, of his being a party to the record, has been deliberately overruled in Worrall v. Jones, a case of great authority, in which Lord C. J. Tindal gave the unanimous judgment of the Court of Common Pleas, that a party to the record may be examined as a witness, provided he be disinterested. In the case of Green v. Sutton,(2) Lord Abinger rejected a person so situated, on the express ground that, having admitted himself liable by suffering judgment by default, he would be directly interested in throwing a part of that burden on another; which was also the ground of the decision in Brown v. Brown.(2) And if the joint liability were an established fact, at the time when the witness is called, this argument would be conclusive; but, on the contrary, it is the very fact in issue, and the witness's interest is that it may not be established, because, unless it is, no judgment can be had against him in this action. He may, indeed, after suffering judgment by default, have little ground to expect ultimately to escape the consequences of a joint liability; but his conduct even in that respect might admit of explanation. Upon the whole, it appears that the reason for excluding the witness fails, and that he ought to be received."

Secondly, of the admissibility of a co-defendant in an action on tort.

Action on tort.

In the case of Ward v. Haydon,(3) it was ruled by Lord Kenyon, C. J., at Nisi Prius, that a defendant in an action of trover, who had suffered judgment by default, was a competent witness for his co-defendant, who had pleaded not guilty. His Lordship observed that, by reason of the judgment by default, the cause was at an end, with regard to the witness; that he was not liable to the costs of the issue tried against the other defendant, and was not himself released, whatever might be the event of that issue. The same point appears to have been ruled in the same way in an action of trespass.(4)

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(1) 2 Q. B. 733.

(2) *Supra*, p. 47.

Under the decisions in this state a party to the action, founded on a joint contract, is not at common law a competent witness, even where he interposes no defence, or has been discharged from liability as an insolvent. Schermerhorn v. Schermerhorn, *supra;* and Supervisors of Chenango v. Birdsall, 4 Wend. 453; Oakley v. Aspinwall, 2 Sand. R. 7. In some of the states the English rule prevails. Rohrer v. Morningstar, *supra;* Kincaid v. Purcel, *supra.*

(3) 2 Esp. N. P. C. 553; S. C., Peake's Add. Ca. 126.

(4) Anon., 2 Campb. 334, n. by Wood, B. See also by Le Blanc, J., 2 Campb. 333, n.

But it may be remarked, that according to the ordinary practice, there is but one assessment of damages in cases of this nature, and the same jury that try the issue between the plaintiff and the defendants who have pleaded, also assess the damages both against the defendant who has suffered judgment by default, and the other defendants if they are found guilty: and it is obvious that a defendant who has suffered judgment by default, has an immediate interest in reducing the amount of damages, and consequently, could not, upon general principles, be called for this purpose. Where a defendant, therefore, who had suffered judgment by default in an action of trespass, was called as a witness for two co-defendants, who had pleaded,(1) Best, C. J., was of opinion, that the witness was incompetent; for if his evidence were admitted on behalf of the other defendants, it might give such a complexion to the case as to operate in reduction of the damages against himself.

Whatever may have been the doubts that have previously existed upon this subject, relative to the admissibility of a defendant for a co-defendant

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(1) Marsh v. Smith, 1 C. & P. 577. See also Webber v. Budd, Ex. Sum. Ass. 1826, cit. Rosc. Ev. 119.

NOTE 24.—One of two defendants sued jointly for the same trespass, if he suffer a default, cannot be a witness for his co-defendant. The reason is, that although one defendant suffer a default, and the other plead and go to trial, the damages are to be assessed against both defendants by the same jury that try the issue. Bohun v. Taylor, 6 Cowen's Rep. 313; Marsh v. Smith, before Best, C. J., 1 Carr. & Payne, 577, S. P. and same reasons given; Chase v. Lovering, 7 Foster, N. H. 295. Ward v. Haydon, before Lord Kenyon, and Chapman v. Graves, before Le Blanc, J., cited in page 50, notes 1 and 2 of the text, seem to be overruled, and for the soundest reasons. In Marsh v. Smith, Best, C. J., said: "If this man's evidence is to be admitted to give a complexion to the case, it may go to reduce the damages against him; and therefore I am of opinion he is clearly interested and ought not to be received." The cases *contra* seem to have been very hastily decided. See also per Tilghman, C. J., 6 Binn. 319, and Bostwick v. Lewis, 1 Day, 33. (Where one of several trespassers is not sued, he is a competent witness against his co-trespasser without being released by plaintiff. Morris v. Daubigny, 16 Com. Law Rep. 402; Kennedy v. Phillipy, 13 Penn. State R. 118, 408; Patch v. Hoyt, 20 Conn. R. 334.)

* * In the present (the 9th) edition of the text the author has embodied the greater part of this note. **

NOTE 25.—Where process was issued against three joint trespassers, two of whom were taken and the other returned not found; held, that the defendant not arrested was a competent witness for the other two (Stockham v. Jones, 10 John. Rep. 21); for he, in truth, was not to be deemed a party, as he would had the action been upon a joint contract. Id.; Rose v. Oliver, 2 John. Rep. 365; Van Norden v. Striker, 9 Wend. 286. In Stockham v. Jones, the cases cited in the text were commented upon and overruled. And in Wakeley v. Hart (6 Binn. 316), it was held, that where all the joint wrongdoers are arrested, but the plaintiff goes to issue with some and takes no steps to compel the others to plead, the latter are admissible, the same as if they had never been named as parties. But if the suit be on contract, though the witness be misnamed—as George, instead of Gabriel F.—he shall be excluded as a party. Van Norden v. Striker, 9 Wend. 286. So the lessor of the plaintiff Elijah, by mistake inserted Elisha, was excluded as a party. Robinson v. Neal, 5 Monroe, 214, 215. In these two cases of misnomer, the witness said he supposed he was the person intended, which was held sufficient to exclude him. Two defendants in trespass, though they sever in their defence, cannot demand separate trials, so as to be witnesses for each other. Dougherty v. Dorsey, 4 Bibb, 207.

in such cases, they seem to be now removed by the recent decision of the Court of Common Pleas, in the case of Thorpe v. Barber,(1) where it was decided that a defendant in an action of tort, who has suffered judgment by default, is not a competent witness for his co-defendant where the jury are summoned as well to try the issues against the one, as to assess the damages against the other.

On the question of admissibility of a defendant as a witness for the plaintiff against co-defendants, it was held, in the case of Chapman v. Graves,(2) by Le Blanc, J., in an action of trespass against three, that one of the defendants who had suffered judgment by default, could not be admitted a witness against the others, who had pleaded, and he distinguished the case from Ward v. Haydon,(3) observing, that there the witness was called to *exculpate* his co-defendant, but that here he was called to *inculpate* the others. But the better opinion seems to be that laid down in the late case of Hadrick v. Heslop,(4) where one of two defendants in an action for a malicious prosecution had suffered judgment by default, and it was held that he was a competent witness against the other.

In an action of ejectment, one of several defendants, in possession of part of the premises, who suffers judgment by default as to such part, will be competent to give evidence for a co-defendant who pleads. In Buller's Nisi Prius, it is said,(5) that if a material witness for the defendant in ejectment be also made a defendant, the right way is for him to let judgment go by default; but if he plead, and by that means admit himself to be tenant in possession, the court will not afterwards, upon motion, strike out his name. "In such a case," adds Buller, J., "if he consent to let a verdict be given against him for so much as he is proved to be in possession of, I see no reason why he should not be a witness for another defendant."(6)

A defendant, who has suffered judgment by default in an action of ejectment against two defendants, has been considered a competent witness for the plaintiff, to prove the other defendant in possession.(7) In that case, Lord Ellenborough, C. J., held, that a verdict for the plaintiff would not prevent him from suing the witness for mesne profits; and that the only supposed interest imputable to the witness was the possibility that the plaintiff would sue the other defendant alone, but that this remote and possible interest would not render the witness incompetent.

Secondly, of the effect of a *nolle prosequi*.

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(1) 5 C. B. 675.

(2) Campb. 333, n.

(3) *Supra*, p. 48.

(4) 17 L. J. (N. S.) Q. B. 313; S. C., 12 Jur. 600. See also a case cited by V. Williams, J., 5 C. B. 676.

(5) P. 285.

(6) B. N. P. 286, citing Dormer v. Fortescue, 9 Geo. II, Willes, 343, n.

(7) Doe d. Harrop v. Green, 4 Esp. 188.

It has been decided, in several cases, that if a *nolle prosequi* is entered as to one of several defendants, such defendant will be a competent witness for or against his co-defendant, and this both in criminal and civil proceedings.(1) In a case where this point arose in an action against two persons who had been partners, upon a bill of exchange accepted during the partnership, Tindal, C. J., in delivering the judgment of the Court of Common Pleas, said, that the only question in the case was, whether the defendant, who had pleaded, would be entitled to sue the witness, either at law or equity, for contribution; that it was clear, he might have done so before the stat. 49 Geo. III, c. 121, § 8 (the then existing Bankrupt Act), but that since that statute, the solvent partner was entitled, and consequently obliged to prove under the commission, and that the certificate would be a bar to any action for contribution: the bankrupt, therefore, being discharged from all liability, was a competent witness for the defendant.(2)

In such cases, the effect of the *nolle prosequi* is entirely to put an end to the proceedings in the action, as far as the particular defendant is concerned, and it follows that, although he was originally one of the parties to the suit, he cannot be considered as a party at the time of the trial. At all events, upon the *nolle prosequi* being entered as to him, he ceases to have any immediate interest in the action, and the question of interest in the event could only arise in respect of a liability over to the other defendant, for whom he is called as a witness.(3)

Where a plaintiff intends to enter a *nolle prosequi* against a defendant for the purpose of making him a witness, he must make his application to a judge at chambers; a judge at Nisi Prius cannot grant the application.(4)

It may be here mentioned, that an unsealed issue roll with a *nolle prosequi* entered thereon, not being a record of the court, is not the proper evidence of a *nolle prosequi*.(5)

Thirdly, of the effect of a separate verdict.

Where no *nolle prosequi* is entered as to a defendant, his situation is obviously different. In an action of assumpsit on a joint contract against two defendants, one of whom had pleaded non-assumpsit, and the other had pleaded bankruptcy, issue having been joined on both pleas, the counsel for the defendants proposed to call the defendant who had pleaded

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(1) Said by Park, J. in Emmett v. Butler, 7 Taunt. 607, to have been so ruled by Le Blanc, J See, also, Moody v. King, 2 B. & C. 558; Melver v. Humble, 16 East, 171; Aflalo v. Fourdrinier 6 Bing. 306; R. v. Shearman, Ca. temp. Hardw. 303; R. v. Ellis, 1 Macnally Ev. 55; Ward v. Mann, 2 Atk. 229.

(2) Aflalo v. Fourdrinier, 6 Bing. 306. See as to the effect of the 49 Geo. III, c. 121, § 8, in restoring competency, Moody v. King, 2 B. & C. 558; Ex parte Young, 2 Rose B. C. 40; Wood v. Dodson, 2 M. & S. 195. The provisions of this statute are contained in sect. 52 of 6 Geo. IV, c. 16, the present Bankrupt Act.

(3) See by Lord Abinger, C. B., and by Alderson, B., in Hawkesworth v. Showler, 12 M. & W. 45.

(4) Spencer v. Harrison, 2 C. & Kir. 429.

(5) Fagan v. Dawson, 4 M. & G. 711.

bankruptcy, as a witness, but Lord Kenyon, C. J. refused to admit him, although it was proposed to give releases from the defendant who had so pleaded, to the bankrupt, and from the bankrupt to the assignees: as the witness stood as a defendant on the record, and was liable to the costs of the action, and that this, therefore, was an interest which could not be released.(1)

In a subsequent case of the same description, before Lord Ellenborough, C. J., the certificate of the bankrupt was put in, and it was proposed that a verdict should be taken in his favor, and that he should then be called as a witness for the other defendant, but the judge refused to permit this course to be taken, and the witness was rejected.(2) So in a later case,(3) in which two out of five defendants in an action of assumpsit pleaded bankruptcy, and the plaintiff had proved under their commission, thereby electing to take the benefit thereof, it was held, by the Court of Common Pleas, that these defendants, having substantiated the plea, were not entitled to a separate verdict in their favor, in order that they might be called as witnesses on behalf of the other defendants, who had pleaded the general issue. It was contended in this case, that the proposed witnesses were disinterested, inasmuch as they were entirely discharged both from contribution and from costs, by the then existing Bankrupt Act,(4) and that having proved their plea, they were entitled to a verdict; but the court held otherwise: Gibbs, C. J., said he knew no rule of law which required a judge to stop in the middle of a cause, to consider separately the case of certain of the defendants, in order that they might be made witnesses for the other defendants.(5)

But in the more recent case of Bate v. Russell,(6) at Nisi Prius, where one defendant had pleaded bankruptcy, and the other to the merits of the action, and it was proposed that, on proof of the bankrupt's certificate, a verdict should be taken for him, in order that he might appear as a witness for his co-defendants, Parke, J., permitted this course to be adopted, and the witness was admitted. Upon the preceding cases of Raven v. Dunning, Currie v. Child, and Emmett v. Butler, being cited as authorities against the admissibility of the witness, his Lordship observed, that they were no longer directly in point, in consequence of the altered state of the bankrupt laws, with reference to costs, but that he would give no opinion on the competency of the witness, and would admit him, giving leave to move; no motion, however, was made on this point.

The question as to the competency of the witness in Bate v. Russell,

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(1) Raven v. Dunning, 3 Esp. 25; Rohrer v. Morningstar, 18 Ohio, 579.
(2) Currie v. Child, 3 Campb. 283.
(3) Emmett v. Butler, 7 Taunt. 599.
(4) 49 Geo. III, c. 121.
(5) 7 Taunt. 606.
(6) M. & M. 332.

after the verdict had been entered in his favor, would appear to be the same as that in Aflalo v. Fourdrinier;(1) as the effect of a separate verdict seems to be the same as that of a *nolle prosequi*, in putting an end to the proceedings, so far as the bankrupt is concerned, and in depriving him of all immediate interest in the result with regard to the other defendants. It will be seen, presently, that one of several defendants has been frequently made a competent witness for his co-defendant, by the effect of a separate verdict in an action of tort, but the case of Bate v. Russell appears to be the first, in which this course has been allowed to be taken in an action on a contract. It would, however, appear to be difficult to assign any good reason for not permitting the like practice to be adopted in actions of *contract*, and it is manifest, that if it were not allowed, it would be in the plaintiff's power to deprive the defendant who had pleaded to the action, of the benefit of the evidence of the bankrupt, by joining issue on the plea of bankruptcy, instead of entering a *nolle prosequi*, although there might be no pretence for questioning the truth of the plea. It may be observed, however, that the question can rarely arise in actions of contract, except in cases where one of several defendants pleads a plea of personal discharge, such as bankruptcy and certificate, or insolvency and discharge.

The next subject for consideration comprises the cases in which a defendant in an action of tort may be rendered a competent witness for his co-defendants, by the effect of a separate verdict at the trial.

The general principle, which governs the decisions on this subject, is laid down by Gilbert, C. B., as follows: "If any person be arbitrarily made a defendant, to prevent his testimony in the cause, the plaintiff shall not prevail by that artifice, but the defendant, against whom nothing is proved, shall notwithstanding be sworn; for here the defendant does not swear in his own justification, but in justification of another with whom he was unnecessarily joined; and if this were not allowed, the plaintiff might turn all the several witnesses into defendants, and thus might be able to prove what he pleased, without contest."(2)

This rule must be understood to apply to those cases only where there is no kind of evidence against such defendant; for if there be any evidence against him, though not enough in the judge's opinion to convict him, he cannot be called as a witness, but his guilt or innocence must await the event of the verdict, the jury being judges of the fact.

In order to render a party who is unnecessarily sued, competent to give evidence, the jury are directed to find a separate verdict in his favor, and, the cause being then at an end with respect to him, he may be called as a witness on behalf of a co-defendant. Some contrariety of practice has prevailed with respect to the particular stage of the cause at which the sepa-

(1) 6 Bing. 306; *Supra*, p. 51.
(2) Gilb. Ev. 117. See, also, B. N. P. 285.

rate verdict may be taken in favor of the party or parties unnecessarily sued. In some cases the rule laid down has been that one of several defendants is not entitled to a verdict separately from the rest immediately at the close of the plaintiff's case, but must wait until the whole of the case of the other defendants, exclusive of the evidence which he may have to give, is entirely finished.(1) In Child v. Chamberlain,(2) however, Parke, B., said, it had been settled, by the unanimous opinion of all the judges, that a defendant against whom the plaintiff has adduced no evidence is entitled to a separate verdict immediately upon the close of the plaintiff's case. But in the later case of Sewell v. Champion,(3) the

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(1) Wright v. Paulin, R. & M. 128; Huxley v. Berg, 1 Stark. R. 98; Wynne v. Anderson, 3 C. & P. 596.

(2) 6 C. & P. 215; S. C., 1 Mo. & Rob. 318. And see by Bosanquet, J., Russell v. Ryder, 6 C. & P. 416.

(3) 6 A. & E. 407.

NOTE 26.—The cases of Warn v. Bourne and Wright v. Paulin, cited in the text, on a former page, do certainly bear out the position that the testimony on both sides must be closed before the defendant can be acquitted and received to testify, and with these will be seen to agree a still later English case, *infra*, though it will also be perceived, *infra*, that the rule is not without its exceptions. And in Bonser v. Curtiss (Sitt. after Mich. T. 1820, cited in a note to Wynne v. Anderson, 3 Carr. & Payne, 596), Abbott, C. J., observed that it is a matter of discretion with the judge, whether the jury shall, in the middle of the cause, acquit a particular defendant, against whom there is no case made out, to make him a witness for the others. And again, in Carpenter v. Jones (1 Mood. & Malk. 198, note, Sitt. after T. T. 1828), the same learned judge (now Lord Tenterden), again distinctly asserted this doctrine of discretion; and acted upon it, by directing an acquittal, and receiving the defendant as a witness, at the close of the defendant's opening speech. In Massachusetts, it is a matter of discretion, in trespass against several, to permit one to be tried before the other, in order that if acquitted, he may be a witness. But if they be tried together, and one acquitted and the other convicted, a new trial will not be granted in order to let in the testimony of the one acquitted. Sawyer v. Merrill, 10 Pick. 16. In England, it was lately held, where there was a joint action of trespass against six defendants, and the plaintiff proved a joint trespass committed by all, and then went on to prove another act of trespass by three of them, expecting to connect the other three with this also, but failed in so doing, that the other three were entitled to be acquitted before the defence was opened, as the plaintiff must be taken to have elected to waive the joint trespass, and to have gone on as against those three for the second act of trespass only. The trespass proved against the six was that they all assisted in taking the goods; and that the other three only were concerned in the sale, which was the other trespass; but in the ordinary case, where several are sought to be fixed with a single act of trespass, and there is a failure to fix this single trespass against all, the whole evidence on both sides, for the defence as well as for the plaintiff, must be gone through with, before an acquittal will be ordered, with a view to let in those defendants who are not touched by the evidence. Wynne v. Anderson, 3 Carr. & Payne, 596. The distinction is a very nice one. And see Dougherty v. Dorsey, 4 Bibb, 207; and see Wakeley v. Hart, 6 Binn. 316, and *ante*, note 25.

In an action for a malicious prosecution against M., W. and C., the plaintiff proved that the defendant M. procured and put into the hands of a constable, a warrant against him for larceny, upon which the plaintiff was arrested, and taken before a magistrate; and on the examination of M. and W., he was bound over to the Mayor's Court, to answer to the charge of larceny. M. was recognized to prosecute, and W. to testify. He also proved that the grand jury returned the indictment against him ignoramus. The plaintiff having rested his case on this proof, the defendant's counsel moved that the jury should be directed immediately to find a verdict in favor of W and C., against whom there was no evidence, in order that they might be examined as witnesses

Court of King's Bench held, that this was discretionary with the judge. Lord Denman, C. J., in delivering the judgment of the court in that case, said: "The application to a judge, *in the course of a cause*, to direct a verdict for one or more of several defendants in trespass, is strictly to his discretion; and that discretion is to be regulated, not merely by the fact that at the close of the plaintiff's case no evidence appears to affect them, but by the probabilities whether any such will arise before the whole evidence in the cause closes. There is so palpable a failure of justice, where the evidence for the defence discloses a case against a defendant prematurely acquitted, that such acquittal ought never to take place, but where there is the strongest reason to believe that such a consequence cannot follow." And in a still more recent case,(1) his Lordship remarked: "The more usual practice certainly is to let the whole case go on. Where one party is acquitted, he might be called for the defence, and prove that he, and not any of the other defendants, was the real wrongdoer. I know of no meeting of the judges at which any such resolution has been come to as that spoken of in Child v. Chamberlain."

The matter then rests entirely in the discretion of the judge; and in a case, where it clearly appeared at the close of the plaintiff's case, that a party had been made defendant with no other object than to exclude his testimony, Wilde, C. J., after animadverting upon such a practice, directed a verdict to be entered at once for that defendant.(2)

In the case already referred to,(3) in which it was ruled that a *nolle prosequi* could not be entered at Nisi Prius as to one of the defendants, the counsel for the plaintiff proposed to offer no evidence against that defend-

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for the other defendant The court directed the jury to find these two defendants not guilty, which being done, they were sworn as witnesses. Wilmarth v. Mountford et al., 4 Wash. C. C. Rep. 79. And in Lanning's Lessee v. Case et al., it was ruled, that if there be no evidence whatever, to prove possession in one of the defendants in ejectment, the jury may find a verdict in his favor at the bar, so as to authorize the other defendants to examine him as a witness. 4 Wash. C. C. Rep. 169. So, in an action against two defendants for an assault and battery, both defendants joined in pleading the general issue, and no evidence having been given against one, it was moved that he be discharged and admitted as a witness for the other defendant. The plaintiff objected that this could not be done, because they had joined in their plea of not guilty. Held, that this made no difference, and that he ought to be discharged. Van Deusen v. Slyck, 15 John. R. 223, and Schermerhorn v. Schermerhorn, 1 Wend. 119. There being some evidence against one of several wrongdoers, who are sued jointly, he cannot be discharged on the trial for the purpose of being improved as a witness. Brown v. Howard, 14 John. R. 119. (If there be little or no evidence against him, he is entitled to be discharged for the purpose of making him a witness (Labar v. Koplin, 4 Comst. 546); and the same rule is followed in criminal prosecutions. Fitzgerald v. The State, 14 Mis. 413. Thus, where two persons are jointly indicted, but tried separately, one of them is a good witness for the other (Lozier v. The Commonwealth, 10 Gratt. Va. 708); and in an action of trespass, the testimony for the plaintiff having been closed, the jury will be permitted to retire and determine on the guilt or innocence of one of the defendants, so that if innocent, he may be sworn as a witness. Bell v. Morrison, 27 Miss. (5 Cush.) 68.)

(1) White v. Hill, 6 Q. B. 487.

(2) Neilan v. Hanny, 2 C. & Kir. 710.

(3) Spencer v. Harrison, 2 C. & Kir. 429; *Supra*, p. 51.

ant, and to have a verdict taken in his favor; but the counsel for the defendants, who stated that he was instructed by one attorney to appear for all three defendants, objecting to such a course, the judge refused the application.

Where a material witness for the plaintiff is by mistake made a defendant, the court will, on motion, suffer his name to be struck out of the record, even after issue joined, and then he may be examined.(1)

In an action of ejectment, if a material witness for the defence has been made a co-defendant through mistake, it has been said that, if he has pleaded, the court will not, upon motion, strike out his name.(2) It has been shown that he will be a competent witness if he suffer judgment by default.(3)

Of the rule that a party is not compellable to give evidence against himself.

The general rule, respecting the incompetency of parties as witnesses in civil suits, has been before laid down; namely, that a party individually named in the record is in general not competent to give evidence for himself or for a joint suitor against the adverse party.(4) By the general

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(1) 1 Sid. 441; B. N. P. 285. It would seem such a course could not be adopted at Nisi Prius. See Spencer v. Harrison, *ut supra.*

(2) B. N. P. 285, citing Dormer v. Fortescue, Willes, 343, n.

(3) Id. and see *supra*, p. 49.

(4) *Supra*, p. 28.

NOTE 27.—At the hearing of an appeal from an order for the removal of a pauper from the town of P. to the town of N., the appellants called one of the overseers of the poor of P. as a witness; to which it was objected, that he was a party, and not compellable to testify; and it was so held by the Supreme Court; and on certiorari, his testimony was struck out of the case, he having been compelled to testify by the court of sessions who heard the appeal. Plattekill v. New Paltz, 15 John. Rep. 309.

A party can in no case be compelled to testify against himself. Worrall v. Jones, 7 Bing. 395. But not being interested in favor of the plaintiff, the defendant (being willing to testify) was received as a witness against his co-defendants, even in an action arising *ex contractu.* Id. And where one party calls on the other as a witness who is sworn without objection, this cannot afterwards be made an objection. Miller v. Starks, 13 John. Rep. 517; Hopkins v. Banks, 7 Cowen's Rep. 650, 653.

Neither the party on record nor the party in interest can be compelled to testify; as where in an action on a check, it was admitted that the plaintiff had no interest in the check, but sued for the benefit of Mrs. R., with her consent; the defendant set up usury as a defence, and offered to call R. to prove the usury; but held, that she could not be compelled to give evidence, unless by her assent. Mauran v. Lamb, 7 Cowen's Rep. 174. Nor can a lessor of the plaintiff in ejectment be compelled to testify for the defendant, though no interest is shown in the witness. Robinson v. Neal, 5 Monroe, 212, 214, 215. On the trial of an action of ejectment, the defendant called one of the lessors as a witness, and offered to prove by him on his *voir dire*, that he had no interest in the land, and disclaimed all connection in the suit. But he was rejected by the court. If his name been used without his consent, it might be struck out on application for that purpose. Jackson ex dem. Goodrich v. Ogden, 4 John. Rep. 140. See *ante*, note 19.

NOTE 28.—Where the plaintiff was sworn as a witnsss, at the trial of a cause, at the particular equest of the defendant, it was held that he could not afterwards object to his testimony.

rule, also, a party to the suit is not compellable to give evidence against himself.

A party to the suit who is excluded by reason of interest from giving evidence against the adverse party, is not compellable to give evidence for the adverse party against himself. Inconvenience from the exclusion of evidence of this description is not extensively felt in practice; as, notwithstanding the ordinary tests to which the testimony of witnesses is subjected, parties would, perhaps, rarely venture to avail themselves of the testimony of their adversaries. This rule seems to have originated from some apprehension of vexation or inconvenience which might ensue, if a person were bound to prejudice or accuse himself.

On questions of settlement, it was formerly determined,(1) that the rated inhabitants of either parish, being in reality parties to the proceedings, could not be compelled to give evidence against their own parish. This decision was before the statute 54 Geo. III, c. 170, which rendered such parties competent in certain cases. The incompetency of rated inhabitants was, as has been seen,(2) entirely removed by the 3 & 4 Vict. c. 26;(3) but it seems that such parties, although thereby rendered competent, are not compellable to give evidence; and, therefore, it has been held, in an indictment against the inhabitants of a township for non-repair of a bridge, that declarations of ratable inhabitants, whether actually rated or not, might be given in evidence for the crown.(4)

In an action of ejectment, on the several demises of two lessors, one of them is not compellable to give evidence for the defendant, though no title has been proved under his demise.(5) The lessors of the plaintiff are substantially the parties on the record; all are jointly liable; that lessor, upon whose title the recovery proceeds, is generally the trustee of the other; and there are the same reasons for protecting them from being examined, which have produced the general rule of law that the parties on the record cannot be compelled to give evidence against themselves, and are not permitted to swear in their own favor.(6)

In the case of several plaintiffs or defendants, the privilege is personal to each plaintiff and defendant. Where one of several co-plaintiffs comes forward voluntarily to disprove the defendant's liability to the demand made upon him, it has been held, that he may be called on the part of the defendant, and admitted to give evidence, though he defeats the claim of

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Miller v. Starks, 13 John Rep. 517. And see Hopkins v. Banks, 7 Cowen's Rep. 650, 653; and Legg v. McNeill, 2 Texas, 428.

(1) R. v. Woburn (Inhab.), 10 East, 403.

(2) *Supra*, p. 41, n. 1.

(3) See R. v. Vickery, 12 Jur. 581, Q. B.

(4) R. v. Adderbury, East (Inhabs.), 5 Q. B. 187.

(5) Fenn d. Pewtress v. Granger, 3 Campb. 177.

(6) By Lord Ellenborough, C. J., 3 Campb. 178.

those who jointly sue with him:(1) for, if the plaintiff were to make a declaration against his interest out of court, evidence of that declaration would be admissible; and how is the proof less credible, said Mansfield, C. J., if, with the consent of the defendant, who waives all objection to his testimony, he declares the same thing upon oath at the time of trial?

SECTION II.

Of the Rule of Incompetency Considered with reference to Parties Prosecuting for Offences, and to Defendants in Criminal Proceedings.

In treating of the subject of the present section, we shall, in the first place, consider the competency of a prosecutor, or person aggrieved by an offence, who is generally, though not necessarily nor always, the prosecutor: and secondly, the competency of defendants in criminal proceedings, as to whom a *nolle prosequi* has been entered, or against whom a separate verdict has been taken.

The general rule is that a prosecutor, or party aggrieved by an offence, is a competent witness on the part of the prosecution. This was so before Lord Denman's Act. An indictment, though commonly set in motion and carried on at the instance of the party aggrieved, is in fact a proceeding instituted in the name and on behalf of the Crown; and its object is not the reparation of individual injury, but the satisfaction of public justice. The single question, upon which the jury pronounce their verdict, is the innocence or guilt of the prisoner. It may be observed, that the prosecutor or party aggrieved has, in general, no direct and certain interest in the event of the prosecution, by reason of liability to costs:(2) in which respect he differs from parties in a civil suit, who are commonly liable to costs, and against whom this liability is the most frequent objection. There are some particular cases, in which a prosecutor may be considered as having a direct pecuniary interest in the event of the prosecution; these will be presently noticed.

It was formerly supposed that a prosecutor was incompetent, in certain cases, by reason of an indirect interest which might arise from the use of the record of conviction in his favor in a subsequent civil suit.(3) But it was afterwards decided, and became an established rule, that a verdict in

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(1) Norden and another v. Williamson, 1 Taunt. 378, by Mansfield, C. J., and Chambre, J., who were the only judges present. And see Worrall v. Jones, 7 Bing. 395; *supra*, p. 48.

(2) The general power of awarding costs in criminal trials, depends upon the stat. 7 Geo. IV, c. 64, §§ 22, 23, which gives a discretionary power to the court, but only to award the expenses of the proceedings.

(3) R. v. Whiting, 1 Salk. 283, prosecution for fraud. This case was overruled in R. v. Broughton, 2 Stra. 1229. See also R. v. Ellis, 2 Stra. 1104; R. v. Nunez, 2 Stra. 1042, prosecution for perjury.

a criminal prosecution could not be used as evidence in a civil suit, either at law or in equity, on behalf of the party who had himself been called as a witness on behalf of the prosecution :(1) so that the supposed indirect benefit or interest would not any longer exist.

An exception to the general rule prevailed for a very long time in prosecutions for forgery, in which cases it was the settled doctrine, that the person aggrieved, being prosecutor, was incompetent to prove the instrument forged, although it was clear that he could not use the conviction as evidence in his own favor, in a civil suit upon the forged instrument. This was often productive of great inconvenience in excluding the most satisfactory evidence that could be given, and the exception was certainly

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(1) Bartlett v. Pickersgill, 4 East, 577, n. (c); R. v. Boston, 4 East, 572, 581; R. v. Yates, C. & Marsh. 132, 137; Smith v. Rummens, 1 Campb. 9; Hathaway v. Barrow, 1 Campb. 151; Burdon v. Browning, 1 Taunt. 520.

NOTE 29.—Per Bayley, J., in Rex v. Williams, *post*, note 30. And see Baker v. The Commonwealth, 2 Virg. Cas. 353. A person from whom goods have been stolen is a competent witness, in a prosecution against the offender, as to all pertinent facts within his knowledge; notwithstanding, he will be entitled, on conviction, to a restoration of the goods, if they can be found, or to a satisfaction out of the future earnings of the convict, in case the goods be not restored; and also to a recompense out of the county treasury, for his labor and expenses in the prosecution. And where a party, from whom goods were stolen, was by law entitled to recover treble the value, he was always received as a competent witness against the offender. Commonwealth v. Moulton, 9 Mass. Rep. 30. The party injured was admitted as a witness in a state prosecution, in Connecticut, on the ground that no judgment for treble value can in such form be rendered from him: Salisbury v. The State of Connecticut, 6 Conn. Rep. 101. And the innkeeper, from whose inn the goods of another were stolen, was *a fortiori*, held admissible. Id.

NOTE 30.—Upon an indictment for taking excessive usury, the borrower is a competent witness for the prosecution, if he be not entitled to a part of the penalty as informer, notwithstanding he have never repaid the money borrowed. Commonwealth v. Frost, 5 Mass. Rep. 53. And see Pettingall v. Brown, 1 Caines' Rep. 168. On the trial of an indictment for a forcible entry and detainer, the prosecutor's wife was received in Pennsylvania, as competent for the state to prove the force. Respublica v. Shriver, 1 Dall. 68. *Quere;* for in England upon the trial of a like indictment, the tenant, whose land is alleged to have been entered upon or holden, is not competent for the prosecution; for the land is to be restored to him on conviction. Rex v. Beavan, Ry. & Mood. N. P. Rep. 242; The King v. Williams, 9 Barnw. & Cress. 549. See the Stat. 21 Jac. I, c. 15, and S. H. 6, c. 9, corresponding to many American statutes. Bayley, J., who delivered the opinion of the court, in the last case, went much into questions of a like character. He seems to concede that it would be otherwise of an indictment for a forcible entry or detainer at common law. He says that rewards given by the legislature for prosecuting, are founded on public policy, to stir up great vigilance. To allow these to disqualify, would defeat the very end of them, the apprehension of offenders. As to private rewards, nothing that private individuals can offer shall disqualify a public witness. The clause of restitution in the 21 H. S., c. 11, is, that the subject of a robbery shall be restored on conviction by reason of evidence given by the party robbed, &c., thus implying that he is to be sworn notwithstanding. He considers several cases where informers, entitled to a reward, have been admitted, as exceptions arising out of the secret nature of the transaction, or an implication from the statute that they should, notwithstanding, be sworn.

An informer, under the act to punish vice and immorality, who is entitled to a share of the penalty, was held incompetent on a summary proceeding, though he had executed an assignment of all his rights to the penalty to a third person. Such right is not assignable. Commonwealth v. Hargesheimer, 1 Ashmead's Rep. 415.

an anomaly in the law of evidence.(1) But the law in this particular was altered by the statute 9 Geo. IV, c. 32, § 2, the effect of which is, to place the law of evidence in prosecutions of forgery upon the same footing as in other criminal proceedings; and now the party aggrieved by an alleged forgery, whether prosecutor or not, is in all cases a competent witness in support of the prosecution.(2)

Prosecutor when formerly incompetent from interest.

There are cases, in which a prosecutor or party aggrieved is entitled, by statute, to some particular benefit or advantage from the conviction of the party accused. In these cases, if the benefit or advantage would immediately result to the prosecutor upon conviction, he was clearly interested in the event, and was formerly held to be incompetent, unless his competency were restored by the statute in question, or by some other statute, or on some principle of public policy.(3) Thus, upon an indictment for a forcible entry, upon the statutes 8 Hen. VI, c. 9, or 21 Jac. I, c. 25, where the effect of a conviction is to entitle the tenant to an immediate award of restitution of the lands, such tenant was considered incompetent by reason of his immediate interest in the event of the prosecution.(4) And in cases of summary convictions, where a penalty is imposed by statute, and the whole or part is given to the informer, who becomes entitled to receive it immediately upon the conviction, the informer was considered an incompetent witness, unless he was made competent by statute.(5)

An exception was made in prosecutions for robbery or theft, where the party injured was competent, although entitled to restitution of his property immediately upon conviction of the offender.(6)

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(1) See by Lord Ellenborough, C. J., 4 East, 582; by Abbott, C. J., 4 B. & A. 210. This doctrine was confined to criminal prosecutions, and did not apply where the question of forgery arose in a civil suit. Hunter v. King, 4 B. & A. 209.

(2) NOTE 31.—The old English doctrine has been adopted by some of the American courts (State v. Brunson, 1 Root, 307; Same v. Blodget, Id. 534; Swift's Ev. 70; but see Day's note 1, 2 N. R. 96; State v. A. W., 1 Tyl. 260; The State v. Hamilton, 2 Hayw. 288); doubted by others (Coe's Case, 1 C. H. Rec. 141); but a majority have gone the other way. Fubber v. Hilliard, 2 N. H. Rep. 481; Pennsylvania v. Farrel, Addis. 246; Commonwealth v. Snell, 3 Mass. Rep. 82; Same v. Waite, 5 Id. 261; State v. Foster, 3 M'Cord, 442; Respublica v. Keating, 1 Dall. 110; Same v. Ross, 2 Id. 239; Same v. Wright, 1 Yeates, 401; Same v. Ross, 2 Id. 1. An apparent first indorser was received to prove his name a forgery. Territory v. Barran, 1 Mart. Lou. Rep. 208. So the alleged drawer of a check (People v. Howell, 4 John. Rep. 296), and the maker of a note. People v. Dean, 6 Cowen's Rep. 27. And see United States v. Johns, 4 Dall. 412. But the instrument must be produced to the party, before he shall be allowed to swear as to its genuineness (Commonwealth v. Hutchinson, 1 Mass. Rep. 7; Same v. Snell, 3 Id. 82), unless it has been secreted to protect the offender. Commonwealth v. Snell, *supra*.

(3) See the judgment of the Court of K. B. in R. v. Williams, 9 B. & C. 549, 555.

(4) R. v. Williams, 9 B. & C. 549; R. v. Beavan, Ry. & Mo. 242.

(5) R. v. Tilley, 1 Stra. 316; R. v. Stone, 2 Ld. Raym. 1545; R. v. Piercy, Andr. 18; R. v. Blaney, Andr. 240.

(6) See 3 Bing. 300, 301; by Park, J., 9 B. & C. 550, and by Bayley, J., Id. 557. As to the

On an indictment on the statute 9 Ann. c. 14, § 5, for fraudulent gaming, the loser of the money was considered competent to prove the loss;(1) for the pecuniary penalty imposed by the statute is not immediately recoverable upon a conviction, but is given by the express words of the statute to such parties as shall sue for the same by a separate action; and the conviction would not be admissible evidence in an action by the party to recover the penalty.(2) So in a prosecution for seducing artificers, under the statute 23 Geo. II, c. 13, § 1, which subjects offenders to a penalty of 500*l.*, the prosecutor was held to be a competent witness;(3) for the statute impliedly renders a separate action necessary for the purpose of obtaining the penalty, and in that action he could not use the conviction in evidence. Cases of this nature were not, therefore, to be viewed as exceptions to the rule respecting interested witnesses; for in none of them

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evidence of persons entitled to a penalty under the excise laws, see 7 & 8 Geo. IV, c. 53, § 75; under the customs laws, see 8 & 9 Vict. c. 87, § 132.

NOTE 32.—That persons entitled to a reward on conviction, are competent witnesses for the prosecution, see Macnally's Ev. 61, 63, and the cases there cited; United States v. Wilson, 1 Baldwin's Rep. 90, S. P. An attorney who, by arrangement with the trustees of a corporation, was to have 10 per cent. on all fines collected in their behalf, was held incompetent as a witness for the commonwealth, in a prosecution for a fine belonging to the corporation. Commonwealth v. Moore, 5 J. J. Marsh. 655, 656.

NOTE 33.—The party injured is a competent witness for the state, in a criminal prosecution. The cases are generally uniform to this effect, on the ground which prevails in civil causes, that the record cannot be used as evidence either for or against the witness. State v. Hasset, 1 Tayl. 55; Commonwealth v. Oliver, 3 Bibb, 474. But they are conflicting as to his competency in those cases where he may, by special provision, derive actual benefit from a conviction.

The rule that he is competent, was applied to a suit *qui tam* for usury. Banner v. Gregg, 1 Harringt. 513. And to a prosecution for playing with false dice. The King v. Chapman, stated by McKean, C. J., in Respublica v. Keating, 1 Dall. 111. The general rule was held not to be altered even by a statute making the prosecutor liable for costs. Commonwealth v. Shriver, Whart. Dig. 331, pl. 734, (2d ed.) *Quere. Vid.* Commonwealth v. Gore, 3 Dana, 475. Where a statute made him liable only in the event of a prosecution appearing to be frivolous or malicious, he was received as but contingently liable. The State v. Blennerhassett, Walker's Rep. 7, and 15, 16. The prosecutor in forcible entry under the statute, is not competent for the state, for he is entitled to restitution. State v. Fellows, 2 Hayw. 340; *Ante*, note 30, p. 59, S. P. The rule, that the injured party is competent, &c., was applied to the person who owned, and from whom a bank bill was stolen, though a conviction would entitle him to a restitution of the property. State v. Casados, 1 Nott & McCord, 91, 99. But this was denied of the party swindled, against the alleged swindler; for a statute gave the former double value, on conviction. State v. Vaughan, 1 Bay, 282, 283. So of an informer, who is entitled to a share of the penalty. City Council v. Haywood, 2 Nott & McCord, 308; Van Evour v. The State, Id. 309, note *a*. But see State v. Bennett, 1 Root, 249.

On trial of an indictment for perjury committed by A. on trial of an action against B. and others, B. is not rendered incompetent as a witness for the prosecution, merely on the ground that he has not paid the debt and costs, and has filed a bill in equity. But *semble*, that if B. expect A. will be a witness against him in a similar action, coming on for trial soon after the indictment, that is such an immediate interest in B. as will disqualify him from being a witness. Rex v. Hulme, 7 Car. & Payne, 8.

(1) R. v. Luckup, Willes, 425, n.

(2) See *Per Cur.* 9 B. & C. 557, 558.

(3) R. v. Johnson, Willes, 425, and see 9 B. & C. 557, 558.

had the witness any direct and certain interest in the event of a prosecution.

Informer competent where fine or imprisonment discretionary.

Even in cases, where by statute a pecuniary penalty may be immediately recoverable upon the event of a criminal prosecution, and where the prosecutor or informer is entitled to part of the amount, it had been held, before Lord Denman's Act, that he was not an incompetent witness, if it were in the discretion of the court to punish the offender either by fine or imprisonment.(1) This was on the ground that a witness would not be incompetent from interest unless the interest were certain: and in cases where a fine is made to depend upon the discretion of the court, it is not certain, until the judge pronounces his sentence, whether the informer will derive any benefit from the event of the prosecution.

From this review of the law, it appears that the prosecutor in criminal cases was considered incompetent only in those instances where the result of a conviction would lead to an immediate and necessary benefit to himself; as in the case of an indictment for a forcible entry where he would be entitled to a restitution of the land, or in the case of an information laid by a common informer where he would be entitled to the whole or a portion of the penalty.

In these last-mentioned cases, namely, of indictments for forcible entry and information by common informers, the objection to the competency of the witness seems now no longer maintainable. This would appear to be so upon a careful consideration of Lord Denman's Act.(2)

The rule of incompetency, in the cases referred to, was founded upon the direct interest of the prosecutor or informer in procuring a conviction. But this statute has abolished the incompetency which was founded upon interest, subject to certain exceptions, within none of which do the cases under consideration appear to range themselves.

In the case of the informer, for instance, it cannot justly be said that he is "a party to the proceeding individually named in the record."(3) He is certainly individually named in the conviction, as the party upon whose information the defendant has been brought before the magistrate, which

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(1) R. v. Cole, 1 Esp. 169, overruling R. v. Blackman, 1 Esp. 96.

(2) It is to be observed that Lord Denman's Act (6 & 7 Vict. c. 85), declares that no person offered as a witness shall hereafter be excluded by reason of incapacity from crime or interest, from giving evidence either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or proceeding *civil or criminal*. Our code, on the other hand, does not attempt to alter the law of evidence in criminal cases, but declares briefly and in general terms that no person offered as a witness shall be excluded by reason of his interest in the event of the action. New York Code of 1848. So that notwithstanding the material alteration of the law of evidence in this state, the competency of witnesses in criminal cases is to be determined by the rule established at common law.

(3) See R. v. Hinks, 2 C. & Kir. 462, *post*, p. 65.

conviction is the record of the proceedings before him. But it may be questioned whether he can be said to be a party to the proceeding any more than any prosecutor is in an ordinary case. In almost every case, the party who lays an information or complaint is named in the conviction, although not entitled to any penalty, and though, where the information is laid by an informer entitled to the penalty, or part of it, that fact is stated in the conviction ;(1) yet, it seems, that would only show in what manner he was interested and would not render him more a party to the proceeding, or more particularly named, than any other person laying an information or complaint. It may, perhaps, also be doubted, whether the term "record" in the act is not confined in its application to proceedings in the superior courts. It seems to be clear that an informer would not come within the succeeding part of the proviso as a "person in whose immediate and individual behalf any action" may be brought or defended ; that clause being expressly limited to actions ; that is, actions properly so called.

It must be observed, however, that by a recent statute,(2) passed to facilitate the performance of the duties of justices of the peace out of sessions, with respect to summary convictions and orders to be made upon any information or complaint laid before them, it is enacted,(3) "that every prosecutor of any such information, *not having any pecuniary interest in the result of the same*, and every complainant in any such complaint, whatever his interest may be in the result of the same, shall be a competent witness to support such information or complaint respectively."

In this particular class of cases, therefore, that is, in summary convictions out of sessions, the statute appears to contain a recognition of the old rule, that an informer who has a pecuniary interest in the result of the information, is an incompetent witness to support the same, notwithstanding the provisions of Lord Denman's Act.(4)

Defendant in criminal prosecution incompetent.

With regard to the competency of parties defending in criminal prose-

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(1) Generally in this form:—"Be it remembered that on, &c., A. B., of, &c., who as well for our Sovereign Lady the Queen as for himself, doth prosecute," &c.

(2) 11 & 12 Vict. c. 43.

(3) Sect. 15.

(4) It may be remarked, that under the provisions of the Metropolitan Police Courts' Act (2 & 3 Vict. c. 71), a power is given to the metropolitan police magistrates to lessen the portion of any penalty to be paid to an informer not being the party aggrieved, or to deprive him of it altogether (§ 62); so that in that district it seems clear upon the authority of R. v. Cole (1 Esp. 169, *supra*, p. 62), that any informer is a competent witness, by reason of his not having a certain interest in the event of the prosecution.

Again, there are cases under that act in which the magistrate exercises a civil jurisdiction (as *e. g.* under sect. 40, by which he is empowered to order the delivery to the owner of goods to the value of £15 which are unlawfully detained—being a proceeding in the nature of an action of detinue); in such a case, it would appear, that the complainant would be a competent witness under the provisions of the 11 & 12 Vict. c. 43, § 15.

cutions, it is scarcely necessary to observe, that as they are generally most strongly interested in the event, it seldom happens that they can be called as witnesses. But as in civil actions against several defendants, a co-defendant may sometimes be so circumstanced as to be a competent witness: so in criminal prosecutions, one of several persons jointly indicted may be rendered competent to give evidence either for the prosecution or for his co-defendants. Thus, upon an information by the crown against two or more, if a *nolle prosequi* be entered by the attorney-general, either before or at the trial, as to one of the defendants, such defendant may be called as a witness for the crown against his co-defendant.(1) So where, upon a joint indictment against two, one had pleaded in abatement, and for want of replication judgment had been entered that he should be dismissed and discharged, he was admitted, without objection, as a competent witness for the other defendant, being himself no longer interested in the event of the prosecution.(2)

In like manner, one of several defendants may be rendered competent in some cases by a separate verdict at the trial. Thus, where several persons were jointly indicted for a conspiracy, Lord Tenterden permitted a verdict of acquittal to be taken in favor of two defendants, at the request of the prosecutor's counsel, before the case was opened, in order that they might be called as witnesses against the others.(3) And where, upon an indictment against several, it appears at the close of the case for the prosecution, that there is no evidence against one of the defendants, it is usual to take a separate verdict of acquittal as to him, and he may then be called as a witness on behalf of the others.(4) This is upon the same principle that is commonly acted upon in cases of tort against several defendants where no evidence is adduced against one or more of them. But it would seem, from analogy to these cases, that it is entirely in the discretion of the judge whether or not a verdict of acquittal is taken at the close of the case for the prosecution.(5)

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(1) B. N. P. 285; by Lord Hardwicke, Rep. temp. Hardw. 163, and see *per cund.* in Ward v. Mann, 2 Atk. 229.

(2) R. v. Shearman and others, Rep. temp. Hardw. 303.

(3) R. v. Rowland and others, Ry. & Mo. 401.

The same was done in Bell v. Morrison (27 Miss. 68); and where the defendants are tried separately, they have been held competent witnesses for each other, though indicted jointly. Lozier v. The Commonwealth, 10 Gratt. 708.

(4) R. v. Mutineers of the Bounty, cit. 1 East, 313; R. v. Bedder, 1 Sid. 237; Hawk. P. C. c. 46, § 98.

(5) See Sewell v. Champion, 6 A. & E. 407; White v. Hill, 6 Q. B. 487.

Where there is any doubt, on the evidence, in respect to the innocence or guilt of one of the parties, it is clear, from the analogy suggested, that the court ought to permit the jury to pass upon the question, and thus give to the other parties an opportunity to produce all the testimony that can be fairly obtained. In a civil action, such parties are in this state, competent witnesses for each other and for themselves, and there is much more reason in permitting persons prosecuted in behalf of the people, as for assault and battery, to testify for each other. See Beal v. Finch, 1 Kernan, 128. But where the defendants are sued for trespass in cutting and carrying

In the case of R. v. Lafone,(1) as reported, some defendants, who had suffered judgment by default to an indictment for a misdemeanor, in obstructing an officer in the execution of his duty, were tendered as witnesses at the trial on behalf of another defendant who had pleaded, but Lord Ellenborough, C. J., said, he had never known such evidence admitted, and rejected the witness. "To allow this evidence," said his Lordship, "would go to every criminal case; for if two were indicted, one by suffering judgment by default, might protect the other: there is a community of guilt; they are all engaged in an unlawful proceeding; the offence is the offence of all, not of a single individual only."

But it has been held, in a recent case,(2) that a prisoner who has pleaded guilty to an indictment is a competent witness against other defendants joined in the same indictment. It was contended in this case that the defendant was not admissible as a witness against two other prisoners included in the same indictment, because he was a party to the record; but Alderson, B., observed that he was not a party to the issues; the only issues being whether the two other prisoners were guilty or not.

Upon an indictment against two defendants for an assault, where one of them pleaded guilty, and was fined, and paid the fine, it was decided, that he might be called as a witness on behalf of the other defendant, who had pleaded not guilty; the trial being at an end with respect to the witness.(3)

And in a later case, upon an indictment against two prisoners for housebreaking, where one of them pleaded guilty, it was ruled, that he might be called as a witness by the other prisoner.(4)

Some difficulty might, perhaps, arise in cases where one of several defendants has pleaded guilty to a charge where the gist of the offence lies in its joint commission by all or a certain number of the parties charged: *e. g.* in an indictment against A. and B. for a conspiracy: in such case, if A. had pleaded guilty, and were called as a witness for B., he would have a direct interest in procuring the acquittal of B.; as, in that event, it seems doubtful whether any valid judgment could be pronounced against the defendant who had pleaded guilty.(5) Nevertheless, it appears, the witness could not be objected to on the score of interest alone; that would be a matter affecting merely his credibility; and though he would undoubtedly be a party to the proceeding individually named in the record, he

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away timber, one of them is not a competent witness, even under our code, for the other to prove a purchase of the timber (Dean v. Thornton, 2 Kernan R. 266); and in similar cases prosecuted in the name of the people, it is very plain that one of the defendants could not be called as a witness for the others, until the jury has passed upon the question of his innocence or guilt.

(1) 5 Esp. 154. See Hadrick v. Heslop, 17 L. J. (N. S.) Q. B. 313; *Ante*, p. 50.

(2) R. v. Hinks, 2 C. & Kir. 462.

(3) R. v. Fletcher, 1 Stra. 633.

(4) R. v. George, C. & Marsh. 111.

(5) See Y. B., 8 Hen. IV, 6; 9 Hen. IV, 9; Thody's Case, 1 Vent. 234; R. v. Cooke, 9 B. & C. 538; R. v. Kenrick, 5 Q. B. 49.

would not be more so than in other cases where a defendant similarly situated has been admitted as a witness;(1) in the language of Mr. Baron Alderson,(2) he would not be a party to the issue. The witness, in fact, would seem to stand in the same position as if he were not joined in the indictment, but the other defendant were indicted alone for conspiring with him, the witness; in which case there seems to be no doubt but that he would be competent.(3)

SECTION III.

Of the Rule of Incompetency, Considered with Reference to Persons in whose Behalf an Action is Brought or Defended.

Former rule as to direct interest.

Under the former state of the law, it frequently happened that the nominal plaintiff on the record had no real interest in the question at issue, and the action was prosecuted solely for the benefit of a third person who was not a party to the record: and if, at the trial, such person were tendered as a witness for the plaintiff on the record, he would obviously have a direct interest in obtaining a verdict for the plaintiff, for such verdict, when obtained, would immediately enure to his own benefit, and the witness, therefore, would have a much stronger interest than the plaintiff himself, in obtaining a favorable termination of the cause.

Indirect interest.

And a direct and immediate benefit or disadvantage from the result of the suit was not the only species of interest which, at one time, rendered a witness incompetent to give evidence. For, until the passing of the statute 3 & 4 Wm. IV, c. 42, §§ 26, 27, which effected a material alteration in the law in this respect, witnesses who were neither parties to the record, nor had any direct interest in the event of the suit, were often rendered incompetent, by reason of an indirect interest in the record with regard to some subsequent suit; although they could derive no immediate benefit or disadvantage from the termination of the particular suit.

These were the only grounds upon which a witness became incompetent from interest, and it was fully settled by many decisions, that all other objections on the ground of a supposed interest would not affect his competency, although they might affect his credit.(4)

A material alteration in the law of evidence was affected by the last-named statute,(5) with regard to witnesses, who were once considered in-

(1) See R. v. George, C. & Marsh. 111; *Supra.*

(2) In R. v. Hinks, 2 C. & Kir. 462; *Ante*, p. 65.

(3) See Poplett v. James, B. N. P. 286; *Ante*, p. 44.

(4) See Bent v. Baker, 3 T. R. 27; Smith v. Prager, 7 T. R. 62; R. v. Boston, 4 East, 581.

(5) 3 & 4 Wm. IV, c. 42.

competent on the ground of an indirect interest, which might accrue from the use of the record as evidence for or against them in some subsequent suit. By section 26, it was provided, that in cases where witnesses were objected to upon that ground, they should nevertheless be examined, but that in such cases a verdict or judgment, for or against the party for whom the witness should be examined, should not be admissible in evidence for or against the witness, or any person claiming under him. The effect of this enactment was to remove the objection to the competency of the witness in civil suits, by removing the interest out of which the objection arose; and the principle upon which the statute was founded, appears to be in some degree analogous to that of the rule adverted to in the preceding section with reference to criminal proceedings; namely, that a witness in a criminal prosecution shall, in no case, be allowed to avail himself of a conviction, where he has himself been called as a witness in support of the indictment. The supposed interest of the witness was removed by putting an end to all possible interest in the record, and by preventing his deriving any benefit or sustaining any loss with reference to the use of the record, and the termination of the suit in favor of either party.

Having thus briefly stated the general condition of the law upon this subject before the passing of Lord Denman's Act,(1) we will now revert to the provisions of that important statute.

We have seen that it has abolished generally the incompetency of witnesses who were considered under the old rule as objectionable upon the ground of their interest in the suit; but it provides that the enactment shall not render competent, not only the parties who are individually named in the record, but also, in ejectment, any lessor of the plaintiff, and any tenant of the premises sought to be recovered; also, in replevin, the landlord or other person in whose right the defendant may make cognizance; and generally any person in whose immediate and individual behalf an action is brought or defended either wholly or in part. The law as to the incompetency of these parties remains, therefore, the same as before the passing of the act.(2)

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(1) 6 & 7 Vict. c. 85.

(2) The provision of the Code, that no person offered as a witness shall be excluded by reason of his interest in the event of the action (§ 398), accompanied with the declaration that such provision should not apply to a party to the action, nor to any person for whose immediate benefit it was prosecuted or defended, has given rise to many decisions proper to be noticed in this connection. In the first place, then, a corporator, though also an officer of the corporation, is not a party for whose immediate benefit the action is brought; and therefore, where the action is against the "mayor, aldermen and commonalty" of a city, an alderman is competent (Pack v. The Mayor, &c., of N. Y., 3 Comst. 489), and was so at common law. Van Wormer v. The Mayor, &c., of Albany, 15 Wend. 262; The Trustees of Watertown v. Cowen, 4 Paige, 510. And a stockholder in the plaintiff's bank is not a party to the action, nor a person for whose immediate benefit it is prosecuted, and is therefore a competent witness for the bank. Montgomery Co. Bank v. Marsh, 3 Selden R. 481; Washington Bank v. Palmer, 2 Sand. 686. So is

In ejectment, the lessor of the plaintiff was always considered as substantially a party on the record;(1) and by reason of his direct and immediate interest in the action was generally incompetent as a witness. Where the name of a person is used, without his concurrence, as a lessor of the plaintiff, and a verdict has been entered for the defendant upon his demise, he may be a witness in support of other counts;(2) for he has ceased to be a party to the suit or to have any interest therein. It has been seen that, by the statute 3 & 4 Vict. c. 26, where parish officers are the nominal parties to an action, they are not on that account disabled from

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a stockholder of a railroad company a good witness for the company. N. Y. and Erie R. R. v. Cook, 2 Sand. 732.

In like manner, the next of kin to the intestate, one of those among whom the fund arising from the estate of the deceased is to be distributed, is a competent witness for the administrator in an action to recover a demand due to the estate; he is not the party for whose *immediate* benefit the action is brought. Butler v. Patterson, 3 Kernan R. 292. For the same reason a residuary legatee is also competent. Freeman v. Spaulding, 2 Kernan, 373; Weston v. Hatch, 6 How. Pr. R. 443. So, also, one who has assigned his property for the benefit of creditors is a competent witness; he is not a party to the suit brought by his assignee, and is not the party for whose immediate benefit the action is brought. Jones v. The East Society, &c., of Rochester, 21 Barb. 161; Davies v. Cram, 4 Sand. 355. See, also, Allen v. Hudson River Mutual Ins. Co., 19 Barb. 442.

In short, there were but few cases under the code, which requires all actions to be brought in the name of the real party in interest, in which a third person could be excluded on the ground that he was the person for whose immediate benefit the action was brought or defended. The plaintiff in an execution, who had indemnified the sheriff for making the levy, was held to be the person for whose immediate benefit the suit was defended, in an action against the sheriff for taking the property. Howland v. Willetts, cited 1 Duer, 325. But the assignor of a cause of action, who had taken from the assignee an agreement that the latter should pay him fifty dollars when the demand should be collected, was held a competent witness in Davison v. Miner, 9 How. Pr. R. 524. So where the assignor of a *chose in action* had covenanted that the full amount of the claim was due, he was, notwithstanding, held a competent witness in an action thereon, because he had no *immediate* interest in the event of the suit. Winthrop v. Myer, 1 Abb. Pr. R. 385; Bridges v. Hyatt, 2 Id. 449.

It is to be observed that the language employed in Lord Denman's Act is slightly different from that used in our code. In that act it is declared that the provision shall not render competent "any person in whose immediate and individual *behalf* any action may be brought or defended, either wholly or in part;" while the language used in our statute was that the provision should "not apply to a party to the action, nor to any person for whose immediate benefit the suit is prosecuted or defended." This language, read in connection with section 111, shows clearly that but few cases could occur in which a person not a party could be excluded. "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 113," which allows an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, to sue without joining with him the person for whose benefit the action is prosecuted. But it is not necessary to dwell longer upon this point, since both parties and persons in interest are now rendered competent witnesses in their own behalf; but "such examination shall not be had, nor shall any other person, for whose immediate benefit the same is prosecuted or defended, be so examined, unless the adverse party or person in interest is living, nor when the opposite party shall be the assignee, administrator, executor, or legal representative of a deceased person." Amendment of 1857 to § 399.

(1) See Fenn d. Pewtress v. Granger, 3 Campb. 177.

(2) See *Per Cur.* in King v. Baker, 2 A. & E. 339.

giving evidence. In a very recent case,(1) where an action of ejectment was brought in respect of parish lands in which the churchwardens and overseers of the parish were the lessors of the plaintiff (under the 59 Geo. III, c. 12, § 17, empowering parish officers to sue in respect of such lands), it was held, that the 3 & 4 Vict. c. 26, was not repealed by Lord Denman's Act. For that act does not positively render the lessor of the plaintiff incompetent as a witness, but merely provided that its general enactment, abolishing incompetency on the ground of interest, should not have the effect of rendering a lessor of the plaintiff competent where he was not so before.(2)

The tenant or other party in possession was also held incompetent as a witness for the defendant, as having an immediate interest in the event of the suit,(3) for the verdict and judgment would have the effect of turning him out of possession immediately.(4)

It has already been remarked, that if one of several defendants in ejectment, who is in possession of part of the premises, suffer judgment by default as to such part, he appears to be competent to give evidence for a co-defendant who has pleaded.(5)

In replevin the conusor, that is, the landlord or other person under whom the defendant made cognizance, was, in general, an incompetent witness for the defendant, being the person really interested in the event of the cause, and in truth the substantial defendant. And the law remains the same under Lord Denman's Act.

In a case, before that statute, where there were two cognizances, one under the party beneficially interested, and the other under a trustee for him; the evidence of the latter was rejected, notwithstanding the absence of any beneficial interest on his part in the premises.(6) The principle here seems to have been that one under whom cognizance is made, and who is *prima facie* the party, shall not be deemed competent merely because the legal estate in respect of which he distrained was held by him as a trustee for others.(7)

In the case of Upton v. Curtis,(8) it appears that a party, under whom cognizance was made, was considered incompetent for the defendant, although that particular cognizance had been abandonded. But it was afterwards decided by the Court of King's Bench, in the case of King v.

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(1) Doe d. Sayer and others v. Hatton, Q. B. 19, Ap. 1849, before Patteson and Erle, J's.

(2) See Dresser v. Clarke, *ante*, p. 45.

(3) Doe d. Jones v. Wilde, 5 Taunt. 183; by Tindal, C. J., in Doe d. Teynham v. Tyler, 6 Bing. 394; Doe d. Lewis v. Bingham, 4 B. & A. 672; Doe d. Willes v. Birchmore, 9 A. & E. 662; Parker v. Mitchell, 11 A. & E. 788.

(4) See 5 Taunt. 183; 6 Bing. 394; 3 N. C. 671.

(5) *Ante* p. 50.

(6) Golding v. Nias, 5 Esp. 272. See Johnson v. Mason, 1 Esp. 89.

(7) See 2 A. & E. 340.

(8) 1 Bing. 210; S. C., more fully reported 8 B. Moo. 53.

Baker(1) that where distinct cognizances are made under different parties, who do not appear to be in any manner connected in interest, if one of the cognizances be abandoned at the trial, the party, under whom it is made, is a competent witness for the defendant. Lord Denman, C. J., in delivering the judgment of the court, after observing that there was reason to suppose that the facts of the case of Upton v. Curtis were not reported with perfect accuracy, said, the court were of opinion, that the offer to abandon the issue joined on the cognizance under the witness, was tantamount to consenting that a verdict should be found for the plaintiff on that issue.(2) In Upton v. Curtis, the defendant had pleaded, first, an avowry for rent due from one P. as tenant to the defendant, and secondly, a cognizance by the defendant as bailiff to P. for rent due to him. The plaintiff, in fact, being tenant to P. was tenant to the defendant. The court held, that P. was not a competent witness for the defendant, to prove the amount of the plaintiff's rent, although the cognizance was abandoned; and this may have been because the proposed witness had an interest in reducing his own rent by raising that of his tenant.(3)

Both these cases occurred before Lord Denman's Act. In the recent Nisi Prius case, however, of Girdlestone v. M'Gowan,(4) which was tried after that statute, where two defendants made cognizance, first, as bailiffs of A. and B., and secondly, as bailiffs of A. alone, it was ruled that B. could not be called as a witness to sustain the second cognizance, though the defendants gave no evidence to support the first and offered to abandon it. Alderson, B., before whom the cause was tried, after consulting with Lord Denman, C. J., who sat in the Crown Court, said: "I have consulted the best authority on the construction of this act, and he is of opinion that I ought to reject the witness. The defendant has put upon the record a cognizance, in which he justifies as bailiff under the proposed witness, and the case is therefore within the exception referred to. It is too late now to abandon the first cognizance. That should have been done before the trial." The defendants obtained a verdict and the point, therefore, was not raised in the court above.

It does not appear that the case of King v. Baker was brought at the time under the notice of their Lordships. The decision in that case certainly appears to be at variance with the ruling in Girdlestone v. M'Gowan; and if the law is correctly laid down in the former case, it does not appear to have been altered by Lord Denman's Act, which does not render a conusor in replevin positively incompetent as a witness, but merely provides

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(1) 2 A. & E. 333.

(2) 2 A. & E. 339, 340. In Hart v. Horn (2 Campb. 92), it was ruled that the declarations of a party under whom cognizance had been made, were inadmissible in evidence for the plaintiff.

(3) See 2 A. & E. 340.

(4) 1 C. & Kir. 702.

that the general removal of interest as a cause of incompetency shall not have the effect of rendering such a party competent.

In the still more recent case of Walker v. Giles,(1) tried before Wilde, C. J., where there were several cognizances, his Lordship held, that a person under whom one of such cognizances was made was a competent witness to prove matters distinct from and independent of that particular cognizance. The report of this case unfortunately does not state what these matters were.

Persons in whose behalf action brought or defended.

In the foregoing instances the application of the new statute is comparatively easy; but questions of difficulty are likely to arise with reference to the parties who still remain incompetent to give evidence as being the persons "in whose immediate and individual behalf any action is brought or defended, either wholly or in part."

In a case which occurred before the passing of the statute, where the plaintiff's attorney had been examined as a witness on his behalf, and it was afterwards discovered that the plaintiff had previously assigned to him all his interest in the event of the suit, the Court of Common Pleas set aside a verdict found for the plaintiff and granted a new trial.(2) It was urged that the mere fact of a witness having been examined, who turned out to have an interest in the event, was not a ground for granting a new trial;(3) but Tindal, C. J., said, the court made the rule absolute, on the ground of *mala praxis;* the witness, the attorney on the record, being the real plaintiff.

Person substantially interested.

When an action is brought by or against a person as a trustee for another, the person substantially interested in the action, though not nominally a party, was always considered incompetent by reason of a direct interest; and he will still continue so, as the action is brought in his immediate and individual behalf. One test whether a witness stands in that situation seems to be whether his admissions would be evidence against

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(1) 2 C. & Kir. 670.

(2) Wade v. Simeon, 2 C. B. 342.

(3) See Dewdney v. Palmer, 4 M. & W. 664; Turner v. Pearte, 1 T. R. 717.

Where the plaintiff transfers his interest in the cause of action, pending the suit, the court may and will, under proper circumstances and conditions, order the assignee to be substituted as plaintiff in the action. Howard v. Taylor, 11 How. Pr. R. 309. But the court will not make such an order for the purpose of rendering the plaintiff a witness in the cause; nor will they, as a general rule, make the order of substitution, except upon the condition that the present plaintiff shall not be examined as a witness in the suit. Harris v. Bennett, 1 Code Rep. (N. S.) 203; Murray v. Genl. Mut. Ins. Co., 2 Duer, 607. The order in such a case can only be made upon the application of or notice to the assignee, pending the suit. M'Gowan v. Leavenworth, 2 E. D. Smith's R. 24; Howard v. Taylor, *supra.* The assignee in such a case, though not substituted as plaintiff in the action, is clearly the party for whose immediate benefit the action is prosecuted.

the party on whose behalf he is called;(1) another test is, whether the witness would have been rendered competent under the old law by release; if he would, he will now be competent without one.(2)

In an action on a policy of insurance,(3) where the declaration averred that the policy was made in the names of the plaintiffs as agents for the sole use and benefit of A. and B., who were interested in the goods insured, it was held, before the statute, that neither of the persons so interested was a competent witness for the plaintiffs; and that even their release to the plaintiff of all actions for any sums to be recovered by them on the policy, would not restore their competency; for it must be presumed, until the contrary be shown, that, as they were interested in the policy, the action had been brought by their authority, and they were liable to the attorney for the costs of the action. And the circumstance that the nominal plaintiffs in the action had received an indemnity from other persons was held not to make any difference, the witness still remaining liable to the attorney in respect of costs. In this case, the action appears to have been brought in the immediate and individual behalf of the persons who were interested in the insurance, and consequently they would remain incompetent under Lord Denman's Act.

But in an action of trover for two promissory notes,(4) where the defendant pleaded that, before the plaintiff was possessed of the notes, one M. was lawfully possessed thereof as of his own property; that they had been fraudulently obtained from M., and wrongfully delivered to the plaintiff; whereupon the defendant, as the agent of M., and by his authority, took the notes out of the possession of the plaintiff; and the replication traversed the property in M.: the defendant called M. as a witness to support the affirmative of this issue; and he stated, on the *voir dire*, that he had not indemnified the defendant, and that he had nothing to do with the action; it was held that he was an admissible witness, at least under Lord Denman's Act, even if he were not so at common law;(5) inasmuch as he had no *immediate* interest in the event of the suit, and the verdict could not be available for him in any subsequent action. In this case, Maule, J., observed, "If on the *voir dire* the witness had said, 'I directed the defendant to obtain possession of the notes for use, and agreed to indemnify him against the consequences of any action that might be brought against him for so doing,' then he would have been the person in whose immediate behalf the action was defended." For it seems, in the case suggested by the learned judge, although a verdict for the defendant would have left the

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(1) By Parke, B., in Sage v. Robinson, 18 L. J. (N. S.) Exch. 31; S. C., not S. P., 3 Exch. R. 142.

(2) By Pollock, C. B., Id. 3 Exch. R. 145.

(3) Bell v. Smith, 5 B. & C. 188. See also Smith v. Lyon, 3 Campb. 465.

(4) Hearne v. Turner, 2 C. B. 535.

(5) But see Green v. Warburton, 2 Moo. & Rob. 105.

notes in his possession, he would, upon his own plea, have been possessed of them as trustee and not merely as agent for the witness.

So, in an action by a ship-broker against the owner of a ship for commission in procuring a charter for the ship,(1) where a witness was called for the plaintiff and stated, on the *voir dire*, that he had introduced the defendant to the plaintiff, that he had nothing to do with the negotiation and had no claim on the former, but that he was to receive half the commission from the plaintiff if he recovered, pursuant to an agreement between them to that effect, and the custom amongst brokers; it was held, that the witness was competent under Lord Denman's Act.

And in a later case,(2) where a witness stated on the *voir dire* that he had agreed to pay half the defendant's costs, and that he defended the action jointly with him, it was held, that he was nevertheless a competent witness for the defendant under Lord Denman's Act, as not being a person in *whose immediate and individual behalf* the action was defended either wholly or in part; even if he were not admissible under the stat. 3 & 4 Wm. IV, c. 42, § 26. Parke, B., observed, in that case, "the plaintiff is to show that the witness is disqualified; but that has not been done. At present, it appears only that the defendant has been indemnified by the witness. It is often difficult to ascertain the dividing point between the case of one who has indemnified, and one who is a party to the suit."

So, on the trial of an ejectment between devisees claiming under different wills of the same testator, a person to whom a legacy (charged upon the land, the subject of the action) had been given by the will, under which the defendant claims, is now a competent witness for the defendant, as the action is not defended for the witness's immediate but only for his mediate benefit.(3)

Before the passage of Lord Denman's Act, in general, a partner,(4)

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(1) Hill v. Kitching, 3 C. B. 299; S. C. at N. P., 2 C. & Kir. 278.

Where a party executes a contract in his own name, whereby he sells a certain quantity of goods or grain, and the vendee brings an action thereon, oral proof is not admissible to show that the party so executing the contract in his own name did so as an agent, and thereby charge the defendant or person not named in the instrument as principal. Fenby v. Stewart, 5 Sand. R. 101.

(2) Sage v. Robinson, 3 Exch. R. 142.

The same rule has been substantially adopted under our statute; thus a party entitled to a sum certain depending upon the success of the action, and an assignor who has covenanted that the whole amount of the claim in suit is due, are competent witnesses, though as strongly interested in the event of the suit as a party who has agreed to pay a portion of the costs. Davison v. Miner, 9 How. Pr. 524; Winthrop v. Myer, 1 Abb. Pr. 385; 2 Id. 449.

(3) Doe d. Bengo v. Nicholls, 18 L. J. (N. S.) Q. B. 81.

(4) Goodacre v. Breame, Peake N. P. C. 174; Evans v. Yeatherd, 2 Bing. 133. See also Cheyne v. Koops, 4 Esp. 112; Jackson v. Galloway, 8 C. & P. 480.

One of a firm not sued, is, at common law, a competent witness for his copartners in an action against them, for a debt alleged to be due from the firm, on being released by his partners from all liability to contribute; though the English rule required also a release from him to the firm of his interest in the assets of the firm, so far as respects the demand in controversy. Lefferts v. De Mott, 21 Wend. 136; 3 Cowen, 84; 3 Wend. 240.

a co-contractor,(1) a joint maker of a promissory note,(2) and a co-obligor in a bond,(3) were held not to be competent witnesses for the parties sued with whom respectively they participated in interest.

In each of these cases the witness was held incompetent as being interested in the event of the suit; but now, upon that ground, such an objection would no longer prevail; and it does not seem that in any instance it could successfully be argued that the person tendered as witness was one in whose immediate and individual behalf the action was defended, either wholly or in part.

In a late case,(4) where a partner who had already had a judgment against him, was called as a witness to prove the same debt against his copartner, but it did not appear by the record that he was an interested party, it was ruled by Tindal, C. J., that he was a competent witness under Lord Denman's Act.

And in an action against one of two part owners of a vessel upon a charter party made by him alone, it was held, that the other part owner, who was no party to the action, and did not authorize the defence, was a competent witness for the defendant.(5) An opinion was intimated by Maule, J., during the argument, that the witness was competent at common law;(6) and it was admitted, that at any rate he might have been rendered so under the statute 3 & 4 Wm. IV, c. 42, § 26.

In actions brought by or against the assignees of a bankrupt, the rule was formerly well established that the bankrupt could not be called as a witness either to support or defeat the commission, or fiat;(7) and this rule was considered as resting, not entirely upon the ground of interest, but partly upon considerations of policy and convenience.(8)

Before the passing of the 6 & 7 Vict. c. 85, however, it was ruled by

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(1) Hall v. Rex, 6 Bing. 181; Young v. Bairner, 1 Esp. 103; Hare v. Munn, Mo. & M. 241, n. *a*.

Where a defendant has no separate defence in an action on a joint contract, a co-defendant called as a witness could prove nothing that would not enure to his own benefit, as well as to the benefit of his co-defendant; and as to such matters, he was therefore held incompetent. King v. Lowry, 20 Barb. 532.

(2) Slegg v. Phillips, 4 A. & E. 852.

Where an action was brought against two defendants, upon a joint and several promissory note, neither of them was allowed to testify for the other, to prove a payment thereon; on the ground that such testimony would go for the benefit of the witness, as well as of his co-defendant. Newall v. Salmons, 22 Barb. 647.

(3) Townsend v. Downing, 14 East, 565.

(4) Cupper v. Newark, 2 C. & Kir. 24.

(5) Atkinson v. Foster, 1 C. B. 712.

(6) Id. 714. But see Jones v. Pritchard, 2 M. & W. 199.

(7) See Field v. Curtis, 2 Stra. 828; Ewens v. Gold, B. N. P. 40; Oxlade v. Perchard, 1 Esp. 288 (commented upon in Sayer v. Garnett, 7 Bing. 104); Hoffman v. Pitt, 5 Esp. 25; Wyatt v. Wilkinson, Id. 187; Cross v. Fox, 2 H. Bl. 279, n. *a*; Flower v. Herbert, Id.; Chapman v. Gardner, Id.; Ferguson v. Spencer, 1 M. & G. 987.

(8) See 14 M. & W. 256.

Lord Denman, C. J., at Nisi Prius, in an action against the assignees of a bankrupt for seizing goods alleged to have been assigned to the plaintiff by the bankrupt before his bankruptcy,(1) that the bankrupt was a competent witness for the plaintiff, to prove that the assignment was made for a valuable consideration and in consequence of pressure, although the defendants relied on the assignment to the plaintiff as constituting in itself an act of bankruptcy.

And since that statute, it has been held by the Court of Exchequer,(2) that a bankrupt is a competent witness, in an action by his assignees against parties claiming under an execution to prove notice to them of a prior act of bankruptcy. And the court intimated a strong opinion that he would also be competent, since Lord Denman's Act, to prove the petitioning creditor's debt, or the act of bankruptcy, or any fact which tended to support the fiat.

In the case of bankruptcy or insolvency, the interest of the bankrupt or insolvent in the fund is of the nature of a residuary interest, being subject to the rights of creditors, who are the persons primarily interested in any fund realized by the assignees. The amount of the creditors' dividend must depend upon the amount of the fund, and a creditor was, therefore, before the statute, held to be an incompetent witness for the purpose of increasing the estate, on account of this direct interest in the event of the suit. He could not, therefore, give evidence to deprive the bankrupt of his allowance.(3) And since the statute it has been ruled in an action by the assignees of a bankrupt to recover money paid by the bankrupt, by way of fraudulent preference,(4) that a creditor under the fiat is inadmissible as a witness for the plaintiff, as being a person in whose immediate and individual behalf the action was brought.

The creditor of a bankrupt is also interested in supporting the bankruptcy, the effect of the bankruptcy being to appropriate the whole estate and effects of the bankrupt towards the immediate satisfaction of his creditors. A creditor was, therefore, before the statute, held an incompetent witness to support the fiat, and it was considered immaterial, whether he had or had not availed himself of the right of proving under the bankruptcy.(5) The petitioning creditor was, *a fortiori*, incompetent to sup-

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(1) Smith v. Groom, 2 Mo. & R. 388.

(2) Udal v. Walton, 14 M. & W. 254.

(3) Shuttleworth v. Bravo, 1 Stra. 507.

On the same principle, one who has made an assignment for the benefit of creditors is a competent witness in an action by the assignee. His interest is residuary, and subject to the rights of the creditors, who are primarily interested in the fund to be realized from the assigned property. Allen v. Hudson River Mut. Ins. Co., 19 Barb. 442. A different rule has been held in the case of an involuntary assignment, without any good reason, since the relation of the parties does not depend upon the form in which it is created. Vanduzen v. Worrell, 18 Barb. 409.

(4) Belcher v. Brake, 2 C. & Kir. 658.

(5) Adams v. Malkin, 3 Campb. 543; Crooke v. Edwards, 2 Stark. 303, overruling Williams v.

port the fiat, for (independently of the objection just mentioned, which applied to other creditors) he gives a bond to the chancellor, conditioned to establish the fact upon which the validity of the *fiat* depends.(1) And this rule was held to apply even though the petitioning creditor had assigned over his debt to a third person.(2) But before the passing of Lord Denman's Act, it was ruled, in an action of trespass against assignees,(3) in which the plaintiff relied upon an assignment by the bankrupt to him before the bankruptcy, and where no notice had been given of disputing the bankruptcy, that the petitioning creditor, having assigned his debt and executed a release to the assignees, was a competent witness for them to prove an act of bankruptcy prior to that on which the adjudication took place, for the purpose of overruling the alleged assignment to the plaintiff.

And since the act, it has been held,(4) that the petitioning creditor is a good witness to support the fiat.

Before the passing of Lord Denman's Act, in an action against a sheriff by the assignees of a bankrupt,(5) to recover the proceeds of the bankrupt's goods which had been sold under an execution, it was ruled by Coltman, J., that the sheriff's officer, who had given the usual indemnity bond to the sheriff, was not a competent witness for the defendant, even though his name were indorsed upon the record under the 3 & 4 Wm. IV, c. 42; his Lordship observing, that the officer was substantially the defendant in the action. But since the statute, in an action against the sheriff,(6) for not taking a party upon a *capias ad satisfaciendum*, it was ruled that the officer to whom the warrant upon the writ had been granted, was a competent witness for the defendant, notwithstanding that he had given the bond of indemnity; it appearing that he had given no instructions to defend the action.

These cases are mentioned as illustrating the principle established by Lord Denman's Act, and showing what parties are or are not to be considered as persons in whose immediate and individual behalf an action is brought or defended.

Stevens, 2 Campb. 301. And see 1 Rose, 392, n.; Ex parte Malkin, 2 Rose, 27; Ex parte Osborne, 2 Ves. & B. 177.

(1) Green v. Jones, 2 Campb. 411.

(2) Carruthers v. Graham, 2 Mo. & R. 368; S. C., C. & Marsh. 5.

(3) Smith v. Groom, 2 Mo. & R. 388.

(4) Johnson v. Graham, 2 C. & Kir. 808.

(5) Groom v. Bradley, 8 C. & P. 50. See also Powell v. Hord, 2 Ld. Raym. 1411; S. C., 1 Stra. 650.

(6) Wilson v. Magnay, 1 C. & Kir. 291; Wheeler v. Senior, Id. 293, n.

SECTION IV.

Of the Rule Considered with Reference to the Husband or Wife of an Incompetent Party.

As a party to a suit is not a competent witness, so neither at common law is the husband or wife of the party competent to give evidence for or against the party.(1) And this rule remains the same under Lord Denman's Act, both as to the husband or wife of the actual party to the suit or of the person in whose behalf the action is brought or defended. The rule is the same in equity.(2)

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(1) Co. Litt. 6 *b;* Hawk. b. 2, c. 46, § 70; Gilb. Ev. 119; B. N. P. 286.

(2) See Sedgwick v. Watkins, 1 Ves. 49; Vowles v. Young, 13 Ves. 144; Langley v. Fisher, 5 Beav. 443.

The parties to the action were by the act to amend the Law of Evidence (14 & 15 Vict. c. 99), passed in August, 1851, rendered competent and compellable to give evidence on behalf of either or any of the parties to the suit, action or other proceeding. The same act contained the following exceptions: "§ 3. Nothing herein contained shall render any person who, in any criminal proceeding, is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband." "§ 4. Nothing herein contained shall apply to any action, suit, proceeding or bill in any court of common law, or in any ecclesiastical court, or in either house of Parliament, instituted in consequence of adultery, or to any action for breach of promise of marriage."

Under the above provisions, it was adjudged that a wife is not a competent witness for her husband, who is a party to the suit. The third section seems to imply that she is competent in civil cases; but it was expressly held in Stapleton v. Crofts, that she was not thereby rendered competent—her exclusion under the common-law rule being founded, not on the interest of the party, but on reasons of public policy. 83 Eng. Com. Law. Rep. 365; S. C., 18 Adol. & Ellis, (N. S.) 367; Alcock v. Alcock, 12 Eng. Law & Eq. 354.

Under a still later statute (16 & 17 Vict. c. 83), husbands and wives are rendered competent and compellable, in all *civil* cases, to give evidence "on behalf of any or either of the parties to the said suit, action or proceeding;" but this provision does not extend to criminal cases, nor to cases of adultery; and neither husband nor wife is competent or compellable to disclose any *communication* made to him or her by the other during marriage.

Our code (§ 390) declares that a party to an action may be examined as a witness, at the instance of the adverse party, or of any one of several adverse parties; but it has been held that the defendant cannot, under this provision, be called and examined as a witness for the plaintiff in an action for a divorce for adultery (Arborgast v. Arborgast, 8 How. Pr. R. 297); nor where the husband and wife are both sued for work, labor and materials furnished to the wife (Main v. Stephens, Voorhies' Code, 549); or for assault and battery. Pillow v. Bushnell, 5 Barb. 156.

The Code (§ 398) provides that no person offered as a witness shall be excluded by reason of his interest in the event of the action; but it has been adjudged that a married woman cannot be compelled to testify as a witness in an action against her husband; her incompetency at common law being placed on grounds of public policy, as well as interest. Erwin v. Smaller, 2 Sand. 340. Nor is the husband a competent witness in an action where the wife sues alone for her separate property. Hasbrouck v. Vandervoort, 4 Sand. 596.

No other relation, however, is excluded:(1) a father may give evidence for his son, or the son for his father; although the relation between them may influence his testimony, it will not render him incompetent.

The reason for excluding the husband and wife from giving evidence either for or against each other, is founded partly on their identity of interest, and partly on a principle of public policy, which deems it necessary to guard the security and confidence of private life, even at the risk of an occasional failure of justice. They cannot be witnesses for each other, because their interests are absolutely the same; they are not witnesses against each other, because this is inconsistent with the relation of marriage, and the admission of such evidence would lead to disunion and unhappiness, and possibly to perjury.(2)

This general rule of evidence, which has been adopted for the purpose of promoting a perfect union of interests, and of securing mutual confidence, is so strictly observed, that even after a dissolution of marriage by divorce, the wife is not admitted to give any evidence of what occurred during the marriage, which would have been excluded if the marriage had continued.(3) This, as Lord Ellenborough, C. J., has said,(4) is on the ground, that the confidence which subsisted between them at the time, shall not be violated in consequence of any future separation. Thus one great cause of distrust is removed, by making the confidence, which once subsists, ever afterwards inviolable in courts of law.

Upon the same principle, where the marriage has been terminated by the death of either party, the survivor will not be permitted to give evidence of transactions that occurred during the marriage. Thus, in an action by an executor, it has been held, that the widow of the testator can-

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The wife is a competent witness for her husband, under a late statute in the state of Connecticut. Merriam v. Hartford & N. H. R. R. Co., 20 Conn. R. 354.

(1) 1 Hale, P. C. 303; 2 Id. 276; Hawk. b. 2, c. 46, § 76; B. N. P. 287; 1 Wils. 332.

(2) See by Tindal, C. J., in O'Connor v. Majoribanks, 4 M. & G. 443.

(3) Monroe v. Twisleton, Pea. Add. Ca. 221.

(4) In Aveson v. Kinnaird, 6 East, 192.

Barnes v. Comack (1 Barb, 392) is to the same effect, holding that the rule excluding the wife from giving testimony against her husband, continues to apply after a dissolution of the marriage contract, as regards transactions that took place previous to the divorce, and coming to her knowledge in consequence of the mutual trust and confidence arising out of the marriage relation. She cannot prove a contract made by her husband. Cook v. Grange, 18 Ohio, 526. But there are exceptions to the rule. Thus, in bastardy cases, where the mother is a married woman, though not competent to prove the non-access of the husband, she is, *from the necessity of the thing*, constantly admitted to prove the criminal intercourse by which the child was begotten. The King v. Luffe, 8 East, 193; The King v. Inhabitants of Kea, 11 Id. 132; Canton v. Bentley, 11 Mass. 441. And in an action for *criminal conversation* with plaintiff's wife, the plaintiff has been permitted, after showing a divorce *a vinculo matrimonii*, to prove the adultery by her; the giving of such testimony, after a divorce, does not betray any trust or confidence arising out of the former relation. Ratcliff v. Wales, 1 Hill R. 63; Dickerman v. Graves, 6 Cush. 308.

not be allowed, on the part of the defendant, to give evidence of a conversation between herself and the testator.(1)

In one case,(2) indeed, Lord Tenterden, C. J., had ruled that a widow was a competent witness for the plaintiff in an action brought against the executors of the husband on his promise; but this case must be considered as overruled by a more recent decision,(3) where, in an action of trover for certain goods brought by the representative of the husband, it was held, that his widow was not admissible as a witness for the purpose of showing that she pledged the goods with the defendant by her husband's authority.(4)

Rule not confined to confidential communications.

This rule, which considers the intimate relation subsisting between married parties as not dissolved by divorce or death, so as to let in the evidence of either party, as to transactions occurring during their joint lives, is not confined to cases where the communications between the husband and the wife are of a confidential nature. Such a limitation of the rule would very often be extremely difficult of application; and would introduce a separate issue in each cause, as to whether or not the communications between them were of a confidential nature.(5)

But where a *feme sole*, being the payee of a promissory note, married, and her husband survived her, it was held, in an action by her administrator against the maker, that the husband was a competent witness to prove payment of the interest to him during coverture, so as to take the case out of the Statute of Limitations.(6) This case was decided upon the ground that the husband had not, by the receipt of the interest, reduced the note into possession, and that he was not the person in whose behalf the action was brought.

In a case before Lord Hardwicke, he would not suffer a wife to be a

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(1) Doker v. Hasler, 1 Ry. & Mo. 198, by Best, C. J.

(2) Beveridge v. Minter, 1 C. & P. 364. It is remarked in a note in 4 M. & G. 439, *e*, that the verdict in this case being for the defendant, the objection could not be brought before the court.

(3) O'Connor v. Majoribanks, 4 M. & G. 435.

(4) See Humphreys v. Boyce, 1 Mo. & R. 140, *post.*

Where the husband or wife is dead, the other may, it seems, give evidence of facts affecting the estate of the deceased, that did not come to his or her knowledge through the relation of confidence existing between them. Pike v. Hayes, 14 N. Hamp. 19. The late English statute, rendering them competent and compellable, in all civil cases, to give evidence on behalf of either of the parties, expressly declares that they shall not be competent to disclose any *communication* made to him or her by the other during marriage. 16 & 17 Vict. c. 83, § 3. The husband being dead, the wife has been held competent to show the execution of a deed to a third person. Gaskill v. King, 12 Ired. 211. But she is not permitted at common law, after his death, to disclose communications made to her by her husband, concerning his affairs, when no other person was present. Babcock v. Booth, 2 Hill R. 181; Osterhout v. Shoemaker, 3 Hill R. 519.

(5) By Tindal, C. J., 4 M. & G. 443.

(6) Hart v. Stephens, 6 Q. B. 937.

witness, though her husband consented.(1) "The rule," he said, "is for the peace of families, and such consent should never be encouraged." But in another case,(2) Best, C. J., expressed his willingness to receive the evidence of the defendant's wife, if the defendant had consented; but there he refused his consent. Where a party consents that his wife shall be examined as a witness against himself, there can be no violation of confidence, which is a principal ground of the rule of exclusion; but the probability, that if such evidence were generally admitted, family dissensions might be increased, is not altogether obviated by the circumstance of consent.

The same reason applies to the declarations of the husband or wife. Where an action is brought by or against the husband, or by the husband and wife jointly, in right of the wife, the general rule is, that the declarations of the wife are not evidence against or for the husband.(3) In an action of trespass against a husband and wife, the wife's confession of a trespass, committed by her, cannot be given in evidence against the husband.(4) In an action for goods supplied to the defendant's wife, who, as it appeared, lived separate upon an allowance from him, it was held, that her declarations as to the receipt of the allowance could not be admitted in his favor.(5) A discourse between the husband and wife, in the pres-

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(1) Barker v. Dixie, Rep. temp. Hardw. 264.

(2) Pedley v. Wellesley, 3 C. & P. 558.

NOTE 34.—Where the husband is a party, the wife cannot be a witness either for or against him. Fitch v. Hill, 11 Mass. Rep. 286; Commonwealth v. Shriver, Quarter Sessions, Phila. 1820, MS.; City Bank v. Bangs, 3 Paige, 36.

She shall not be examined against her husband, on his trial for murder, even by consent of the parties. Randall's Case, before Van Ness, J., 5 Cit. H. Recorder, 141, 153, 154. Nor can she be examined for the plaintiff, though the defendant married her after the plaintiff had subpœnaed her in the cause. Pedley v. Wellesley, 3 Carr. & Payne, 558.

In one case, the court refused to hear the husband as a witness against one indicted for larceny jointly with his wife, though she was not taken, and the district attorney entered a *nolle prosequi* as to her; for, perhaps, her husband might disclose enough to require that a bench warrant should issue against her. The People v. Colbern, 1 Wheel. Cr. Cas. 479.

(But where two persons were jointly indicted for an assault, and one of them was defaulted on his recognizance, his wife was held a competent witness for the other. The State v. Worthing, 31 Maine, 62.)

(3) Winsmore v. Greenbank, Willes, 577; Alban v. Pritchett, 6 T. R. 620; Barron v. Grillard, 3 Ves. & B. 165; Baker v. Morley, B. N. P. 28.

(4) Denn v. White, 7 T. R. 112.

(5) Hodgkinson v. Fletcher, 4 Campb. 70.

The husband being dead, the wife is not incompetent to prove a fact coming to her knowledge by the open declaration of her husband in the presence of other persons. Pike v. Hayes, 14 N. Hamp, 19; Hay v. Hay, 3 Rich. Eq. 384. But she cannot disclose communications made to her alone. Babcock v. Booth, *supra*. Neither the husband nor wife is a competent witness against the other, much less can the declarations of one be proved as against the other. Pillow v. Bushnell, 5 Barb. 156; where it was held that in an action brought by the husband and wife for an assault on the wife, the latter could not be called as a witness.

NOTE 35.—See The City Bank v. Bangs, 3 Paige, 36. On the trial of an indictment against husband and wife for receiving stolen goods, the declarations of the wife respecting the goods,

ence of a third person, may be given in evidence against the husband, like any other conversation in which he may have been concerned.

Letters written by the husband or wife are subject to the same rule as their declarations. In general, letters written by the husband to the wife may be read as evidence against him, but her letters to him will not be evidence for him.(1)

This rule is intended for the protection of persons who have entered into the relation of husband and wife; and does not extend to those, who, not being married, have lived together and cohabited as man and wife. Where

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which were found in the husband's house, were offered in evidence; and though the declarations tended to criminate the husband, held that they must, notwithstanding, be received, in order to show the guilt of the wife; and the jury must take care that they did not operate to the prejudice of the husband. Commonwealth v. Briggs, 5 Pick. 429.

Declarations of a wife, made in the absence of the husband, are not evidence against him, though she be a party to the suit, which is brought to recover land in which she is jointly interested in her own right. Moody v. Fulmer, Whart. Dig. (2d ed.) 308, pl. 439; Turner and wife v. Coe, 5 Conn. Rep. 93. (The wife's admission during coverture, of a debt due from her before marriage, is not admissible as evidence against her husband. Ross v. Winners, 1 Halst. Rep. 366; Hawkins v. Hatton et ux., 2 Nott & M'Cord, 374, S. P.)

NOTE 36.—On the other hand, the learned author seems to have erred in laying down the rule as general, that the declarations of the husband shall not be received to affect the wife. It is believed that where they are joint parties, as they must be if both are alive, either as plaintiffs or defendants, even in respect to matters which, independent of the coverture, would concern the wife alone, the husband's declarations should be received against both. Accordingly, it has been adjudged that, in an action for a wrong done to the wife (*e. g.* slander), brought, as it must be, in their joint names, his admissions (*e. g.* that the slander did not originate with the defendant) are admissible against both. Evans v. Smith, 5 Monroe, 363, 364. Otherwise where she is a sole party claiming under a right paramount to the husband's, after his death, though his admission may have been made during coverture. Thus, an admission of the deceased husband, in respect to his widow's claim of land in her own right, are not admissible against her, for her claim is not through, but independent of him. Smith v. Scudder, 11 Serg. & Rawle, 325.

Where the wife is indicted for a crime, living the husband or after his decease, the propriety of the exception is still more striking. Thus, on trial of an indictment against a married woman for larceny, where evidence that her husband had deposited a sum of money for the use of the person whose property she was alleged to have stolen, to be paid over to him in case he should not appear at the trial to testify against her, which sum was afterwards paid over to him, he not having appeared according to his recognizance—was received as evidence against her; and the jury were told they might infer her privity with and consent to the husband's acts; and she was convicted; a new trial was granted, the court saying that acts done by the defendant's husband, without her knowledge, were improperly admitted. Commonwealth v. Robbins, 3 Pick. 63.

(1) B. N. P. 28.

NOTE 37.—Such letters are admissible, whether written to the husband or others, to show the state of the wife's feelings, although they may also state a fact which would not strictly be evidence. Willis v. Bernard, 8 Bing. 376.

So, in an action against the husband for necessaries furnished the wife, upon an allegation that she had left his house on account of his cruel treatment, her letters, written in affectionate terms, are admissible to rebut such allegation. But it must be proved at what time they were written, or they are not so admissible. Their dates are not sufficient proof of the time, when they are offered in favor of the husband, on account of the danger of collusion, though it is generally otherwise. Houliston v. Smyth, 2 Carr. & Payne, 22.

a woman, called as a witness by the defendant, had in fact been married to the plaintiff, and lived with him as her husband during the time of the transactions to which she was called to speak, but had ceased to live with him when her former husband (who had been absent from this country upwards of thirty years, and was supposed to be dead) returned from abroad, it was held, that there was no objection to her evidence.(1) Though a person has represented a woman to the world as his wife (to whom he was never married), it has been decided, that she is not, therefore, incompetent to give evidence in any legal proceeding to which that person is a party,(2) although this seems to have been doubted formerly.(3)

In these cases, the parties at the time were not actually husband and wife; but where that relation does exist at the trial, the rule is so strictly applied as to render a wife incompetent against her husband, although the marriage took place after the wife was served with a subpœna to give evidence in the suit.(4)

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(1) Wells v. Fisher, 1 Mo. & R. 99; S. C. *ut* Wells v. Fletcher, 5 C. & P. 12.

(2) Batthews v. Galindo, 4 Bing. 610.

(3) See Anon. cit. 1 Price, 83; Campbell v. Twamlow, Id. 81.

NOTE 38.—(The legal relation of husband and wife must exist, in order to make it the ground of excluding them from giving testimony for or against each other. Thus, a slave who cohabits with a free woman of color, as her husband, is a competent witness against her on the trial of an indictment for leasing a house to be kept as a bawdy-house. Coleman v. The State, 14 Miss. 157.) And it is now settled that a kept mistress, who has passed as the party's wife, is competent for him; though it may be otherwise if he habitually allow her to pass as his wife. Several of the judges recognized the opinion of Lord Kenyon, C. J., cited in the text, as sound law; though Best, C. J., thought the wife should be so *de jure*, in order to be excluded. Batthews v. Galindo, 4 Bing. 610; S. C. at N. P., 3 Carr. & Payne, 238; S. C., 1 Moore & Payne, 655. And see Randall's Case, 5 C. H. Rec. 141, before Colden, Mayor, and Jay, Recorder. In a case where the woman was sued, a witness who lived with her as her husband was received as competent in her behalf. Meunier v. Couet, 2 Mart. Lou. Rep. 56.

(4) Pedley v. Wellesley, 3 C. & P. 558.

NOTE 39.—Where a party shall lose his witness where the latter voluntarily acquires an interest after the former had a right to his testimony, will be more fully considered in a future note. Where he has attested a paper, his handwriting may sometimes be proved. Ford, J., in Henarie v. Maxwell, 5 Halst. 298. But in general the only way in which the difficulty can be obviated, is still to admit him as competent. Commonwealth v. Gore, 3 Dana, 474; Den ex dem. Rem v. Jackson, 2 Dev. 187, 189, 190. This was refused where the witness had married a wife who was interested. Van Horne's Ex'r v. Brady, 1 Wright, 452.

The commonwealth in a case where it is not bound to prosecute without security, acquires no interest in the witness's testimony till the indictment be found. Therefore, where a witness agreed before that, to indemnify the prosecutor, he was held incompetent for the commonwealth. Commonwealth v. Gore, 3 Dana, 474.

Several courts also require, in addition to the fact that subsequent interest has been acquired, that a want of *bona fides* in its acquisition should also appear. If honestly incurred in the usual course of business, and without any intent to deprive the party of his testimony, either in the witness or opposite party, he may in this way, render himself incompetent. Eastman v. Winship, 14 Pick. 44, 46, 47. See Manchester Manufact. Iron Co. v. Sweeting, 10 Wend. 162, 164, S. P., per Savage, C. J.

If the party introducing the witness have assented to his taking an interest, he is incompetent, In Hovill v. Stevenson (5 Bing. 493), the plaintiff having assigned an interest in the charter

It is now proposed to illustrate the rule by a reference to some particular cases; to show first, that a husband and wife are not competent witnesses *against* each other; and secondly, that they are not competent *for* each other.

1. Husband and wife not competent *against* each other.

First, it is a general rule, that husband and wife cannot be witnesses against each other, either in civil or criminal proceedings. In an action brought by a woman as *feme sole*, the defendant cannot call the plaintiff's husband to prove her married, thereby to nonsuit her.(1) And the wife of a bankrupt cannot be examined to prove his bankruptcy.(2)

In an action brought by a trustee under a marriage settlement, to recover back the value of certain goods which had been sold by the defendant, as sheriff, under an execution against the husband of the *cestui que trust*, the husband was not admitted to prove, on the part of the plaintiff, that the goods had been conveyed in trust to the plaintiff for the separate use of his (the witness's) wife.(3) In this case, as the witness's debt would have been discharged by a sufficient execution, his evidence would have been in that respect against his personal interest:(4) but, on the other hand, it was the wife's interest to have the property secured for her separate use; and though the action was between third persons, yet it directly affected her interest, the action being brought by her trustee for her benefit,

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party on which he sued, to the subscribing witness, and the latter refusing to release, evidence of his handwriting was precluded, and the action in consequence failed.

(1) Bentley v. Cook, 3 Dougl. 442.

(2) Ex parte James, 1 P. Wms. 611. See *infra*, as to examination before commissioners.

(3) Davis v. Dinwoody, 4 T. R. 678.

(4) See Bland v. Ansley, 2 N. R. 331.

NOTE 37.—The case of Davis v. Dinwoody (4 T. R. 678), can hardly be supported upon a question of interest; but in another view, it may be easily sustained. The wife was the real party, like a lessor in ejectment (*ante*, note 27), or the assignee of a chose in action. Id. These, it will be seen, by the cases there cited, of Robinson v. Neal, and Mauran v. Lamb, are to be deemed the real parties. So in this case of Davis v. Dinwoody, the wife being the real party, though the suit was in the name of her trustee, the husband could not be sworn; not because of his interest, for that appears to be balanced; but *as husband*, his *wife being a party*. The action could not properly be said to have been between third persons.

In this view, the case of Richardson v. Learned (10 Pick. 261, 267, cited also in note 42), is quite questionable, as I had occasion to mention in the note referred to.

Independent of the strong interest which the husband has in the recovery of his wife's trustee, according to Davis v. Dinwoody, she was the *cestui que trust* of the plaintiff, who was suing for her money—yet the husband was held competent to testify for her.

(It is clear from the later decisions, that the husband is not a competent witness in an action involving either the legal or equitable estate of his wife; nor the wife against her husband in an action involving his interests. Erwin v. Smaller, 2 Sand. 340; Robbins v. Abrahams, 1 Halst. Ch. (N. J.) 465; Footman v. Pendergrass, 2 Strobh. Eq. 317; Edwards v. Pitts, 3 Strobh. 140; Mayrant v. Guignard, 3 Strobh. Eq. 112; Hasbrouck v. Vandervoort, 4 Sand. 596; Miller v. Williamson, 5 Md. 219; Johnson v. Slater, 11 Gratt. (Va.) 321; Jones v. Norton, 10 Texas, 120. And it is evident that letters or declarations written or made by either of them cannot in such cases be used as evidence against the other.)

and the real point in issue being whether the goods belonged to her or her husband.

The husband and wife are not allowed to be witnesses against each other in criminal proceedings, except in certain cases which will afterwards be mentioned. In a prosecution for polygamy, the first husband or wife cannot be admitted to prove the former marriage against the prisoner;(1) such evidence would directly criminate, and, therefore, is not admissible for the reason before mentioned. On a trial for murder, the wife of the prisoner cannot be a witness against him. On a prosecution against a woman and others, for a conspiracy in procuring a marriage between her and her husband, the man is not a competent witness against her in support of the prosecution.(2) It seems also to be the better opinion, that a wife is not compellable to give evidence against her husband on a charge of high treason.(3)

In collateral proceedings.

Although the husband and wife are not allowed to be witnesses against each other, where either is directly and immediately interested in the event of a proceeding, whether civil or criminal, yet, in collateral proceedings, not immediately affecting their mutual interest, their evidence is receivable, notwithstanding that the evidence of the one tends to contradict the other, or may subject the other to a legal demand, or even to a criminal charge.

The rule laid down in the case of The King v. The Inhabitants of Cliviger(4) (namely, that a husband or wife ought not to be permitted to give any evidence that may even tend to criminate each other), is now considered as having been laid down in terms much too general and undefined.

This rule was much discussed in the cases of The King v. The Inhabitants of All Saints, Worcester,(5) and The King v. The Inhabitants of

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(1) Mary Grigg's Case, Sir T. Raym. 1.

(2) R. v. Serjeant and others, 1 Ry & M. 352, before Abbott, C. J.

Fitch v. Hill, 11 Mass. 286; City Bank v. Bangs, 3 Paige, 36; The People v. Colbern, 1 Wheel. Crim. Cas. 479.

(3) H. P. C. 301; Brownl. 47, contradicting Sir T. Raym. in Grigg's Case, cited Gilb. Ev. 19; B. N. P. 259.

(4) 2 T. R. 263.

NOTE 40.—See Fitch v. Hill, 11 Mass. Rep. 286.

On the traverse of an indictment for subornation of perjury, where two witnesses on the part of the prosecution swore that the testimony given by them on a former trial was false, their wives' testimony was held not admissible to impeach that of their husbands, either directly or collaterally. New York Gen. Sessions, before Radcliff, Mayor; Francis & Jones' Cases, 1 Cit. H. Rec. 121. *Quere.* Indeed, it would seem now to be the settled doctrine, both on authority and principle, that husband and wife may be received to contradict or criminate each other in a collateral matter, *i. e.* in all cases except where one is called to contradict or criminate the other as a party to some cause.

(5) 6 M. & S. 194.

Bathwick;(1) where the Court of King's Bench was of opinion, after much argument, that the rule laid down in the case of The King v. Cliviger, was too large and general. It was decided, in The King v. Bathwick, upon a question respecting a female pauper's settlement, where a man had been called to prove his marriage to her, that another woman was a competent witness to prove her own previous marriage with the same man; for although, if the testimony given by both witnesses were true, the husband had been guilty of the crime of bigamy, yet nothing that was said by the wife in that case, nor any decision of the Court of Quarter Sessions, founded upon her testimony, could afterwards be received in evidence to support an indictment against him for that crime; it being altogether *res inter alios acta;* neither the husband nor the wife having any interest in the decision of the question.

In The King v. Gleed,(2) however, upon an indictment for larceny,

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(1) 2 B. & Ad. 639.

NOTE 41.—The case of Rex v. Cliviger was still farther questioned in The King v. the Inhabitants of Bathwick (2 Barnw. & Adolph. 639), where the doctrine in the text seems to be fully confirmed. In that case, on a question of settlement, the husband, C., swore to his marriage with the pauper, but did not say, nor was asked whether he had not been before married to M. She was called and allowed to prove her previous marriage with C., for this is not contradicting her husband, though the court intimate she might do so. As to criminating her husband, within the case of Rex v. Cliviger (2 T. R. 263); the court doubt that case much; say it was shaken by Rex v. The Inhabitants of All Saints (6 M. & S. 194); and strongly insist that the wife may be received to prove facts which might go to show the criminality of the husband, provided her testimony now would not be evidence to affect him in a prosecution against him.

(2) 2 Russ. Cr. & M. 983, ed. by Greaves.

NOTE 42.—During the trial of five defendants on an indictment for an assault and battery, the counsel for the defendants moved that the wife of one of them might be examined as a witness for the other four; but the court ruled unanimously that she could not be examined. To have had the benefit of her testimony they should have moved to be tried separately from the husband, which the court would have granted, had this been assigned as a reason for the motion. Commonwealth v. Easland et al., 1 Mass. R. 15. But *quere* of this; for where they severed it was holden that one was not competent for the other. The People v. Bill, 10 John. Rep. 95. It follows that the wife would not be competent. For where Colbern and Elizabeth, the latter being the wife of Weir, were jointly indicted, and Colbern alone was taken and put upon his trial, the husband was held incompetent for the people, because the wife was so within the case of The People v. Bill. The People v. Colbern, 1 Wheel. Cr. Cas. 479. On this decision being made, the district attorney entered a *nolle prosequi* in her favor and offered her husband again, but the court still rejected him as incompetent, because his testimony might still affect his wife, the *nolle prosequi* not being final. He might disclose enough to require that the court should issue a bench warrant against her. To warrant the testimony of the husband she must first have been tried and acquitted by the jury. Id. 481. But see State v. Anthony (1 M'Cord, 285), that the wife may be a witness for one indicted jointly with her husband for murder, but tried separately from him.

(Where parties jointly indicted are tried together, the wife of one of them is not a competent witness for the others. The Commonwealth v. Robinson, 1 Gray (Mass.), 555. But she has been held competent for the others, where her husband, jointly indicted with them for an assault has been defaulted upon his recognizance. The State v. Worthing, 31 Maine, 62. And where her husband has been examined for the state, she may be called on the other side to prove that he testified under a bias against the defendant, though not to contradict him. Cornelius v. The State, 7 Eng. 782.

where a woman was called, on the part of the crown, to prove that her husband, who had absconded, had been present when the article was stolen, and that she saw him deliver it to the prisoner, Taunton, J., after consulting with Littledale, J., rejected the witness. His Lordship said: "The evidence of the wife here would directly charge the husband with being a principal, and although there is no prosecution pending, her evidence cannot but facilitate an accusation against her husband. Now, the law does not allow the wife to give evidence against her husband, and it is quite consistent with that principle that this evidence should not be received."

It may be doubted, however, whether this ruling was correct. It would certainly appear not to be so upon the principles laid down in R. v. Bathwick (which was cited in the case;) for if the husband were indicted for the theft, the wife could not be a witness on that trial, nor could anything she had said on the former trial be in any way adduced in evidence against him.

Although a wife is not to be rejected as a witness because her evidence has a tendency to criminate her husband, yet it seems she cannot be compelled to give such evidence.(1)

In like manner a wife may be a witness in an action between third persons not immediately affecting the interest of the husband, though her evidence may possibly expose him to a legal demand: as, in an action between third persons for goods sold and delivered, to prove that the goods had been sold, not on the credit of the defendant, but on her husband's credit.(2) This evidence, it may be said, was in some measure against the husband, though he was not a party to the suit. On the other hand, to reject her evidence in such a case would be a hardship on the defendant, who may have no other means of defending himself against an unjust demand: and, though upon her testimony the defendant might have a verdict, and an action might afterwards in consequence be brought against the husband, she would not then be admitted as a witness, nor could her evidence in the first suit be produced against him.(3)

It was held in one case, that in action by the wife's trustee to recover money in trust to her separate use, the husband was a witness for her trustee. Richardson v. Learned, 10 Pick. 261. But *quere;* she was the real party. Suppose a suit by her husband's trustee; could the wife be a witness for him?)

(1) By Bayley, J., in R. v. All Saints, Worcester, 6 M. & S. 200.

(2) Williams v. Johnson, by King, C. J., 1 Stra. 504; S. C., B. N. P. 287.

(3) If the husband's interests are involved in the action, as where it is brought against his trustee, the wife is not a competent witness. Edwards v. Pitts, 3 Strobh. 140. But in general, where the action is between third persons, the wife is a competent witness where the husband is competent; thus, where the husband, the payee of a note, indorses it over to a third party, his wife is rendered a competent witness for the holder, on his executing to the husband a release from liability thereon. Bisbing v. Graham, 14 Penn. State R. 14. The release renders the husband competent (Wheaton v. Wilmarth, 13 Metc. 422), which also renders his wife competent. So where the wife is interested, her interest must be removed before her husband can be sworn as

Neither party competent to prove non-access.

It is settled, that either a husband or a wife is incompetent, as well after as before the death of the other party, to prove non-access during wedlock, that is to say, the absence of the fact of sexual intercourse, or of the opportunity of sexual intercourse, whatever may be the form of the legal proceeding, or whoever may be parties to it.(1) This rule is established, independently of any possible motives of interest in the particular case, upon principles of public policy and decency.(2) Nor can either party be examined as to any collateral fact, for the purpose of proving non-access: thus, the husband cannot be asked whether, at a particular time, he did not live at a distance from his wife and cohabit with another woman.(3) Nor is the evidence of either admissible to prove directly the illegitimacy of children born during marriage;(4) although it has been said that the parents may bastardize their issue by any evidence except that of non-access.(5) Thus a wife will not be permitted to prove that the children, whose legitimacy is in question, are the issue of another man to whom she had been married during her first husband's lifetime.(4) But on the other hand, a wife may prove the fact of her own adultery.(6) So, in an earlier case, where the question was as to the legitimacy of a party, his mother was called as a witness, to prove that she was not married to the father of the child till after its birth.(7)

2. Husband and wife not competent *for* each other.

Secondly, it is a general rule, that neither the husband nor the wife

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a witness in the cause. Hough v. Patrick, 26 Vt. (3 Deane), 435. See also Baring v. Reeder, 1 Hen. & Munf. 154.

(1) R. v. Rook, 1 Wils. 340; R. v. Luffe, 8 East, 203; R. v. Kea, 11 East, 132.

(2) See by Lord Mansfield, C. J., in Goodright v. Moss, Cowp. 494. See also Cope v. Cope, 1 Mo. & R. 274, and B. N. P. 113; Rep. temp. Hardw. 83.

(3) R. v. Stourton, (Inhabs.) 5 A. & E. 180.

The non-access of the husband cannot be proved by the wife, though she may testify to the fact of criminal intercourse, and designate the person with whom such intercourse took place. From motives of public decency she is not allowed to bastardize her offspring. The illegitimacy of the child being shown by proper evidence, she is in certain cases permitted, *ex necessitate*, to testify with whom she has had sexual intercourse, and who is the father of the child. Ratcliff v. Wales, 1 Hill R. 63, 65; The People v. Overseers of Ontario, 15 Barb. 286; Parker v. Way, 15 N. Hamp. 45. The presumption is that a child born during lawful wedlock is legitimate, and this presumption must be overcome by positive testimony. Wright v. Hicks, 12 Geo. 155. Proceedings in cases of bastardy are generally regulated by statute (Chapel v. White, 3 Cush. 537); and in some cases the evidence of the mother is made presumptive proof of the paternity of the child, which is to be disproved by the defendant. Moody v. Goode, 10 Ired. (N. C.) 49. See, also, The State v. Wilson, Id. 131, 350.

(4) R. v. Mansfield, (Inhabs.) 1 Q. B. 444.

(5) By Patteson, J., in R. v. Stourton, 5 A. & E. 186.

(6) R. v. Reading, Rep. temp. Hardw. 82; R. v. Bedell, Andr. 8; R. v. Luffe, 8 East, 203.

(7) Cooke v. Lloyd, Peake Ev. App. xxviii. In this case declarations of the father and of the son himself were admitted to prove the bastardy of the latter. As to this see, *post*, *Hearsay in Questions of Pedigree.*

will be allowed to give evidence for each other, in civil or criminal proceedings.

Where the defendant pleads coverture, the person alleged in the plea to be husband is not a competent witness to prove his marriage with the defendant.(1) A husband is incompetent to give evidence in support of the interest of his wife, who takes a reversion in fee in the property in dispute.(2)

In the case of Hawkesworth v. Showler and Boyce,(3) which was an action of trespass for taking the plaintiff's goods under a distress for rent,

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(1) Woodgate v. Potts, 2 C. & Kir. 457.

NOTE 44.—In the case of Perry, tried on an indictment for a forcible marriage, the wife was received as a witness for her husband to prove that the elopement and marriage were voluntary. Bristol assizes, 1794; Macnally's Ev. 181; S. C., 2 Hawk. P. C. c. 46, § 77 (Curwood's ed.). This case was tried before Gibbs, C. J., when he was recorder of Bristol. Per Abbott, C. J., in Rex v. Serjeant, 1 Ry. & Mo. N. P. Rep. 354.

On an indictment for a conspiracy in inveigling a young girl from her mother's house, and procuring the marriage ceremony to be recited between her and one of the defendants while she was intoxicated, the girl was held to be a competent witness to prove the facts. Respublica v. Hevice, 2 Yeates, 114. The court said they were not competent to determine whether there was a real marriage; therefore, receiving the evidence, they left it to the jury, with instructions that if they found a marriage, they should disregard the testimony. S. C., 3 Wheel. Cr. Cas. 505, 506. *Quere.*

(2) Cornish v. Pugh, 8 D & R. 65.

(3) 12 M. & W. 45.

(In an action brought by the husband and wife in relation to her separate estate, he is not a competent witness, nor are his acts and declarations evidence against her. Stuart v. Kissam, 2 Barb. 493. Nor is she a competent witness against him, where she is not a party. Copous v. Kauffman, 8 Paige, 583. Neither is the husband a competent witness in favor of his wife. Hosack v. Rogers, 8 Paige, 229. But in an action between third parties, she may be examined, where her husband has a collateral interest in opposition to the party calling her. The City Bank v. Bangs, 3 Paige, 36.)

NOTE 45.—The declarations (deposition) of a wife *in extremis*, are admissible against the husband, charged with her murder. Pennsylvania v. Stoops, Addis. 381. Macnally says, that in the researches which he had made, he had not discovered any trial for high treason in which the wife was examined as a witness against her husband. Macnally's Ev. 181.

It is well stated that, in general, neither husband or wife is admissible as witnesses for or against each other. Corse v. Patterson, 6 Harr. & John. 153; Tacket v. May, 3 Dana, 80, per Robertson, Ch. J.; Rigdon's Heirs v. Rigdon's Devisees, 6 J. J. Marsh. 54; Sadler v. Houston, 4 Porter, 208. Some cases go so far as to maintain the rule though they have been divorced *a vinculo*. State v. Phelps, 2 Taylor, 374. But see State v. J. N. B., 1 Id. 36, *contra*. In cases of book account, where the party is a witness, *quere*, whether his wife may be received also? Stanton v. Wilson, 3 Day, 37. But she is competent in a prosecution against her husband, for a personal outrage to herself. State v. Boyd, 2 Hill, 288; Per Bronson, J., in The People ex rel. Ordronaux v. Chegaray, 18 Wend. 642.

In an action by a woman as a *feme sole*, her husband is an incompetent witness to prove a marriage. Bentley v. Cooke, 3 Doug. 422. But though each supposed they were married, if in fact the marriage was void, as where the wife had a former husband living, she was held competent as a witness against him, even to prove conversations of her supposed husband during cohabitation. Wells v. Fletcher, 5 Carr. & Payne, 12; S. C. *nom.* Wells v. Fisher, 1 Mood. & Rob. 99. The marriage of slaves in North Carolina is void; therefore the husband or wife, (slaves) may be witnesses against each other, even in a capital case. The State v. Samuel, 2 Dev. & Bat. 177.

The cases cited *ante*, in note 41, and the text, will be found to qualify the proposition that the husband or wife are not receivable to make statements contradictory of each other. And even the wife is receivable to show the criminality of the husband, except in cases where her evidence would influence a suit or prosecution against him. See also per Park, J., and Best, C. J., in Henman v. Dickenson, 2 Moore & Payne, 289, 291; S. C., 5 Bing. 183; Corse v. Patterson, 6 Harr. & John. 153; Wilmot's Lessee v. Talbot, 3 Harr. & M'Henry, 2; Redman v. The State, 1 Blackf. 429, 430, 431; The People ex rel. Ordronaux v. Chegaray, 18 Wend. 637; Capehart v. Adm'rs of Huey, 1 Hill's Ch. Rep. 409; Bell v. Coil, 2 Id. 110. The notion of such testimony being inadmissible from policy seems to be pretty much given up in England, though several American cases have gone on that ground. See also Poultney v. Fairhaven, Brayt. 185. These cases are quite uniform that the wife shall not be received to disclose conversations of the husband, even though he be dead when she is examined. Per Williams, J., in Edgell v. Bennett, 7 Verm. Rep. 537. But the rule is confined to conversations, and does not extend to distinct facts. Williams v. Baldwin, 7 Verm. Rep. 503, 506; Wells v. Tucker, 3 Binn. 366. It seems, however, that, to be admissible, the fact must be of such a nature, that it cannot be supposed the wife learned it in consequence of confidence reposed. In assumpsit for board of the defendant's child, his wife was refused as a witness against him to prove his promise to pay while she was his wife, though now divorced by act of Parliament. It was said that her knowledge might have been acquired in consequence of confidence reposed in her by her husband. Monroe v. Twistleton, Peak. Add. Cas. 219, 221; and see note *a*, at the last page, for several English cases. The reasoning of Lord Alvanley in the principal case is very strong. The rule does not extend to those who have cohabited as husband and wife without being married, especially after they have separated. Wells v. Fletcher, 5 Carr. & Payne, 22.

It was said by Lord Mansfield, in Goodright v. Moss (Cowp. 594), that it is a rule founded in decency, morality and policy, that a husband or wife shall not be permitted to say, after marriage, that they have had no connection, and therefore that the offspring is spurious; more especially the mother, who is the offending party, and that the point had been solemnly decided at the Delegates. See Cope v. Cope, 1 Mood. & Rob. 274. In Bull. N. P. 113, a case is referred to as showing that the wife might be examined after her husband's death, to prove the child a bastard, which is inconsistent with the principle adopted by Lord Mansfield. Lord Hardwicke (Rep. temp. Hardw. 83) puts the incompetency of the wife to give evidence of non-access upon the ground of interest, a ground which would only apply in particular instances, as in orders of filiation. It does not appear clearly how the circumstances of the wife being an offending party can affect the question.

That the wife's competency in point of interest follows her husband's, see Corse v. Patterson, 6 Harr. & Johnson, 153; Stanton v. Wilson, 3 Day, 37; Beach v. Swift, 2 Connecticut Rep. 269; Wilmot's Lessee v. Talbot, 3 Harris & M'Henry, 2; Williams v. Baldwin, 7 Verm. Rep. 503, 506, 507; Jackson v. Heath, 1 Bailey, 355, 356; Pyle v. Maulding, 7 J. J. Marshall, 202, 203; Chambers v. Spencer, 5 Watts, 404; Van Deusen v. Frink, 15 Pick. 449; Thomas v. Catheral, 5 Gill & John. 23; Cornish v. Pugh, 8 Dowl. & Ryl. 65; Rex v. Smith, Mood Cr. Cas. 289; Capehart v. Adm'rs of Huey, 1 Hill's Ch. Rep. 409; Bell v. Coil, 2 Id. 110. But this rule ceases to apply after his death. It is, therefore, no objection then, that he was interested during his lifetime in the fact now sought to be proved by his widow. Edgell v. Bennett, 7 Verm. Rep. 534; Caldwell v. Stewart, 2 Bail. 574; Chambers v. Spencer, 5 Watts, 404.

The wife may testify against the interest of the husband in a cause between third persons, if he, being present, do not himself object. Jackson v. Heath, 1 Bail. 355; Pedley v. Wellesley, 3 Carr. & Payne, 558. She cannot be a witness for the defendant in a suit against her husband's surety, without a proper release from the surety to the husband. Thomas v. Catheral, 5 Gill & John. 23. The husband being the beneficial, though not the nominal plaintiff, his wife is not an admissible witness for him. Pyle v. Maulding, 7 J. J. Marsh. 203. Nor is the husband a witness for the wife's trustee in an action (trover) by him for her use. Hopkins v. Smith, 7 J. J. Marsh. 263.

* * And see State v. Phelps, 2 Tyler's R. 374; Ratcliff v. Wales, 1 Hill R. 63; and Barnes v. Comack, 1 Barbour's Supr. C. R. 392. In the case last cited, Barculo, J., lays down the rule that "the testimony of the wife can never be received against her husband, except in proceedings instituted against him on her behalf. This rule holds not only during the coverture, but

the case having been clearly proved against the defendant Boyce, who was the broker employed to make the distress, the other defendant, Showler, for the purpose of showing that he had not authorized the taking of the goods by Boyce, tendered the wife of the latter as a witness. Lord Abinger, C. B., however, before whom the cause was tried, was of opinion that she was incompetent; and the Court of Exchequer upheld this decision, and refused a rule for a new trial. Lord Abinger said, upon that occasion, he was clearly of opinion that the wife was interested; she had an interest in giving evidence to fix Showler and acquit her husband, as in such a case execution might be taken out against Showler alone. On the other hand, if Showler obtained a verdict, execution would go against her husband alone; if, therefore, she gave evidence to acquit Showler altogether, she would give evidence against her husband.

Upon a prosecution against several persons for a conspiracy, Lord Ellenborough, C. J., refused to admit the wife of one of the defendants to be a witness for the others; a joint offence being charged, and an acquittal of all the other defendants being a ground of discharge for the husband.(1)

On the trial of an indictment against two prisoners for burglary, in which each of them set up the defence of a distinct *alibi*, it was proposed, on the part of one of the prisoners, in proof of his *alibi*, to call the wife of the other prisoner; but her evidence was rejected, on the ground that it tended to show that the witness for the prosecution was mistaken as to one of the prisoners, which would weaken the effect of that witness's testimony as to the other prisoner, her husband. And it was decided, by a majority of the judges, that the witness had been properly rejected.(2)

Where, however, of two or more parties indicted, one of them is not upon his trial at the time when the others are being tried, the wife of the party not upon his trial is admissible as a witness. Thus, in the case of the King agt. Williams,(3) where another person, although a defendant on the record,(4) had been tried and convicted at the previous assizes, and consequently the only issue which the jury were bound to decide by their verdict was whether Williams was or was not guilty,(4) the wife of the other person was admitted to give evidence: as neither the wife nor the

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also continues to apply after a dissolution of the marriage contract, as regards transactions which took place previous to such dissolution. * The only safe and correct practice is, to adhere to the rule, that whatever passes between husband and wife in confidence shall forever remain sacred." In this case, the wife, who had been divorced, *a vinculo*, for the adultery of her husband, had been examined as a witness against the husband as to transactions which occurred during the marriage, and her testimony was suppressed. * * (Lucas v. State, 23 Conn. 18; Smith v. Potter, 1 Wms. Vt. 304.)

(1) R. v. Locker and others, 5 Esp. 107; R. v. Frederick and another, 2 Str. 1094, S. P.

(2) R. v. Smith and another, Moo. C. C. 289.

(3) 8 C. & P. 284, cit. by Alderson B., 12 M. & W. 49.

(4) From the report of the case, it does not appear that the husband was jointly indicted with the defendant, Williams; indeed the contrary would rather appear; but see by Alderson, B., *ut supra.*

husband was interested; he had already been found guilty, and was to suffer the same judgment whether the other defendant upon the record was found guilty or not. So, in the case of the King agt. Thurtell, where Probert was admitted a witness for the crown, the wife of Probert was also allowed to be a witness, because her husband could not be at all affected by her evidence. In the same manner, if Probert had not been apprehended, and Thurtell only had been on trial at the time, it seems that the wife would have been capable of being examined, as the question would have been, whether Thurtell was guilty, and not whether Thurtell and Probert were guilty.(1)

In the case of the Queen agt. Sill and others,(2) however, tried before Tindal, C. J., where A. and B. were indicted for burglary and stealing, and evidence was given to show that a part of the stolen property was found in the house of each of the prisoners, it was proposed to call the wife of A. as a witness for B., to prove that she brought to B.'s house that part of the stolen property that was found there; and his Lordship said, he thought she was a competent witness for that purpose.

It may be questioned whether this point was sufficiently considered. If the witness was competent at all, she might have sworn that she also took to her husband's house the stolen property that was found there, having received it from a third party. It may be doubted, also, whether the very fact which she was called to prove, might not inferentially be evidence against her husband. It seems indeed to be a hardship upon the prisoner B., if the fact was in truth as suggested, that by a technical rule he should be debarred from calling the only witness who could establish his innocence; but the hardship would have been the same supposing A. himself had taken the goods to B.'s house. Perhaps the difficulty might have been got over by taking a separate verdict against A., supposing the evidence would have warranted such a course.

In a late case before the master of the rolls,(3) it was held that a husband could not be examined as a witness against his wife in a suit affecting her separate estate, although there were other defendants in respect of whom he would be competent.

It has been seen that, in general, letters written by the husband to the wife are not evidence for the husband, though letters written by the husband to the wife may be evidence against him.(4)

Action for crim. con.

In an action for criminal conversation with the plaintiff's wife, the wife's letters to the defendant are not evidence for the defendant against

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(1) By Alderson, B., *ut supra.*
(2) 1 C. & Kir. 494.
(3) Langley v. Fisher, 5 Beav. 443.
(4) *Supra*, p. 81.

the husband, nor is her confession evidence for the husband against the defendant; but conversations between her and the defendant are evidence against him.(1) Evidence of the manner in which the husband and wife used to live together, before her connection with the defendant, is clearly admissible for the purpose either of increasing or diminishing the damages; and upon this principle it has been determined, that where the husband and wife have lived apart from each other, the letters of the wife to her husband, written before any suspicion of criminal intercourse, are admissible in evidence, as showing their demeanor and conduct to each other, and whether they were living on terms of mutual affection; but, on account of the obvious danger of collusion, it ought to be strictly proved, that the letters, which are offered in evidence, were written at a time when the wife was not suspected of misconduct.(2)

Admissions of wife acting as agent for husband.

The rule in question has no application to cases where the wife has acted for the husband in his business, and by his authority and consent; he thereby adopts her acts, and will be bound by any admission or acknowledgment made by her respecting that business; the wife in such cases being considered his agent. Thus, where the wife has made a contract for her husband, which has been adopted by him, her acknowledgment as to the amount of the money due will be evidence against him.(3) In an action by a servant for wages,(4) the plaintiff was allowed to give in evidence a deed executed by the wife of the defendant at the time of the hiring, which, though void as a deed, was admitted in order to show the terms of the contract. And in an action for goods sold and delivered at the defendant's shop,(5) an offer by the wife to settle the demand was

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(1) B. N. P. 28; Winsmore v. Greenbank, Willes, 577.

(2) Edwards v. Crock, 4 Esp. 39; Trelawney v. Coleman, 1 B. & A. 90; S. C., 2 Stark. R. 191.

(3) Emerson v. Blonden, 1 Esp. 142; 1 Str. 527; B. N. P. 287; Anderson v. Saunderson, Holt N. P. C. 591.

(4) White v. Cuyler, 6 T. R. 176.

(5) Clifford v. Burton, 1 Bing. 199.

Where the wife acts as agent for her husband, her acts, declarations and admissions are evidence against her husband, like those of any other agent. Fenner v. Lewis, 10 John. R. 38; Riley v. Suydam, 4 Barb. 222; Williamson v. Morton, 2 Md. Ch. Decis. 94.

NOTE 46.—The declarations of the wife, who managed her husband's business as tavern keeper, he being incapable of managing his affairs through insanity, were received in an action on a bill for boarding the defendant's intestate, to show payment; on the authority of Str. 527. Hughes' Adm'rs v. Stokes' Adm'rs, 1 Hayw. 372. So it would be of her admissions in her course of agency in any particular transaction. Curtis v. Ingham, 2 Verm. Rep. 289.

In an action of debt, the question was put to the jury on contradictory testimony of agency in the plaintiff's wife, whether a considerable payment to her should be credited to the defendant; and the court remarked to the jury that "There are many occasions on which a wife, as agent for the husband, appears as the principal. The cares of matrimony, the duties of management are divided; the husband assumes some parts, and submits other parts to the care of the wife. Where he either acts or submits, he is bound. A husband is often from home. Nothing is more common than to pay the wife, in his absence, a debt due to the husband. That is for the con-

admitted in evidence, as she used to serve in the shop, and was in the habit of transacting the business in his absence. Upon the same principle, the wife's acknowledgment, as to a debt being due for goods furnished with her husband's consent for her accommodation, or for goods purchased by her for the husband and used by him, has been held sufficient to take the case out of the Statute of Limitations.(1) In an action against a police officer,(2) to recover money which he had taken from the plaintiff's wife on suspicion of her having got it unlawfully, Lord Ellenborough, C. J., admitted the account given by her respecting the money on her examination before a magistrate, to be given in evidence on behalf of the defendant: "The money," said Lord Ellenborough, "appears never to have been in the husband's possession, and, as the wife had the exclusive custody and management of it, he must be bound by what she said concerning it."

Such statements and admissions are receivable in the same manner as declarations or admissions made by any other agent with reference to a tronsaction which is within the scope of his authority.(3) There is, however, this difference, that in the latter case, where the agent is living he may be called as a witness, although it is not necessary that he should be so called; whereas we have seen, the wife can in no such case be called. In O'Connor v. Majoribanks,(4) the widow was not admissible to prove the fact of her agency; but if that fact had been shown *aliunde*, any admissions made by her in that character would have been receivable in evidence.

The agency of the wife, as that of any other agent, may be inferred from circumstances. Some facts must be shown, however, from which the wife's agency may be inferred with reference to the particular transaction to which the admission relates. Thus, where it was proved, upon the trial of an action of replevin,(5) that the house in respect whereof rent was claimed by the defendant was occupied by the plaintiff's wife, who carried on a trade therein, and it was admitted that, the husband being generally absent, she carried on the business by his authority, and attended to all the receipts and payments relating thereto, it was held that a statement made by her to the landlord, that she would pay the rent of the shop, admitting its amount, on a future day, was not evidence against the

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venience of both parties, and seems to be considered an implied agency. If the defendant made this payment in the usual way, it seems proper to consider it as a payment to the husband on a presumed agency, with which, in their common concerns, every wife is presumed vested. Spencer v. Tisue, Addis. Rep. 316, 319. See the text and notes, *post*, on the admissions of an agent generally.

(1) Gregory v. Parker, 1 Campb. 394; Palethorp v. Furnish, 2 Esp. 511, n.; Anderson v. Saunderson, Holt N. P. C. 591; S. C., 2 Stark. R. 204. And see 15 Ves. 159.

(2) Carey v. Adkins, 4 Campb. 94.

(3) See *post*.

(4) 4 M. & G. 435; *Ante*, p. 78, 79.

(5) Meredith v. Footmer, 11 M. & W. 202.

husband of the terms of the tenancy, the wife not being shown to be the agent of her husband with respect to the payment of rent.

In an action for goods sold,(1) in order to show that the defendant was not liable, a witness cannot be asked whether the plaintiff's wife had said anything to him as to the person whom her husband had trusted for the goods, and to whom he looked for payment.

There are also several exceptions to the general rule upon this subject, where, from the nature of the inquiry, the information to be expected is peculiarly within the knowledge of the husband or wife, and where to exclude such evidence would occasion insecurity to that relation of society, which it is the object of the rule to protect.

In cases of personal injuries.

In all cases of personal injuries committed by the husband or wife against each other, the injured party is an admissible witness against the other.(2) The evidence is admissible in such cases upon the principle of necessity; not a general necessity, as where no other witness could be had, but a particular necessity, as where, for instance, the injured party might be otherwise exposed without remedy to personal injury.(3)

Thus a wife may be a witness on the prosecution of her husband for aiding in a rape committed on her person by another man;(4) or upon a charge against her husband for committing an unnatural offence upon her.(5) And on a prosecution against a man for beating his wife, she is allowed to give evidence.(6)

On the trial of an indictment against a man for shooting at his wife,(7) the evidence of the wife was ruled by Garrow, B., after consulting with Holroyd, J., to be admissible against the husband; but Holroyd, J. thought that the wife could only be permitted to prove such facts as could not be proved by any other witness.

Although the wife is admissible in all such cases, she is not an indispensable witness.(8)

A wife is permitted to exhibit articles of the peace against her husband:(9) and the court will not receive affidavits on the part of the defendant, to contradict the truth of the articles exhibited against him, and pre-

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(1) Duckworth v. Johnson, 1 C. & Kir. 584. See further as to cases where the declarations of the wife are admissible on behalf of the husband as being part of the *res gestæ*, *post.*

(2) R. v. Jagger, 1 East P. C. 455, by Buller, J. See also by Hullock, B., in Wakefield's Case, Murray, 257.

(3) By Lord Mansfield, C. J., in Bentley v. Cooke, 3 Doug. 424.

(4) Lord Audley's Case, 3 How. St. Tr. 413. See also Hutton, 116; 1 Hale P. C. 301; Rep. temp. Hardw. 83; B. N. P. 287.

(5) R. v. Jellyman, 8 C. & P. 604.

(6) R. v. Azire, 1 Str. 633; B. N. P. 287; R. v. Jagger, 1 East P. C. 454.

(7) Whitehouse's Case, 2 Russ. C. & M. 984, (3d ed.) See also R. v. Jagger, *ut supra.*

(8) R. v. Pearce, 9 C. & P. 667.

(9) B. N. P. 287.

vent his giving surety.(1) So an affidavit of a married woman has been admitted to be read, on an application to the Court of King's Bench for an information against her husband, for an attempt to take her away by force after articles of separation :(2) and it would be strange, said Buller, J., to permit her to be a witness to ground a prosecution, and not afterwards to be a witness at the trial.(3)

On the trial of a man for the murder of his wife, her dying declarations are evidence against him.(4)

Special cases.

By the Bankrupt Act,(5) commissioners in bankruptcy are empowered to examine the wife of the bankrupt for the discovery of his estate. A similar power had been given by the 21 Jac. I, c. 19. Before that statute, the commissioners could not examine the bankrupt's wife.(6)

Upon an appeal against an order of bastardy,(7) in the case of a married woman, Lord Hardwicke and the other judges held that she was a competent witness to prove her criminal connection with the appellant, though her husband was interested both in the question and in the event of the appeal; because such a fact, so secret in its nature, can scarce ever be proved by other evidence. And by a parity of reason, Lord Ellenborough, C. J., said,(8) if she be admitted, as a witness of necessity, to speak to the fact of the adulterous intercourse, it might also perhaps be competent for her to prove that the adulterer alone had that sort of intercourse with her

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(1) Lord Vane's Case, 2 Str. 1202, more fully stated from Ford's MS. in 13 East, 171, n. *a*; S. P., R. v. Doherty, Ib.

(2) Lady Lawley's Case, B. N. P. 286; Mary Mead's Case, 1 Burr. 543.

(3) B. N. P. 287.

(4) Woodcock's Case, 1 Leach Cr. C. 500; John's Case, 1 East P. C. 357.

(5) 6 Geo. IV., c. 16, § 37. See also 8 & 9 Vict. c. 48, § 1.

(6) Anon., 1 Brownl. 47.

(7) R. v. Reading, Rep. temp. Hardw. 82; R. v. Bedell, Andr. 8; Gilb. Ev. 139; Cope v. Cope, 1 Mo. & Rob. 273, n.

(8) In R. v. Luffe, 8 East, 203.

NOTE 47.—On similar principles, upon the trial of an indictment for fornication and bastardy with a married woman, she was held competent to prove the criminal connection. Commonwealth v. Wentz, 1 Ashm. Rep. 269, and the cases cited *infra* from Browne and Binney. But not to prove the non-access of her husband. Commonwealth v. Miller, cited 1 Browne, App. lii; Commonwealth v. Stricker, 1 Browne, App. xlvii; Commonwealth v. Connelly, 1 Browne, 284; Commonwealth v. Shepherd, 6 Bin. 283; The King v. M'Lean, cited 6 Bin. 290. But if the court permit her to be asked a question, from the answer to which non-access may be inferred, as "how long it was since she last saw her husband," and afterwards direct the jury that they are not to consider anything which fell from her as evidence of non-access, and there is strong evidence of non-access from other witnesses, the verdict will not be disturbed. Commonwealth v. Shepherd, 6 Bin. 283. (The mother, in such cases, cannot testify to the absence, non-access of the husband, nor to any other fact capable of proof by other evidence. The People v. Ontario, 15 Barb. 286; Parker v. Way, 15 N. Hamp. 45. There is, as we have seen, a presumption in favor of a child born during lawful wedlock, that it is legitimate. Wright v. Hicks, 12 Geo. 155. See also Chapel v. White, 3 Cush. 537; and Moody v. Goode, 10 Ired. 49; and The State v. Wilson, Id. 131, 350.)

by which a child might be produced within the limits of time which nature allows for parturition.

On an appeal against the removal of a woman, as the widow of A. B., deceased, *prima facie* evidence of the marriage having been produced on the part of the respondents, the Court of King's Bench determined, that the woman was a competent witness, on the part of the appellants, to disprove the marriage.(1)

It may be remarked here, that in proceedings before justices under the Vagrant Act,(2) against a husband for neglecting to support, or deserting his wife and family, it is believed to be the universal practice, as also at sessions in the case of an appeal, to admit the wife as a witness. This practice is presumed to have arisen from the necessity of the case, for although instances frequently may and must arise where all the facts necessary to insure a conviction might be proved by other witnesses, yet it must often happen that some of the circumstances, such as the husband's ability to support his family, or the act of desertion, could be proved only by the wife.

On an indictment for a second marriage during the continuance of a former marriage, though the woman first married by him cannot be a witness,(3) yet, after proof of the first marriage, the second woman he married may be a witness,(4) not being legally the wife of the prisoner. After such proof, she would be competent to give evidence for as well as against the prisoner.(5)

Upon the same principle, on a prosecution for forcible abduction and marriage of a woman, she is a competent witness against(6) or for the prisoner;(7) as she is not legally his wife.(6) And the better opinion seems to be, that the rule is the same, though the woman afterwards voluntarily cohabits with the prisoner.(8)

The exception as to the admissibility of the wife is confined to cases of

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(1) R. v. Bramley, 6 T. R. 330; S. P., R. v. St. Peter's, Burr. Sett. Cas. 25.

(2) 5 Geo. IV., c. 83. See sect. 3 and 4.

(3) Mary Grigg's Case, Sir T. Raym. 1; Hawk. b. 2, c. 46, § 71.

(4) 1 Hale P. C. 393; B. N. P. 287; 1 East P. C. 469.

(5) See 1 Ry. & Mo. 354.

In prosecutions for bigamy, the marriage must be alleged and proved distinctly (The State v. Bray, 13 Ired. 298; The People v. Humphrey, 7 John. R. 314); and it is necessary to allege directly the time and place of the first marriage. The State v. La Bore, 26 Vt. (3 Deane), 765. The confessions of the defendant and proof of cohabitation and reputation are not enough to establish the fact of marriage on an indictment for bigamy. Gahagan v. The People, 1 Parker C. R. 378. Where one of the parties are under the age of consent at the time of the marriage, and the marriage is not confirmed by cohabitation after coming to full age, neither of them is liable in Ohio to prosecution for bigamy. Shafher v. The State, 20 Ohio 1.

(6) Gilb. Ev. 120; 1 Hale P. C. 301; 2 Hawk. P. C. c. 46, § 78; B. N. P. 286.

(7) R. v. Perry, cited by Abbott, C. J., in R. v. Serjeant, Ry. & Mo. 354.

(8) By Hullock, B., in Wakefield's Case, Murray, 257; S. C., 2 Lewin, 1, 279. See also 4 Bl. Com. 209; 1 East P. C. c. 11, § 5; Hawk. P. C. c. 41, § 13; Swinden's Case, 4 How. St. Tr. 575. *Contra*, 1 Hale P. C. 302; Respublica v. Hevice, 2 Yeates, 114.

personal injuries effected by violence or coercion. Therefore, upon an indictment for a conspiracy in procuring a young female who was a ward in chancery, to marry, she is not admissible either for or against the husband.(1)

The restrictions upon the admissibility of the evidence of parties to the suit and of their wives, which it has been seen are relaxed in the case of defendants in equity, have been entirely removed by the recent statute establishing the courts for the recovery of small debts,(2) with regard to all actions brought in those courts; the 83d section of that statute enacting, that "on the hearing or trial of any action, or on any other proceeding under this act, the *parties* thereto, their *wives* and all other persons, may be examined either on behalf of the plaintiff or defendant."(3)

CHAPTER V.

OF THE TIME OF OBJECTING TO THE ADMISSIBILITY OF A WITNESS.

It remains now to consider what is the regular time for making an objection to the admissibility of a witness; for though the grounds of incompetency have been very much reduced in number by the operation of Lord Denman's Act, still the mode of making the objection in cases which may occur, remains the same.

Before proceeding to the cases on this subject, it may be convenient first to notice one in which the objection to the admissibility of a witness is of a merely technical nature. An objection to a witness, on the ground of his misdescription in the list of witnesses, which is required previously to a trial for high treason, must be taken in the first instance; and it is too late to take such objection after the witness has been examined in chief.(4) This is an objection merely formal and technical, and should be taken, if at all, at the strictly regular time.

Witness to be examined on *voir dire* before he is sworn.

The strict and regular method of raising an objection to the competency of a witness, is by examining him on the *voir dire*;(5) that is, he should be sworn to answer all such questions as the court shall demand of him,(6) the inquiry as to the competency of a witness being conducted, as has

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(1) R. v. Locker, 5 Esp. 107; R. v. Serjeant, Ry. & Mo. 354.

(2) 9 & 10 Vict. c. 95.

(3) See also 11 & 12 Vict. c. 43, § 15, *supra*, as to the admissibility of complainants before justices. See also, introductory chapter.

(4) R. v. Watson, 2 Stark. R. 158; S. C., 32 How. St. Tr. See R. v. Frost, 9 C. & P. 165, 183.

(5) *Veritatem dicere: Vrai dire.*

(6) See by Rolfe, B., 11 M. & W. 689.

already been shown,(1) by the judge, and what the witness states on such examination not being evidence in the cause to be laid before the jury. And in strictness, also, this examination, being of a preliminary nature, ought to be taken before the witness is examined, or even sworn in chief. And this was the rule formerly.(2)

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(1) *Supra*, p. 3.

(2) See 1 T. R. 717. See also Dewdney v. Palmer, 4 M. & W. 664.

The party intending to object to the competency of a witness may either introduce proof showing that he is incompetent, or have him sworn upon the *voir dire*, and take his evidence in relation to the question of competency. And it rests upon the party objecting to prove the incompetency of the witness (The State v. Holloway, 8 Blackf. 45); and he must point out to the court the ground of his incompetency. White Water Valley Canal Co. v. Dow, 1 Smith, 62; Leach v. Kelsey, 7 Barb. 466.

If the party objecting to the competency of a witness chooses to have him sworn on the *voir dire*, and examines him, he cannot afterwards introduce other evidence to establish his incompetency; so held where the witness was objected to on the ground of interest. Le Barron v. Redman, 30 Maine (17 Shep.), 536; Stewart v. Lake, 33 Maine R. 87; Gordon v. Bowen, 16 Penn. State R. 226. Knowing that the witness is incompetent, the party entitled to object must do so promptly. Bangher v. Duphern, 9 Gill, 314. If it appear that the party entitled to make the objection knew or ought to have known that the witness was incompetent, and he cross-examines the witness before raising the objection, this will be deemed a waiver of the incompetency. Liston v. Hardy, 7 Eng. Law & Eq. R. 204. But when he does not know, and has no means of knowing or supposing the witness to be incompetent, he may take the objection and have the testimony stricken out, if it appear at any time during the examination of the witness that he is incompetent. Jacobs v. Layborn, 11 Mees. & Welsb. 685.

Having reason to believe the witness incompetent, the regular course is to take the objection at he earliest opportunity; and though the objection may in other cases be made at any time, as soon as the incompetency appears on the examination, the party against whom the witness is called has the right to require him to be sworn on his *voir dire*, preliminary to the general oath. Seeley v. Engell, 3 Kernan R. 542. And notwithstanding the objection to the competency of the witness is made and overruled before he is sworn in chief, his testimony will be excluded or stricken from the case, if it appear on his cross-examination that he is incompetent. Lester v. McDowell, 18 Penn. State R. 91. *Contra*, Dewdney v. Palmer, 4 M. & W. 664, since overruled. And it appears to be now held in England that the incompetency may be shown by examination of the witness in the first instance, or by other and independent evidence, or in both of these ways. 11 M. & W. 692.

There are many cases of incompetency under the common-law rules of evidence in which the witness may be rendered competent; as where his incompetency arises out of his interest in the event of the suit, which may be released. In these cases, if the objection be not made in time, it is deemed to have been waived. Combs v. Bateman, 10 Barb. 573.

When one party attempts to prove the execution of a contract, without calling the attesting witness, the opposite party must object to the competency of the proof at the first opportunity. If the contract be proved on a commission, no objection being made, it is too late to make the objection at the trial. Ward v. Whitney, 3 Sand. R. 403. If the testimony of a co-defendant is offered on behalf of the other defendant, he should be sworn; because the relevancy or competency of the evidence proposed to be given by him must be determined when it is offered. So held under the Code of 1851, in Eno v. Del Vecchio and Snyder, 4 Duer R. 53. Each defendant is a competent witness for his co-defendant, in an action of *tort*, under section 397, as amended in that year. Beal v. Finch, 1 Kernan R. 128. And under the Code of New York as amended in 1857, the parties to the action are competent witnesses.

Where a release is handed to the witness, and he is permitted to testify without objection to its sufficiency, the opposite party is presumed to have waived any objection founded on the insufficiency of the release. Bullen v. Arnold, 31 Maine R. 583. If interested in the *event* of

But this strict and ancient practice has been much modified; as appears by authorities which can be traced back in our Law Reports beyond the last century. There is no doubt but that so far back as that period our ablest judges have allowed such objections to be freely taken after the witness has been sworn, and after his examination in chief, in cases where the adverse party was not previously aware of the incompetency of the witness. And in such cases, if this course were not permitted, it is obvious that the rules as to the incompetency of witnesses might be entirely evaded; as it might turn out upon the cross-examination of a witness, that he was in truth the party to the cause, or, in the words of Lord Denman's Act, the person in whose immediate and individual behalf the action was brought or defended.

The practice, therefore, may now be considered as fully established (notwithstanding what has been said by a high authority as to its irregularity),(1) that the objection to the competency of a witness may be raised after the witness has been examined in chief;(2) and this appears always to have been the rule in equity,(3) where there is no examination upon the *voir dire*.(4)

Formal examination on *voir dire* not necessary.

And although the examination of the witness in the cause may be stopped at any time, in order that he may be sworn upon the *voir dire* and examined by the judge as to his competency;(5) yet this formal proceeding is not necessary, and if it should appear, while the witness is still under examination, that he is incompetent, the objection may be taken, and the judge will strike out his evidence from his notes.(6)

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the suit, he is incompetent to testify even in respect to a fact which does not affect his interest Gerrish v. Cummings, 4 Cush. 391.

(1) See by Parke, B., 10 M. & W. 145.

(2) Needham v. Smith, A. D. 1704; by Lord Keeper King, assisted by Holt, C. J., and Powell, J.; Lord Lovat's Case, 18 How. St. Tr. 596; Jacobs v. Layborn, 11 M. & W. 685.

(3) Needham v. Smith, *ut supra;* Vaughan v. Worrall, 2 Madd. 322; Selway v. Chappell, 12 Sim. 113.

(4) By Lord Abinger, C. B., 11 M. & W. 691.

(5) By Rolfe, B., 11 M. & W. 688.

(6) Turner v. Pearte, 1 T. R. 720; Stone v. Blackburne, 1 Esp. 37; Howell v. Lock, 2 Campb. 14. And see by Lord Abinger, C. B., 11 M. & W. 690.

NOTE 48.—(The decisions in respect to the mode of proving the incompetency of the witness, on the ground of interest, remain valuable illustrations of the doctrine stated in the text.)

Fisher v. Willard, 13 Mass. Rep. 379, 381; Bank of North America v. Wickoff, 2 Yeates, 39; Evans v. Eaton, 1 Pet. C. C. Rep. 322. Objections to the competency of a witness, whose deposition is taken under the 30th section of the United States Judiciary Act, should be made at the time of taking the deposition, if the party attend and cross-examine, and the facts constituting the incompetency be known to him at the time of the examination, in order that the objections may be removed by release or otherwise; and if not then made, the party will be presumed to have intended to waive them. But if the facts were then unknown to him, the objection may be made at the time of reading the deposition. United States v. One case of hair pencils, 1 Paine's Rep. 400. But in Massachusetts the objection need not be taken till the trial in any

case. Talbot v. Clark, 8 Pick. 51. Ordinarily, at whatever stage of the cause the witness is discovered to be interested, in law or equity, his testimony must be rejected (Swift v. Dean 6 John. Rep. 523; Fisher v. Willard, 13 Mass. Rep. 379); and the admissibility of evidence, if not objected to, at the trial, cannot be questioned on a motion for a new trial. Jackson ex dem. Dox v. Jackson, 5 Cowen's Rep. 173. Otherwise, if the incompetency of the witness was not known at the trial. Niles v. Brackett, 15 Mass. Rep. 378.

It is a good test of competency, where the witness is examined as to interest, in any stage of the cause, to suppose him examined on his *voir dire*, and see how the matter would then stand, This examination on the *voir dire* is a mode often omitted, yet well to adhere to. Thus, in trover against a servant, the defence was, that he got the article of the plaintiff for his master, to be returned if not approved, or otherwise, purchased and paid for. On the master being introduced for the defence, to prove the authority, and that he had kept it, the objection was made by the plaintiff, that he was interested, as the verdict might subject him to claim over by his servant. He was admitted, and proved the authority, and keeping of the article by himself, though it was never purchased. Parke, J., suggests that the whole was to be taken as if the witness had deposed on his *voir dire;* in which view his interest would appear to be balanced, *i. e.*, if the servant was subjected, he might be liable over on the ground of a supposed fraud in the message, or if the defence succeeded, then he would be liable to the plaintiff. Grylls v. Davies, 2 Barnw. & Adolph. 129.

The objection on account of interest in chancery, should be made as soon as the interest is discovered. If known while before the examiner, it should be made there; if not appearing there by pleadings, testimony, or otherwise, it may be made whenever it shall appear, or be first known. Rogers v. Dibble, 3 Paige, 238. If not made the first opportunity, it is waived; for the party should have a chance to release or otherwise avoid the objection. Id. The objection may be made at the commencement of the examination, and afterwards established by other evidence. Id. A cross-examination does not waive the objection, where it is made as soon as the interest is discovered, though such cross-examination be had after the examiner overrules the objection, or reserves the question, or the party calling the witness insists on proceeding against the decision of the examiner. Id. A motion may still be made to suppress the deposition, or the testimony may be objected to at the hearing. Id. And see Harrison v. Courtauld, Russ. & Mylne, 428; and Swift v. Dean, cited *supra.*

Where the interest of the witness is releaseable, and the party knowing of his interest, raises no objection till the proofs are closed, it is then too late to object. Town v. Needham, 3 Paige, 552.

In Vermont, it was held that an objection before auditors against the bail being a witness, which was a fact appearing upon the record of the court, though it was not verified any way to the auditors, was well made; and on the coming in of the report, this should have been rejected by the court for that reason. The witness on his *voir dire* had forgotten it. M'Connell v. Pike, 3 Verm. Rep. 505.

A witness is said to be examined on a *voir dire* when he is sworn and examined, whether he be not a party interested in the cause, as well as the person for whom he is a witness. Termes de la ley, 581.

Smallwood v. Mitchell, 2 Hayw. 145; Davis v. Whiteside's Adm'r, 4 J. J. Marsh. 116, 117; Cotchet v. Dixon, 4 M'Cord, 311; Stebbins v. Sackett, 5 Conn. Rep. 258; Rogers v. Dibble, 3 Paige, 238; Chance v. Hine, 6 Conn. Rep. 231; Jones v. Tevis, 4 Litt. 25, 28.

It may be proper to observe here, that what a witness who is called shall have been heard to say, shall not be received to show his interest; for it is mere hearsay. Commonwealth v. Waite, 5 Mass. Rep. 261: Pierce v. Chase, 8 Mass. Rep. 487; Vining's Lessee v. Wooten, 1 Cooke, 127; Jones v. Tevis, 4 Litt. 25, 28; Pollock's Lessee v. Gillespie, 2 Yeates, 129; Cotchet v. Dixon, 4 M'Cord, 311; Stimmel v. Underwood, 3 Gill & John. 282; Freeman v. Luckett, 2 J. J. Marsh. 390; Davis v. Whiteside's Adm'r, 4 J. J. Marsh. 116. *Contra*, Dennis v. Jones, 1 Coxe's Rep. 46. And see Patten v. Halsted, Id. 277. But what the party who offers the witness said, may be received. Pierce v. Chase, 8 Mass. Rep. 487. And see 5 Id. 261. But where the defendant, having objected to the competency of the plaintiff's attorney called as a witness, in order to show his interest, offered to prove by a person that he called on the plaintiff and told him that he was authorized by the defendant to ascertain on what terms he, the plaintiff, would settle the suit;

and that the plaintiff referred him to the attorney, saying that he owned a part of the demand against the defendant, which was a promissory note; held, that this statement of the plaintiff, being made during a negotiation for a settlement, was not admissible in evidence, even to show the interest of the witness. Williams v. Thorp, 8 Cowen's Rep. 201. *Quere.* See *ante*, as to confessions made during a negotiation to compromise.

Most of the American cases have strictly followed the old English rule laid down in the text, (former edition), that where you resort to the *voir dire* you are concluded; and if you fail to show incompetency in this mood, you cannot do it by other evidence of any kind in the course of the same trial. Mifflin v. Bingham, 1 Dall. 272, 275, per M'Kean, C. J.; Welden v. Buck, Anth. N. P. Rep. 9, 10; Stebbins v. Sackett, 5 Conn. Rep. 258, 261, per Hosmer, C. J.; Butler v. Butler, 3 Day, 214, 218; Chance v. Hine, 6 Conn. Rep. 231, 232, per Lanman, J.. So if you inquire of the witness as to his interest, on his general oath, this is equivalent to an inquiry upon the *voir dire*, and equally prevents a resort to any other mode. Butler v. Butler, 3 Day, 214, 218. But this was denied in Mifflin v. Bingham (*supra*), where it is said, though you cross-examine the witness thus to show his interest, and fail, you may yet show it otherwise. And it was said in Stebbins v. Sackett (*supra*), that if you inquire on the *voir dire* of one set of facts, and fail on these to establish incompetency, you may still go to other evidence in order to show incompetency from another state of facts. See this case *infra*, stated more at large.

The cases are still more strongly and directly to the point, that after you have attempted to show incompetency by evidence derived from any other source than the witness, you shall not afterwards put him on his *voir dire*. Bridge v. Wellington, 1 Mass. Rep. 219, 221, 222; Mifflin v. Bingham, 1 Dall. 272, 275, per M'Kean, C. J.; Stebbins v. Sackett, 5 Conn. Rep. 258, 261. Nor can you cross-examine him to the point of interest when he comes to be sworn in chief, in consequence of your failure in your first attempt to prove him incompetent by testimony other than his own. Chance v. Hine, 6 Conn. Rep. 231. And it was held he could not be cross-examined under such circumstances, even to impeach his credibility. Id.

But where you have failed in your attempt by other testimony to show one set of facts upon which you rely for incompetency, you may still show his interest on another set of facts, even on his *voir dire*. Thus, where it appeared by the plaintiffs' general evidence that the witness was interested to testify in favor of the plaintiffs, the witness having indorsed the note in question after the defendant, the plaintiffs released the witness. The defendant then insisted, that the witness was interested, as having made a general assignment of the note in question to the plaintiffs, with all his other property, to pay his creditors, so that this note, if recovered, would go to increase the fund for payment; and if the suit should fail, the fund would be diminished—an interest not touched by the release. And to prove the assignment, the defendant offered to have the witness sworn on his *voir dire*. Held admissible. Stebbins v. Sackett, 5 Conn. Rep. 258, 261.

It was held in Bridge v. Wellington (1 Mass. Rep. 219, 222), that where a party offers a witness against you, and you object upon the party's own evidence that the witness is interested, and your objection is overruled, this is not such an attempt to prove the interest by evidence *aliunde* as comes within the rule precluding a resort to the *voir dire*.

The defendant objected to the competency of a witness offered by the plaintiff, on the ground that it appeared from the testimony already given in the case, that the witness was interested. The judge permitted the witness to be sworn, reserving the question of his competency. Held, that the question should have been decided when the objection was made; but having reserved the question, the judge could not, in deciding afterwards on the competency of the witness, take into consideration his testimony, given while the question remained undetermined; but that the decision must be made on the other facts of the case, without regarding such testimony. Mott v. Hicks, 1 Cowen's Rep. 513.

Evans v. Eaton, 1 Peters' C. C. Rep. 322. A question arose in this cause whether, when a witness is sworn on his *voir dire*, any other evidence could be given to prove his interest, except such as might arise from his own testimony. The court decided it could not; but said, if it should appear in any subsequent stage of the examination, by other evidence, that he was not a competent witness, the court would set him aside. A witness on her *voir dire*, states that she was the wife of the party; *semble*, she may restore her competency by stating that she had been divorced *a vinculo*, though it was objected that the record should have been produced. Wells

If, however, the objection has not been raised before the witness has left the box, he cannot be recalled for the purpose of examining him as to his competency.(1)

The result appears to be, that in ordinary cases, that is, where the incompetency of a witness is unknown to the adverse party, the objection need not be raised by an examination on the *voir dire*, either preliminarily to his examination in chief, or after such examination has commenced or concluded; but it will be sufficient to raise the objection as soon as the party becomes aware of it, provided it be done before the witness leaves the box. But after he has left the box, he cannot be recalled for the purpose of starting the objection.

It has been thought, however, that where, from the commencement of an examination in chief, the opposing counsel knows of a witness's incompetency, he ought not to be allowed to lie by and take the chance of the evidence being in his favor, and when he finds it to be unfavorable to him, then to take the objection.(2) Lord Abinger, C. B., referring to this opinion, thought differently, observing, that a counsel who knows of an objection to the competency may very fairly say, "I will lie by, and see whether he will speak the truth; if he does not, I will exclude his evidence." But this reasoning seems not quite satisfactory: and, on further consideration, it may perhaps be thought, that with a view to fair practice, and for the ends of justice, the safest and least inconvenient course would

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v. Fletcher, 5 Carr. & Payne, 12. Though the witness on his *voir dire*, being offered for the defendant, answered that he was not liable to pay the costs of defence, the plaintiff's counsel was allowed to show him a letter of his own, to the defendant's wife, and then repeat the question. Homan v. Thompson, 6 Carr. & Payne, 614. The court said, that after an examination on the *voir dire*, other evidence to show interest could not be produced. But yet, if it come out in the course of the witness's examination in chief, that he is interested, he may be rejected. Davis v. Barr, 9 Serg. & Rawle, 138. Said, you may offer direct proof of interest after failing to show it by the *voir dire*. Hamblett v. Hamblett, 6 N. Hamp. Rep. 351. In an action by the indorsee against the indorser of a note, the maker, on his *voir dire*, expressed his doubts whether he was interested, stating his interest to depend on the question whether a demand he had against the defendant, was barred by the Statute of Limitations, in case he should be sued by the defendant on a recovery against him, in the pending cause. Held a competent witness for the defendant, this not being either a declaration that he was interested, or that he believed himself to be so. Bank of Columbia v. Magruder, 6 Harr. & John. 172; Galbraith v. Galbraith, 6 Watts, 112, 122, S. P. It was said, the judge may, in his discretion, allow a resort to the *voir dire*, after other modes of impeaching the witness have failed of effect, though it is doubtful whether he is bound to allow it. Butler v. Tufts, 1 Shepl. 302. On the *voir dire*, a witness may be required to verify his signature to an instrument, which may then be read in proof of his interest. Hamblett v. Hamblett, 6 N. Hamp. Rep. 333, 351.

He may be examined respecting contracts, records or documents. Miller v. Mariner's Church, 7 Greenl. 51, 62; Hays v. Richardson, 1 Gill & John. 366. And see Seewell v. Stubbs, 1 Carr. & Payne, 73, and the note to this case. See also Herndon v. Givens, 16 Ala. R. 672.

(1) Beeching v. Gower, Holt N. P. C. 314; Dewdney v. Palmer, 4 M. & W. 667. In the first-mentioned case the judge had recalled the witness, for the purpose of asking him a question connected with the cause; but he would not permit him to be re-examined as to his competency.

(2) By Parke, B., in Jacobs v. Layborn, 11 M. & W. 685. See also Hartshorne v. Watson, 5 N. C. 477.

be, to require the counsel, if he knows, or has reason to suspect, the incompetency of a witness, before the examination in chief commences, to make inquiry on that point in the first instance.

If the proposed witness should be the party substantially interested in the suit, or, in the words of Lord Denman's Act, the party in whose immediate and individual behalf the action is brought or defended, and the adverse party should know that such a person (who is in reality his adversary in the suit) is about to be called as a witness against him, he may, if he thinks fit, openly waive the objection and allow the examination to proceed. But if he allow him to be sworn and give evidence without raising the objection, it seems reasonable that he should be deemed equally to have waived his power of objecting.

The objection to a witness's competency may be supported either by the examination of the witness, or by independent evidence. It was at one time thought that a party could not resort to both these methods;(1) but there appears to be no good reason for this restriction, and the rule is now otherwise.(2)

Where the incompetency of the witness would appear from some written instrument which is not produced, he may be examined as to the contents of it. The general rule, which requires the production of the instrument itself, or that a notice to produce it should be given before a witness can be examined as to its contents,(3) does not apply to such a case; for the objecting party may be ignorant of its existence before the examination of the witness, and he cannot be supposed to know that this particular witness would be called on the other side. If, however, the witness himself produces the instrument, it ought, of course, to be read as the best proof of the witness's situation.(4) And if the instrument is in court, the opposite counsel is entitled to have it produced, and to make any objection that may exist as to its admissibility for want of sufficient stamp.(5)

When the objection arises from a witness's examination or from independent evidence, it may be removed by a further examination of the witness.(6) Thus, in an action brought by a chartered company,(7) where a witness for the plaintiff admitted, on the *voir dire*, that he had been a freeman of the company, but added that he was then disfranchised, Lord

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(1) See 10 Mod. 151; Ambl. 593; Ca. temp. Hardw. 358.

(2) See the opinion of Lord Abinger, C. B., 11 M. & W. 692, and Lord Hardwicke's in Lord Lovat's Case, *supra*, p. 99.

(3) *Post*, Chap. *On the Exclusion of Secondary Evidence.*

(4) Butler v. Carver, 2 Stark. R. 434. See also Godmanchester (Bailiffs, &c.) v. Phillips, 4 A. & E. 550; Lucas v. Eades, 1 Dowl. (N. S.) 424.

(5) Quarterman v. Cox, 8 C. & P. 97.

(6) See Brookbank v. Anderson, 7 M. & G. 295, 313.

(7) Butchers' Company v. Jones, 1 Esp. 162. See also Botham v. Swingler, Peake N. P. C. 214; S. C., 1 Esp. 164. Another example may be seen in R. v. Gisburn, 15 East, 57.

Kenyon ruled, that it was not necessary to prove the disfranchisement by the regular entry in the company's books, and that the witness was competent. So, in an action by an administrator,(1) where a witness called for the plaintiff admitted that he was next of kin, and was objected to on this ground, but answered, on re-examination, that he had released all his interest, this was held by Lord Ellenborough to remove the objection.

Where a party calling a witness, who has been objected to, attempts to remove the objection, not by a further examination of the witness, but by other independent proof, he will be subject to all the ordinary rules of evidence, and the best proof will be required according to the nature of the case.(2)

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(1) Ingram v. Dade, Lond. Sitt. after Mich. T. 1817; S. C., 1 C. & P. 235, n. See also Wandless v. Cawthorne, Mo. & Ma. 321, n.; Carlisle v. Eady, 1 C. & P. 234; and Lunnis v. Rose, 10 A. & E. 606.

(2) Corking v. Jarrard, 1 Campb. 37.

(In Pennsylvania, a witness is not allowed to remove an appearance of interest, shown by other evidence, by his own testimony. Anderson v. Young, 21 Penn. 443; Banks v. Clegg, 14 Penn. State R. 390. And if it appear from his testimony on the *voir dire* that he is incompetent, and he be allowed to testify notwithstanding, his examination in chief cannot be looked into to cure the error. Lay v. Lawson, 23 Ala. 377. The incompetency of a witness on the ground of interest may be waived; and where a witness incompetent on the ground of interest, is sworn in chief, and examined in relation to the interest of another witness merely, the opposite party has a right to examine the witness so sworn on the merits of the case: the party calling him thereby waives the objection grounded on his interest. Linsley v. Lovely, 26 Vt. 123; Kelly v. Brooks, 25 Ala. 523. And such a waiver cannot be recalled. Chateau v. Thompson, 3 Ohio, (N. S.) 424.

If the witness answers on his *voir dire* that he is interested in the event of the suit, this is *prima facie* sufficient to exclude him; but the party calling him may follow up the examination and show by him that he is not in fact interested. Blackstock v. Leidy, 19 Penn. (7 Harris) 335; Tarleton v. Johnson, 25 Ala. 300.)

NOTE 49.—In an action by the assignees, the bankrupt was called for them, and stated that he had obtained his certificate, but did not produce it. His release was in court. Held, that both must be produced, or their absence accounted for; that it was not like the case of an objection raised by secondary evidence on the *voir dire*, which may be removed by it. Goodhay v. Henry, 1 Mood. & Malk. 319, 320; Wandless v. Cawthorne, Id. 321, note, S. P.; Anonymous, Id., S. P.; and see Jackson ex dem. Montressor v. Rice, 3 Wend. 180. And so in all cases where the incompetency of the witness appears not on the *voir dire*, but *aliunde*, as if it be shown from the face of a paper produced in the cause, the witness cannot himself be examined to remove it. Evans v. Gray, 1 Mart. Lou. Rep. (N. S.) 709; Mott v. Hicks, 1 Cow. Rep. 513. But a witness examined in chief, stating facts which create an interest, and following this with facts which do it away, is competent. McMicken v. Fair, 6 Mart. Lou. Rep. (N. S.) 515.

We stated *ante*, some cases as to the manner, other than by the *voir dire*, of proving the discharge of a witness's interest when it appears that he is incompetent. The amount of those cases seems to be, that if his interest appear otherwise than by his own examination, he himself is incompetent to testify to the facts by which it was removed. And so is the case of Fay v. Green, 1 Aik. Verm. R. 71. Otherwise, if the objection arise out of his own examination, though in chief.

In Bean's Ex'r v. Jenkins' Ex'r (1 Harr. & John. (Maryland,) 135), both the declarations of the party offering the witness, and the out-door declarations of the witness himself, were received to prove his incompetency. That the former were correctly, and the latter improperly received, by many books, and even on the later Maryland cases, see per Skinner, Chancellor, in Nichols v. Holgate, 2 Aik. 138, 140; Doe ex dem. Ingram v. Watkins, 1 Dev. & Batt. 442, 445. Two per-

CHAPTER VI.

OF THE COMPETENCY OF ACCOMPLICES, INFORMERS AND SELF-DISCREDITING WITNESSES.

In connection with the question of incapacity of persons to give evidence, may be considered another class of persons, whose testimony, although by law admissible, is still regarded with some suspicion, and generally requires more or less confirmation.

SECTION I.

Of the Competency of Accomplices.

Before the passing of Lord Denman's Act, a person who had been convicted of any infamous crime could not be received as a witness: but even then a witness was not incompetent from infamy of character, unless a conviction and judgment were proved against him;(1) not even though he might admit himself to have been convicted.(2) And it was also a settled rule of evidence, that a witness in a criminal prosecution was not incompetent on the ground that he had been an accomplice with the prisoner at the bar in the particular crime which was the subject of the indictment.

With respect to any objection that might be made against the reception of the evidence of accomplices, on the ground of the admitted infamy of their character, there appears to be no distinction between an accomplice, who acknowledges that he has participated in the commission of the crime with which the prisoner at the bar stands charged, and any other witness, who admits that he has been guilty of a similar crime on a different occasion. But the testimony of an accomplice is usually given under an

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sons being offered as witnesses for the plaintiff were objected to, and a witness for the defendant stated he heard the plaintiff say he was not to pay the costs of this suit if he lost it, as he had somebody between him and danger, which the witness *understood* to mean the two witnesses offered. This was held insufficient to establish their incompetency by reason of liability for costs. High v. Stainback, 1 Stew. Rep. 24.

Semb. Though the judge should receive the declarations of the witness as to interest in presence of the jury, it would not be cause for a new trial, if he receive the witness as competent, and submit his credit to the jury. Ackley v. Kellogg, 8 Cowen, 223.

(1) R. v. Castle Careinion, 8 East, 78.

(2) Ib.; R. v. Teal, 11 East, 309; Rands v. Thomas, 5 M. & S. 244.

The English statute declares that no person offered as a witness shall hereafter be excluded by reason of incapacity from *crime* or interest. 6 & 7 Vict. c. 85. Our statute, on the other hand, declares that no person offered as a witness shall be excluded by reason of his interest in the event of the suit (Code of N. Y., § 398), thus leaving the question of incompetency, arising from the conviction of infamous crime, as it stood before the Code.

express or implied promise of pardon; sometimes, in the expectation of receiving a reward on the prisoner's conviction; and this peculiarity in the situation of an accomplice appears to furnish a much stronger ground of suspicion against his evidence, than exists with regard to witnesses whose conduct has been equally guilty, but who do not give their evidence from the same interested motives. It had been, however, long settled, that an unconvicted accomplice was not an incompetent witness, although he might have had a promise of pardon or reward, on condition of giving evidence against the prisoner.(1)

The evidence of accomplices has been at all times admitted, and its admission has been supported on the ground of public policy and necessity, from its being scarcely possible to detect conspiracies, and many of the worst crimes, without their information. In Charnock's Case,(2) Lord Holt, in his address to the jury, said: "Conspiracies are deeds of darkness

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(1) Tongue's Case, Kel. 17; S. C., 1 Hale P. C. 303; Layer's Case, 19 How. St. Tr. 373; S. C., Hawk. P. C. b. 2, c. 46, § 135; Willes, 423, 425; 4 East, 180; Say. 289; R. v. Rookwood, 4 St. Tr. 681.

(2) 12 How. St. Tr. 1454, referred to by Lord Ellenborough in Despard's Case, 28 How. St. Tr. 488.

NOTE 50.—The doctrine of the text in regard to the admissibility of accomplices, has been recognized in several, and, it is presumed, in most of the United States, in its fullest extent. The People v. Whipple, 9 Cowen's Rep. 707; Byrd v. The Commonwealth, 2 Vir. Cas. 490; Bean v. Bean, 12 Mass. Rep. 20; Churchill v. Suter, 4 Mass. Rep. 156; M'Niff's Case, 1 C. H. Rec. 8; The State v. Wier, 1 Dev. 363; United States v. Henry, 4 Wash. C. C. Rep. 428. The evidence of accomplices has been at all times admitted, although from a principle of public policy, or from judicial necessity, or from both. They are no doubt requisite as witnesses in particular cases, but it has been well observed, that in a regular system of administrative justice, they are liable to great objections. "The law," says one of the most useful modern writers on criminal jurisprudence, "confesses its weakness, by calling in the aid of those by whom it has been broken. It offers a premium to treachery, and destroys the last virtue which clings to the degraded transgressor. On the other hand, it tends to prevent any extensive agreement among atrocious criminals, makes them perpetually suspicious of each other, and prevents the hopelessness of mercy from rendering them desperate." People v. Whipple, 9 Cowen's Rep. 707. As in a criminal case, a *particeps criminis* is admitted as a witness, so in a civil case, a *particeps fraudis* may be, either to prove or disprove the fraud. Churchill v. Suter, 4 Mass. Rep. 156; Bean v. Bean, 12 Id. 20; Major v. Deer, 4 J. J. Marsh. 586, 587; Glenn v. Kapff, 2 Gill & John. 132.

But it has been held in Vermont, that on the trial of an indictment for adultery, a *particeps criminis* is not a competent witness, on the ground that no person shall be allowed to testify his own guilt or turpitude, to convict another. State v. Annice, N. Chip. Rep. 9. Offenders against the act to prevent duelling are competent (in New York) to testify against any other person offending in the same transaction; indeed, are compellable to testify the same as any other witnesses. 2 R. S. 686, § 3. The thief is competent to prove an indictment for buying stolen goods of him. M'Niff's Case, 1 C. H. Rec. 8; Hill's Case, Id. 57, 59. In the latter case, it is asserted that conviction may follow, though the testimony of the accomplice stand uncorroborated. Per Radcliff, Mayor, in his charge. Id. 50. *Quere.* An accomplice, separately indicted, is competent as a witness for or against another indicted for the same offence. To constitute an accomplice, the person charged as such must have an intention of committing the crime. Mere apparent concurrence is not enough. United States v. Henry, 4 Wash. C. C. Rep. 428.

(An accomplice is only admitted from the necessity of the case, and where there is no other person by whom the crime or offence can be proved. Ray v. State, 1 Iowa (Greene), 316.)

as well as of wickedness, the discovery whereof can properly come only from the conspirators themselves; and the evidence of accomplices has been allowed good proof in all ages; and they are the most proper witnesses; for otherwise, it is hardly possible, if not altogether impossible, to have full proof of such secret contrivances." In answer to an objection of the prisoner, that "although an accomplice was a legal witness, he was not a good one," Lord Holt added, "the credit of what he says, as in all other cases, must be left to the jury, who are judges of the matter of fact, and of the credibility of witnesses."

Object of admitting accomplices.

The object of admitting the evidence of accomplices is, in order to effect the discovery and punishment of crimes, which cannot be proved against the offenders without the aid of an accomplice's testimony. In order to prevent this entire failure of justice, recourse is had to the evidence of accomplices, and they are admitted to give evidence for the crown, either under an express promise of pardon, offered upon certain conditions by special proclamation, in the Gazette, or otherwise; or, more commonly, under an implied promise of pardon, on condition of their making a full and fair confession of the whole truth.(1) In the former case, accomplices who comply with the proposed conditions are entitled to pardon as a matter of right: in the latter case, they have an equitable title to be recommended to mercy, on a strict and ample performance of the condition on which they are admitted as witnesses, to the satisfaction of the presiding judge. This equitable right cannot be pleaded in bar, or in any manner set up as a legal defence to an indictment charging them with the same offence, though it may be made the ground of a motion for putting off their trial, in order to allow time for an application to the proper quarter.(2) With regard to other offences with which the prisoner at the bar is not charged, an accomplice can derive no advantage from such equitable claim to a pardon: the claim must be considered as limited to the particular offence for the prosecution of which his testimony is admitted.(3)

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(1) See Rudd's Case, Cowp. 339.

(2) See Rudd's Case, Cowp. 339.

NOTE 51.—Accomplices are admitted to give evidence under an implied promise of pardon, on condition of their making a full and fair confession of the whole truth; that is, of all the offences about which they might be questioned, and of all their associates in guilt. This implied promise arises from the consideration, that the witness, who is not bound to criminate himself, does so to discover greater offenders; and upon performance of the condition to the satisfaction of the court, he acquires an equitable title to a pardon. People v. Whipple, 9 Cowen's Rep. 707. (If he acts in good faith, and is admitted by the court as a witness, the government is honorably bound to discharge him. United States v. Lee, 4 McLean, 103.)

(3) Lee's Case, Russ. & Ry. C. C. 361; Brunton's Case, Id. 454. It is entirely in the discretion of the judge in these cases, whether he will recommend the accomplice to mercy. As the

Application to court to admit accomplices.

It is not a matter of course to admit a person, charged with the commission of a crime, as a witness against his associates, not even after he has been allowed to give evidence before the committing magistrate: but if his evidence is deemed to be absolutely necessary in support of the prosecution, the proper course is to apply to the court for permission to send him as a witness before the grand jury; and it is in the discretion of the judge, under all circumstances of the case, whether he will grant or refuse an order. Where it is intended to make this application, the accomplice ought not to be included in the indictment; but where he has been included with his confederates in a joint indictment, he may still be used as a witness in some cases with the consent of the court. Thus, in a prosecution for a conspiracy, a verdict of acquittal may be taken against some of the defendants before the opening of the case: and the defendants so acquitted may be called as witnesses for the prosecution.(1) And the same course may be adopted, with the permission of the court, in cases of felony.(2) In such case, however, the witness stands wholly absolved from the charge, and can no longer be considered in the light of an accomplice.

If an accomplice, after having confessed the crime, and after having been received as a witness against his associates, breaks the condition on which he has been admitted, by refusing to give full and fair information, the court may direct a bill to be presented forthwith to the grand jury against him, or, if they are discharged, may commit him to prison, and he may be tried and convicted on his own confession.(3)

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accomplice is entitled to no protection in respect to other offences, he is not bound to answer questions relative to such offences on his cross-examination. West's Case, O. B. Sessions, 1821. See *post, Examination of Witnesses.* It is not usual to admit accomplices who are charged with other felonies.

NOTE 52.—An accomplice admitted to testify of one crime, may, though he behave well, be prosecuted for another crime, the implied promise of pardon not extending to that; and if it appear that he is charged with any other felony than that in relation to which the prosecutor moves for his admission as a witness, this fact, of itself, will be sufficient ground for rejecting him. People v. Whipple, 9 Cowen's Rep. 721, note *a*, also resolved in several cases, 2 Carr. & Payne, 411; Maudslay v. Le Blanc, 12 Eng. Com. Law Rep. 643.

(1) R. v. Rowland, Ry. & Mo. N. P. C. 401. See R. v. Fletcher, 1 Stra. 633.

(2) R. v. Owen, 9 C. & P. 83.

NOTE 53.—For several cases sanctioning this practice, see 2 Carr. & P. 411, and the note there.

A motion should be made to the court for the admission of an accomplice to testify, by the public prosecutor, and the court, under the circumstances of the case, will admit, or disallow the evidence, as may most effectually answer the purposes of justice. Thus, where one against whom a verdict had been given for murder, was offered as a witness against an accessory before the fact, but appeared to have been the leader in perpetrating the crime, he was rejected. People v. Whipple, 9 Cowen's Rep. 707.

(On the motion to admit the accomplice as a witness, it should be shown that his testimony is absolutely essential to prove the commission of the crime by the party indicted or on trial, and that the person proposed to be admitted is not more guilty than the other. Ray v. State, 1 Iowa R. 316.)

(3) See Moore's Case, 2 Lew. 37; R. v. Smith; R. v. Stokes; R. v. Holtham, cit. 2 Russ. Cr. & M., by Greaves, 958, n. *d.*

On the trial of a person for a misdemeanor in receiving stolen goods (under the repealed statute 22 Geo. III, c. 58), which authorized proceedings against the accessory, notwithstanding the principal felon might not have been convicted or might not be amenable to justice, the party who had committed the theft, but had not been convicted, was held to be a competent witness for the prosecution,(1) and the same doctrine would be applicable to the case of a receiver, prosecuted for a substantive felony under the provisions of the statute now in force on this subject.(2)

As an accomplice is not an incompetent witness for the prosecution, it follows that he will be also a competent witness on behalf of the prisoner, notwithstanding he may be himself charged on a separate indictment.(3) And upon a joint indictment against several prisoners, where there is either no evidence whatever, or very slight evidence against one of them, the court, in the exercise of its discretion, sometimes will direct a verdict to be given for him, and upon his acquittal admit him as a witness for the other prisoners.(4)

NOTE 54.—It seems, that what an accomplice states under oath against his associate, would not be admissible evidence against himself, on account of the implied promise of the court to recommend him to mercy. See the remarks of Duer, Circuit Judge, in the People v. Whipple, 9 Cowen's Rep. 716. But where an accomplice received a promise from the attorney-general that he should not be prosecuted if he would become state's evidence and make a full disclosure, and upon such promise he made a confession, but afterwards refused to testify, he was put upon his trial, and this same confession was held admissible in evidence against him. The Commonwealth v. Knapp, 10 Pick. 477, 489 to 495.

(1) Haslam's Case, 1 Leach C. C. 467; Price's Case, Id. 468, n. 1; Patram's Case, 2 East P. C. 782. See also Wild's Case, 2 East P. C. 782; and 7 & 8 Geo. IV, c. 29, § 58.

(2) 7 & 8 Geo. IV, c. 29, § 54.

NOTE 55.—The statute of New York provides that an accessory may be indicted, tried, convicted and punished, notwithstanding the principal felon may have been pardoned, or otherwise discharged, after his conviction. 1 R. L. 496; 2 R. S. 727, § 49. Under this statute, it is held that the accessory may be proceeded against, if the principal has been convicted, although he have not been sentenced, and that, in such case, the principal felon is a competent witness against the accessory. People v. Whipple, 9 Cowen's Rep. 707, 709, 710.

(A confession, made by a principal, cannot be given in evidence against an accessory. State v. Newport, 4 Harring. 567. Where the statute makes the aiding and abetting the commission of a crime a distinct and substantive offence, it is not essential that the principal should be first tried and convicted. Noland v. The State, 19 Ohio R. 131. But in general, the acquittal of the principal discharges the accessories. United States v. Crane, 4 McLean, 317.)

(3) 2 Hale P. C. 280; 2 Roll. Abr. 685; Fortesc. 246.

(4) 2 Hawk. P. C. c. 46, § 98; R. v. Bedder, 1 Sid. 237. See *supra*, p. 64.

NOTE 56.—Where several persons are jointly indicted, one is not a competent witness for another, without being first acquitted, or convicted; and it makes no difference whether the defendants plead jointly or separately. The People v. Bill, 10 John. Rep. 95; Campbell v. The Commonwealth, 2 Virg. Cas. 314. *Et vide* The State v. Alexander, 2 Rep. Const. Ct. So. Ca. 171. Thus, where two being jointly indicted for an assault and battery, pleaded, and were tried separately; and after the testimony for the people against one had closed, he offered to prove his defence by the other, it was held, that the witness offered was incompetent before trial and acquittal, or conviction. People v. Bill, 10 John. Rep. 95. So where two were jointly indicted for larceny, and being separately arraigned, pleaded and were tried separately, it was held that a party in the same indictment cannot be a witness for his co-defendant, until he has been first

SECTION II.

Of the Confirmation of Accomplices.

Since accomplices are competent witnesses, it appears to follow, as a necessary consequence, that if their testimony is believed by the jury, a prisoner may be legally convicted upon it, though it be unconfirmed by any other evidence. It is the peculiar province of the jury to determine upon the degree of credit to be attached to any competent evidence submitted to their consideration; and it has accordingly been laid down in many cases as a settled rule, that a conviction obtained upon the unsupported testimony of an accomplice is strictly legal.(1)

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acquitted, or, in some cases, convicted, whether the defendants be jointly or separately tried. Campbell v. The Commonwealth, 2 Virg. Cas. 314.

If any evidence is given against one of two jointly tried, the court will not strike his name out of the indictment for the purpose of making him a witness for the other; and where there is no evidence against one of several defendants, *it seems* that the motion to strike out his name can only be legally granted by consent of the attorney for the state, and by considering it equivalent to a motion on his part for leave to enter a *nolle prosequi* as to such defendant. State v. Alexander, 2 Rep. Const. Ct. So. Ca. 171. Accordingly, on trial of an indictment for larceny, the attorney-general not consenting, though no evidence appeared against one of the prisoners, the court refused to swear him as a witness for the others. State v. Carr, 1 Coxe, 1. But of this, *quere;* for the attorney-general may thus wrongfully withhold evidence from the defendants; and in another case, persons joined in a complaint, against whom there was no evidence, were, on motion in behalf of the other defendants, admitted for them. State v. Shaw, 1 Root, 134. But if circumstances are proved from which it is possible for the jury to presume guilt, a co-defendant in an indictment cannot be a witness for the defence. Pennsylvania v. Leach, Addis. 352.

For the general doctrine, see also Rex v. Long, 6 Carr. & Payne, 179.

Where one is indicted jointly with his accomplices, it is in the discretion of the state's attorney to try the prisoners separately, and use the accomplice or not, on trial, as a witness; but the prisoners have no such right of election for such a purpose, because the accomplice jointly indicted is not competent for them though they sever. State v. Calvin, R. M. Charl. 151, 169. And it was said generally, that the state may use the accomplice as a witness, but the prisoners not. Id. 169. *Quere* of this, independent of their being joined as parties? He is competent for either party, if not indicted. And *quere*, whether the accomplice, so long as he remains on the record as a joint indictee, can be received as a witness for either party, though his associates be tried separately? Rex v. Rowland, Ry. & Mood. N. P. Rep. 401, and note.

(Where the statute makes the aiding and abetting in the commission of a crime a distinct offence, and one is indicted for the crime, and another for aiding in its commission, the former is a competent witness on the trial of the latter. Noland v. The State, 19 Ohio, 131. And it is held in Virginia that where the indictment is joint, and the prisoners are tried separately, one of them may be a witness for the other. Lozier v. The Commonwealth, 10 Gratt. 708. And though tried together, if there be but little evidence against one of them, the court will submit his case first to the jury, so that if he is found not guilty, he may be sworn as a witness for the other. Fitzgerald v. The State, 14 Mis. 413.)

(1) R. v. Atwood, Leach C. C. 521; R. v. Durham, Id. 538; 1 Hale P. C. 303; R. v. Dawber, 3 Stark. R. 34; R. v. Jarvis, 2 M. & Rob. 40. See also by Lord Ellenborough, C. J., in R. v. Jones, 2 Campb. 132; 31 How. St. Tr. 325; 7 T. R. 609, S. P.; by Lord Denman, C. J., in R. v. Hastings, 7 C. & P. 152, and by Alderson, B., 7 C. & P. 273. On the general subject, as to the evidence of accomplices, with reference to the point of confirmation, see Sir T. Witherington's argument, 5 How. St. Tr. 176; Discussion in Sayer's Case, 16 How. St. Tr. 158; Sir R. Atkyn's

But great injustice would result, if it were the practice of juries to convict upon the unsupported evidence of accomplices, whose testimony, though admitted from necessity, ought always to be received with great jealousy and caution. For upon their own confession they stand contaminated with guilt; they admit a participation in the very crime which they endeavor, by their evidence, to fix upon the prisoner; they are sometimes entitled to a reward upon obtaining a conviction, and always expect to earn a pardon. Accomplices are therefore of tainted character, giving their testimony under the strongest motives to deceive; and a jury would not, in general, be justified in giving to such witnesses credit for a conscientious regard to the obligation of an oath. Sometimes they may be tempted to accuse a party who is wholly innocent, in order to screen themselves or a guilty associate; and if the prisoner has been their participator in crime, they may be disposed to color and exaggerate their statement against him, with a view to hide their own infamy, or, by obtaining his conviction, to protect themselves from his vengeance, and secure the expected benefit.(1) The doctrine, therefore, of a conviction being legal upon the unsupported evidence of an accomplice has been greatly modified in practice; and it has long been considered, as a general rule of practice, that the testimony of an accomplice ought to receive confirmation; and that, unless it be corroborated in some material part by unimpeachable evidence, the presiding judge ought to advise the jury to acquit the prisoner.(2)

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remarks, 9 How. St. Tr. 721, as to the evidence of an indicted accomplice; Murphy's Case, 19 How. St. Tr. 702; Sir J. Copley's remarks in Watson's Case, 32 How. St. Tr. 513; Lord Ellenborough's charge in Watson's Case, 32 How. St. Tr. 583; Lord Tenterden's charge in the cases of the Cato street Conspiracy, 33 How. St. Tr. 689.

(The former note, embracing an extract from Amos & Phillipps, editors of the eighth edition of this work, has been embodied in the text. See Note 25, Part I, Cowen & Hill's Notes, 3d edit.; the latter part of the note follows on a subsequent page.

It is certainly the province of the jury to determine the weight and credibility of the evidence submitted to them (State v. Brown, 3 Strobh. 508); and it is as clearly the duty of the court to instruct them that the testimony of an accomplice requires confirmation. Ray v. State, 1 Iowa, 316.)

(1) See Lord Hale's remarks on Tongue's Case, 1 Hale P. C. 304. In the earlier state trials, the protection and countenance afforded by the judges to accomplices, spies and informers was carried to a shameful length. The language of Lord Holt, as reported in the trials for the Assassination Plot, may probably be thought, at the present day, too favorable to accomplices. See particularly Charnock's Case, 12 How. St. Tr. 1454.

(2) See the cases collected and stated in the text, *infra*. On the subject of the Evidence of Accomplices, see a tract written by an eminent Irish judge, and published in 1836, which contains an elaborate examination into the origin and history of this practice. According to the view of this learned writer, the practice of requiring confirmation cannot be traced back more than half a century. And he observes, that in the earlier cases which have been referred to as authorities for the practice, nothing can be found which leads to the inference of any general regulation on the subject, and that the credibility of an accomplice, whether confirmed or unconfirmed, appears to have been treated as a question for the jury. See Tongue's Case, 6 How. St. Tr. 226; by Sir O. Bridgman, 1 Hale P. C. 334. See also R. v. Charnock, 12 How. St. Tr. 1454. In this case, almost the only material witnesses were accomplices. The observations of Lord

The practice of requiring confirmation has been stated not to extend to cases of misdemeanors;(1) but such distinction, for which there appears to be no sound reason, if it ever prevailed, no longer exists.(2)

Holt, as to their competency have been cited in the text, *ante*, p. 90; they were said by Lord Ellenborough, C. J., in R. v. Despard, 28 How. St. Tr. 488, to comprise in a few words the good sense and sound law on the subject. In R. v. Rudd (Cowp. 339), Lord Mansfield, C. J., said "the single testimony of an accomplice is *seldom* of sufficient weight with the jury to convict the offender."

NOTE 57.—(If the court refuse to instruct the jury that the unsupported testimony of an accomplice is not sufficient to justify a conviction, or if the jury find the prisoner guilty upon such testimony, this is a sufficient ground for a new trial. Ray v. State, *supra.*)

In Hill's Case (1 C. H. Rec. 57, 59), it is said a conviction may follow, though the testimony of the accomplice stand uncorroborated. *Quere.* And see United States v. Tom Jones, 2 Wheel. Cr. Cas. 451 to 461. A case of piracy before Thompson, J.

(1) By Gibbs, A. G., in R. v. Jones, 31 How. St. Tr. 315.

(2) See R. v. Farler, 8 C. & P. 106.

The testimony of an accomplice requires confirmation, because he stands before the court a discredited witness; but there is an evident distinction between a witness who is self-discredited as guilty of an infamous crime, and one who is only guilty of a misdemeanor that subjects him to a moderate fine. The State v. Quarles, 8 Eng. (13 Ark.) 307. A man may be convicted of petit larceny, and still remain a competent witness. 5 Hill, 260. And a conviction for that offence in another state, will not render the convict incompetent. Uhl v. The Commonwealth, 6 Gratt. 706. And where two persons are indicted and tried separately for a misdemeanor, there does not seem to be any reason for excluding them as witnesses on the trial of each other.

NOTE 56.—*When parties jointly indicted may be witnesses, for or against each other.*—It seems to have been assumed, in one case, that though an accomplice and his associates be jointly indicted, yet, if the latter be separately tried, the accomplice may be a witness for the state, though not for the prisoners; and it was held, that the state's attorney, but not the prisoners, may elect to try separately with a view to use the accomplice as a witness. State v. Calvin, R. M. Charlt. 151. But before the state's attorney can in such case use the accomplice as a witness, ought not the attorney to move, and have him acquitted, or at least enter a *nolle prosequi* against him? See Rex v. Rowland, Ry. & Mood. N. P. Rep. 401, and the note. Does not the case come within the general rule, that so long as the witness's name stand on the record, he being thus designated as a joint party and subject to be tried as such, he is incompetent? In respect to the prisoner's right to have one jointly indicted with him sworn as a witness in his behalf, he must in all cases, whether he be tried jointly with, or separately from, the witness, who has not even been arraigned, wait for a conviction or acquittal of the witness. The People v. Williams, 19 Wend. 377; State v. Blennerhassett, Walker's Rep. 7, 16, 17. If there be no evidence against him, the court may direct an acquittal, or order the defendant to be discharged. 2 R. S., 616, § 19 (2d ed.); State v. Blennerhassett, Walker's Rep. 7, 16, 17. But, until that be so, the rule of exclusion applies, even where the trials are ordered for different counties. State v. Mills, 2 Dev. 420; Carter's Case, cited Id. 422. And it makes no difference that the defendants have pleaded separately. State v. Mooney, 1 Yerg. 431. It is put in the text that, unless acquitted, he should not only be convicted, but fined, before he is competent. The American cases usually put the case of a conviction merely as restoring competency, without its being followed by the sentence of the court. But Ruffin, J., in State v. Mills (2 Dev. 422), says the practice in North Carolina has accorded with the English strictness.

In Amos and Phillipps' ed. of Phil. Ev., p. 70, note 3, the case of Rex v. Lafone (5 Esp. 160), is examined, and several arguments urged in favor of receiving one joint indictee as a witness for another, after he has suffered judgment by default. The learned editors urge, what it seems difficult to deny or explain away, that there exists no objection beyond what goes to his credit, any more than in the case of an accomplice. The same reasoning would seem to apply where the witness pleads guilty, especially in all those courts which do not exclude witnesses solely on the ground of their being parties.

It has been laid down, that this practice of requiring some confirmation of an accomplice's evidence, must be considered in strictness as resting only upon the discretion of the presiding judge.(1) And this, indeed, appears to be the only mode in which it can be made reconcilable with the doctrine already stated, that a *legal* conviction may take place upon the unsupported evidence of an accomplice. But it may be observed, the practice has obtained so much sanction from legal authority, that a deviation from it in any particular case would be justly considered as of questionable propriety. Although the judge does not in express language declare, that a case depending on the unconfirmed evidence of an accomplice is insufficient in law to warrant a conviction, but merely advises the jury not to place credit on the evidence; yet, as it is not likely an instance should arise in which the jury would disregard the advice so given, and convict the prisoner, the substantial result appears to be nearly the same as if the practice had depended upon a rule of law, instead of being only the exercise of the discretion of the presiding judge. The only distinction appears to be, that if the judge were to submit a case of this nature to the jury without any such recommendation, and a conviction ensued—or if a jury were to convict in opposition to the recommendation of the judge—it could not properly be said in either case, consistently with the authorities on the subject, that the conviction would be illegal.

The necessity for confirmation will depend in some measure upon the nature and circumstances of the crime.(2) Upon an indictment against a man for committing an unnatural offence with his own wife, if it appears that she consented to the act, she becomes an accomplice, and her evidence will require confirmation.(3) In a case where the prisoner was indicted for manslaughter at a fight, it was objected, that all persons who had been present, were principals in the second degree, and that their evidence ought to receive confirmation, as in the case of accomplices, but the judge was clearly of opinion they were not such accomplices as would require any further evidence to confirm them.(4) Such persons are manifestly not in the situation of accomplices.

The practice of requiring confirmation, when the case for the prosecution is supported by an accomplice, applies equally when two or more accomplices are brought forward against a prisoner. In a case in which

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(1) By Lord Ellenborough, C. J., in R. v. Jones, 2 Campb. 132.

(2) See R. v. Jarvis, 2 Mo. & R. 40, 42.

(3) R. v. Jellyman, 8 C. & P. 604.

(4) R. v. Hargraves, 5 C. & P. 170, by Patteson, J.

If the parties present are confederates and engaged in a common design, they are all equally guilty. Green v. State, 13 Miss. 382; Regina v. Greenwood, 9 Eng. Law & Eq. R. 535. If they aid and encourage the commission of the crime, they are guilty as accessories, though not present. Hately v. State, 15 Geo. 346; Brennan v. The People, 15 Ills. 511. And if they come together on a common design to assist in the perpetration of the crime, they are guilty. M'Carty v. State, 26 Miss. 299.

two accomplices spoke distinctly to the prisoner's guilt, the judge directed the jury, that, if their statement were the only evidence against him, he could not advise them to convict; observing, that it was not usual to convict on the evidence of one accomplice without confirmation, and that, in his opinion, it made no difference (with respect to the practice and the propriety of convicting), whether there were more accomplices than one.(1)

It appears to have been held, in one case, that a confirmation by the wife of an accomplice would be insufficient: it was said, that the wife and the accomplice must be considered as one for this purpose.(2) In that case, the circumstances of the case might have been such as to warrant this decision. But it may often happen, that the evidence of the wife is so free from all suspicion, so independent of the evidence of the husband, so manifestly unconcerted and uncontrived, and so undesignedly corroborative of his evidence, that it might be proper not to consider the accomplice and his wife as one, but to act upon her evidence as sufficient confirmation.

Extent of confirmation.

From the anomalous nature of the rule of practice which requires confirmation, more especially from the circumstance that the rule is considered as resting upon the discretion of the presiding judge, and that it appears in fact to have originated in the exercise of such discretion, it might be expected that some difference of opinion would arise as to the nature and extent of the necessary confirmation. It is clearly unnecessary that the accomplice should be confirmed in every circumstance which he details in evidence; for there would be no occasion to use him at all as a witness, if his narrative could be completely proved by other evidence free from all suspicion.(3) The rule upon the subject which has generally been laid down, is, that if the jury are satisfied that he speaks truth in some material part of his testimony, in which they see him confirmed by unimpeachable evidence, this may be a ground for their believing that he also speaks truth in other parts, as to which there may be no confirmation.(4) So far all the authorities agree; the only point on which any difference of opinion has been supposed to exist, relates to the particular part or parts of the accomplice's testimony, which ought to be confirmed.

In some cases it has been considered, that the confirmation ought to be such as affects the individual prisoner, and connects him immediately and directly with the crime; in other cases, this description of confirmation has

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(1) R. v. Noakes, 5 C. & P. 326, before Littledale, Bolland and Alderson, J's.

(2) R. v. Neale, 7 C. & P. 168, by Park, J.

(3) See report of the Trials at York, on Special Commission, 1813, pp. 16, 17, 50, 150, 165, 201, particularly the charges of Thompson, C. B., in R. v. Swallow, and of Le Blanc, J., in R. v. Mellor.

(4) See authorities cited in the preceding note, and Despard's Case, 28 How. St. Tr. 488, and by Lord Ellenborough, C. J., 31 How. St. Tr. 325; R. v. Barnard, 1 C. & P. 88.

been considered unnecessary, and it has been held, that confirmation of the accomplice in some parts of his testimony, which do not connect the prisoner directly with the crime, may be sufficient to entitle the accomplice to credit, and to warrant the judge in leaving the case to the jury without a recommendation to acquit.

In the first case in which this question appears to have been expressly raised, two prisoners had been convicted on the evidence of an accomplice, who was confirmed as to the circumstances attending the offence, but not as to the identity of the prisoners, and the judges were unanimously of opinion, that the conviction was good, upon the general ground already mentioned; namely, that a prisoner may legally be convicted upon the unconfirmed evidence of an accomplice.(1) In a case occurring shortly afterwards, a similar decision took place, and, as it appears, on the same ground. At the trial, the court observed, that the practice of rejecting an unsupported accomplice was rather a matter of discretion with the judge than a rule of law, and the case having been left to the jury, and the prisoner convicted, the judges afterwards held the conviction good.(2) It was, however, said in this case that the witness (a receiver) was rather an accessory after the fact than an accomplice in the fact.

The same general doctrine was laid down in the case of the King agt. Jones,(3) by Lord Ellenborough, C. J., who there referred to a case in which the judges were of opinion, that four prisoners had been properly convicted upon the testimony of an accomplice, whose evidence had been confirmed as to three of the prisoners, but not as to the fourth. And in the report of the York trials under a special commission, it is laid down by Thompson, C. B., that confirmation need not be of circumstances which go to prove, that the accomplice speaks truth with respect to *all the prisoners* (when several are tried), and with respect to the share they have each taken in the transaction; for if the jury are satisfied that he speaks truth in those parts in which they see unimpeachable evidence brought to confirm him, that is a ground for them to believe that he speaks also truly with regard to the *other prisoners*, as to whom there may be no confirmation.(4)

Again; in the later case of The King agt. Dawbar,(5) where an accomplice was confirmed as to one of several prisoners jointly indicted, but not as to the others, Bayley, J., told the jury that if they were satisfied, from the confirmation, that the accomplice was a credible witness, they might act on his testimony with respect to the prisoners as to whom he had not

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(1) R. v. Atwood, Leach C. C. 521, cit. 7 T. R. 609.

(2) R. v. Durham, Leach C. C. 538. See, lso, R. v. Smith, reported in a note to the last case.

(3) 2 Campb. 132; 31 How. St. Tr. 325.

(4) R. v. Swallow, see *ante*, p. 114.

(5) 3 Stark. R. 34. And see R. v. Barnard, 1 C. & P. 88, by Hullock, B.

been confirmed, and they were convicted. In Birkett's Case,(1) the judges were of opinion that an accomplice did not require confirmation as to the person charged by him, if he were confirmed in the other particulars of his statement. And in the case of The King agt. Hastings,(2) at the Old Bailey, before Lord Denman, C. J., Park, J., and Alderson, B., when the counsel for the prosecution stated that he should not be able to confirm an accomplice, who was to be called as a witness, with regard to the persons of the prisoners, but only as to the general circumstances of the case, Lord Denman said he considered, and he believed his learned brothers concurred with him, that it was altogether for the jury, who might, if they pleased, act on the evidence of the accomplice without confirmation; but observed, that a person so situated would not be likely to receive any great degree of credit.

In the case of The King agt. Addis,(3) an accomplice, who was the principal witness, was corroborated as to collateral facts, none of which tended to connect the prisoner with the accomplice or with the transaction. Patteson, J., observed that the corroboration ought to be as to some fact or facts, the truth or falsehood of which would go to prove or disprove the offence charged against the prisoner. And in the later case of The King agt. Wilkes,(4) on an indictment against two persons, Alderson, B., pointed out the distinction between confirmation as to the circumstances of the felony, and confirmation affecting the individuals charged; the former only proves that the accomplice was present at the commission of the offence; the latter shows that the prisoner was connected with it. In summing up, the judge observed that confirmation merely as to the circumstances of the felony was really no confirmation at all; that it was true, the jury might legally convict on the evidence of an accomplice only, if they could safely rely on his testimony; but that he always advised juries not to act on the evidence of the accomplice, unless confirmed as to the particular person charged with the offence. After adverting to the facts of the case as affecting the two prisoners, the same judge stated to the jury, that if they thought the accomplice was not sufficiently confirmed as to one, they would acquit that one; and that if they thought he was confirmed as to neither, they would acquit both.

Where a thief and receiver were jointly indicted,(5) the same learned judge expressed his opinion that confirmation as to the thief did not advance the case against the receiver. And in a former case of a similar description,(6) where there was a slight confirmation as to the receiver,

(1) Russ. & Ry. C. C. 252.
(2) 7 C. & P. 152.
(3) 6 C. & P. 388.
(4) 7 C. & P. 271. See, also, R. v. Webb, 6 C. & P. 595.
(5) R. v. Moores, 7 C. & P. 270.
(6) R. v. Wells, M. & M. 326.

but none as to the principal felon, Littledale, J., thought the case failed altogether, and that the accomplice ought to be confirmed as to the principal before the jury could be asked to believe the witness's testimony as to the guilt of the receiver.

In the case of The King agt. Farler,(1) Lord Abinger, C. B., said: "It is a practice which deserves all the reverence of law, that judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice, unless the accomplice is corroborated in some material circumstance. Now, in my opinion, that corroboration ought to consist in some circumstance that affects the identity of the party accused. A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history, without identifying the persons, that is really no corroboration at all. The danger is, that when a man is fixed, and knows that his own guilt is detected, he purchases impunity by falsely accusing others."(2)

On a review of the cases above cited, the result that may be deduced from them seems to be: That, on the trial of a prisoner against whom an accomplice appears as witness, there should be (in order to warrant a judge in advising the jury to give credit to such a witness, and to warrant the jury in convicting) some confirmatory evidence; that is, some proof independent of the evidence of the accomplice, from which it may be reasonably inferred that the prisoner was concerned with the accomplice in the commission of the crime. And on the trial of several prisoners charged as being jointly concerned in a crime, for warranting the jury in convicting all the prisoners there should be some unimpeachable independent evidence, from which the jury may reasonably be satisfied that the accomplice speaks truly as to all the prisoners, and that they were all jointly concerned with him. But it would be going much too far, to bind the discretion and judgment either of a judge or a jury by any fixed, rigid rule as to the quantity or kind of confirmatory evidence which ought to be given. This, however, is settled—that the confirmation required should not be a confirmation merely of those parts of the narrative which implicate the accomplice alone, and which may be true without involving the prisoners in any share of the transaction; but such a corroboration, by unimpeached evidence, as may satisfy the jury that those persons whom he charges with a participation in the crime were, in truth, as he represents, his confederates and associates in guilt. It appears to be settled also, by the authorities before cited, that the question, whether evidence brought forward to confirm the accomplice is a satisfactory and sufficient confirmation, is a question which the jury, and the jury only, are to determine.

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(1) 8 C. & P. 106.

(2) See, further, R. v. Dyke, 8 C. & P. 261; R. v. Birkett, Id. 732.

SECTION III.

Of the Evidence of Informers and Self-Discrediting Witnesses.

1. Informers.

There is another class of witnesses who cannot properly be considered as coming within the description of accomplices, or as partaking of their criminal contamination—namely, persons who have entered into communication with conspirators, with an original purpose of discovering their secret designs, and of disclosing them for the benefit of the public.(1) The existence of such original purpose on their part is best evinced by a conduct which precludes them from wavering or swerving from the discharge of their duty, if they might otherwise be disposed so to do; as when the witness voluntarily makes an early disclosure, and thenceforth acts in pursuance of directions given to him as to the part which he is to bear in the general confederacy. Such a witness is not to be considered in the light of an accomplice, although, perhaps, on other grounds, no small degree of prejudice or disfavor may attach to him; for certainly, no man of honor or right feeling would continue to associate with his companions, apparently forwarding the purposes of a conspiracy, with the intention afterwards of betraying and giving them up to justice. Whatever may be the merit or demerit of this species of conduct on other grounds, such a witness is not, strictly speaking, an accomplice.

The objection to the competency of informers, on the ground of being entitled to a penalty on the conviction of the offender against whom they give information, has been considered in another part of this work.(2)

2. Witness alleging his own dishonesty.

Mr. Justice Lawrence observes,(3) that the constant practice of examining accomplices shows that the mere circumstance of a man's having represented himself as having done things inconsistent with common honesty is not sufficient to reject his testimony, however it may weaken and impeach it. The maxim of the civil law—*nemo allegans suam turpitudinem est audiendus*—would not admit of such a practice.(4) But this maxim is of a nature so exclusive in its operation, and at the same time

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(1) See Lord Ellenborough's address to the jury in Despard's Case, 28 How. St. Tr. 489.

On the trial of an indictment against the prisoner for a conspiracy to procure property under false pretences, the acts and representations of a supposed agent or joint conspirator cannot be given in evidence until it is first shown that he acted by the procurement of the prisoner, or at his instigation. But though such testimony be improperly received, the error will be cured by a subsequent direction to the jury to disregard such evidence. The People v. Parish, 4 Denio R. 153

(2) *Supra*, ch. 4, § 2.

(3) Jordaine v. Lashbrooke, 7 T. R. 601.

(4) "Testes qui adversus fidem suam testationis vacillant, audiendi non sunt," was also the maxim of the civil law. Domat, Book 3, tit. 3, § 6, art. 12.

so vague and undefined, that our courts of law have properly rejected it as a rule of evidence, although in some old cases it appears to have been acted upon.(1)

In the case of Walton v. Shelley,(2) which was an action upon a bond, given by the defendant in consideration of the plaintiff's delivering up

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(1) See Titus Oates' Case, 10 How. St. Tr. 1185; Canning's Case, 19 How. St. Tr. 632.

(2) 1 T. R. 296.

(A person who transfers a negotiable note or draft as good business paper, whether by indorsement or delivery, is precluded, is estopped from setting up the defence of usury to an action brought on the instrument, or for the recovery of the money received on it. McKnight v. Wheeler, 6 Hill, 492; Edwards v. Dick, 4 Barn. & Ald. 212. But it has been held that the drawer of a bill payable to his own order and accepted for his accommodation, who transfers it by indorsement usuriously without representing it to be business paper, may interpose the defence of usury, and that the acceptor may also set up that defence. Clark v. Lisson, 4 Duer, 408. In Edwards v. Dick (*supra*), it did not appear that the defendant, the drawer of the bill and payee named in it, who transferred it by indorsement after acceptance, made any representation in regard to it except what was implied by the transfer for a good consideration; and so in McKnight v. Wheeler, it did not appear that the payee who transferred the note by indorsement made any representation except what was implied by the transfer for value, for the face of the note; and in each of those cases the court treated the transfer as a new contract, not within the statutes of usury and gaming. The statute pronounces void all notes, bills and other securities given for an usurious consideration; but the law does not allow the maker of a note, who has represented it to be good business paper and thereby induced another person to purchase the same, to interpose the defence of usury. Middletown Bank v. Jerome, 18 Conn. 443. And when the holder and apparent owner sells negotiable paper at an under-value representing it to be good business paper, the transaction is not usurious; if sold without indorsement, the vendor is liable thereon for the money given therefor; and if sold by indorsement, the indorser is precluded from setting up the defence of usury. Holmes v. Williams, 10 Paige Ch. R. 326. The case of Clark v. Lisson, holds that the vendor is not estopped, unless he has made some positive representation that the security was business paper; but it seems clear that the vendor is liable for money had and received where he sells worthless paper for value, concealing the fact rendering it valueless.)

NOTE 58.—The decisions upon this subject in the United States are far from being uniform. Not only have the different courts divided upon the question whether the loose maxim adopted in Walton v. Shelley should be applied in any case, but those who have applied it have differed in measuring the extent of its application, and have sometimes been inadvertently, and sometimes confessedly inconsistent with themselves. The only way, therefore, in which the character of these decisions can be presented, would seem to be by a consideration of them as they began and have gone forward in each distinct court.

In the United States courts, the case of Walton v. Shelly has been followed, and still maintains its ground. United States v. Dunn, 6 Peters, 51. See per Chase, J., in Wilson v. Lenox, 1 Cranch, 201.

The following collection of the decided cases, arranged in chronological order for each state will exhibit the opinions of the courts of the several states, so far as they are ascertained, and the various modifications which the doctrine has received:

New York. The payee and indorser of a promissory note, who had been discharged under the bankrupt law of the United States, and had released all his interest, was held to be an incompetent witness for the maker, or a subsequent indorser, to prove that the note was given for an usurious consideration. Winton v. Saidler, 3 John. Cas. 185. And see Steinback v. Rhinelander, Id. 269. But an indorser of a promissory note was held a good witness for the maker, in a suit against him by the indorsee, to prove the indorsement was made after the note became due, with a view to let in proof impeaching it. Baker v. Arnold, 1 Caines' Rep. 258.

A. made a promissory note, payable to C., who indorsed it for the accommodation of A., which

note A. subsequently negotiated to S. at an usurious rate of interest. To pay this note, when it became due, A. drew two other notes payable to C. and indorsed by him, which A. by the order of S. delivered to R. & H., who were acquainted with the previous transactions. These notes were protested in the name of R. & H. for non-payment. C. then made two other notes, payable to R. & H. or order, for the purpose of taking up the protested notes. In an action by R. & H. against C. on one of the notes last made, A. was offered by the defendant as a witness to prove the facts, and was released by C., the defendant. Held, that he was not a competent witness to invalidate the note of which he was maker, and that it was immaterial whether the suit was directly on the note alleged to have been usurious, or whether it comes in question collaterally, the cases being considered by the court as the same, because they involve in them the validity of the original notes. Coleman v. Wise, 2 John. Rep. 165. And see Cummings v. Fisher Anth. N. P. Rep. 1, 7, and note *a*, at p. 9.

A party to negotiable paper may be a witness to prove facts subsequent to the due execution of the instrument, which will destroy the *title* of the holder, or which will cast on him the burden of showing himself a *bona fide* holder. Thus, where a note was drawn by H. payable to M., and M., after indorsing it, delivered it to a third person to be presented to the bank for discount, who, instead of offering it at the bank, fraudulently put it into the hands of a broker, it was held that M., the indorser, was a competent witness to prove these facts. Woodhull v. Holmes, 10 John. Rep. 231. So where a note, before it became due, was paid to the payee by the maker, who took a receipt in full, and the note was afterwards, before it became due, indorsed by the payee and by the indorsee to the plaintiff, who was informed of the payment before receiving the note, it was held that the plaintiff took it subject to such payment, and that the first indorsee was a competent witness to prove the payment of the note. White v. Kibbing, 11 John. Rep. 128.

The payee of a note having indorsed it to the plaintiff upon an usurious consideration, he was held an incompetent witness, in an action against the maker, to prove the usury, and it was held to make no difference that the plaintiff knows the fact of usury, or was a party to it. Mann v. Swann, 14 John. Rep. 270.

A note was indorsed by the defendant for the accommodation of the makers, who were then in good credit. Before negotiating the note, they became insolvent, and the defendant then directed them not to part with it, which they promised. They afterwards passed it to the plaintiffs, with full notice of all the circumstances, in satisfaction of a debt due from them to the plaintiffs. The plaintiffs having brought an action on the note against the indorser, held, that the plaintiffs were not *bona fide* holders, and could not support the action; and that as the defence rested on matters arising subsequent to the execution of the note, one of the makers was a competent witness to defeat the recovery. Skelding v. Warren, 15 John. Rep. 270. See Hubby v. Brown, 16 Id. 70. Such subsequent fact, however, must not involve the moral turpitude of the witness. The meaning of the rule that a party to a negotiable instrument cannot be a witness to invalidate it, is that one whose name appears on the paper shall not be admitted to say that it was tainted with illegality or fraud when it passed from his hands. Agreeably to this rule, it was held that a second indorser is competent to prove that the third indorser had said that he had received and discounted the note on usurious interest. Powell v. Waters, 17 John. Rep. 176. But where an agreement was made between the maker and payee, at the time of the execution of the note, that it should be deemed void and returned if the maker did not take certain goods of the payee for which the note was given, and the payee immediately indorsed the note to the plaintiff to secure a debt, at the same time informing him of the condition upon which the note was given; in an action against the maker, the indorser was held competent to prove that the plaintiff had notice of the conditions, and that the maker did not take the goods of the payee, so that the note became void; *because*, the indorser was not called to prove the note void at its inception, but to show that it became so by the *subsequent* determination of the defendant not to take the goods. M'Fadden v. Maxwell, 17 John Rep. 188.

The plaintiff requested the defendants and R. to lend him their names to a note for 2,000 dollars, for the purpose of raising money for the accommodation of the plaintiff, and it was agreed that R. should make the note payable to the defendants, to be indorsed by them; and the defendants accordingly indorsed a blank paper and delivered it to the plaintiff to be filled up by R. with a note for 2,000 dollars, which the plaintiff, without the privity or consent of the defend-

ants (the indorsers), procured R. to fill up with a note for 4,000 dollars; held, that D., a subsequent indorser, and R., the maker, were competent witnesses to prove the fraud in the filling up of the note, the reason and policy of the rule being to guard and protect *bona fide* holders of negotiable paper, which they have honestly received in the usual course of business, and not for the benefit and protection of the party who is the very person that committed the fraud in the inception of the note. Myers v. Palmer, 18 John. Rep. 167. So where S. made a note to C., who indorsed it to the plaintiff, on which the plaintiff received five per cent. above the legal interest, and on the note becoming due, C. procured D., the defendant, to make another note payable to him, which he indorsed to the plaintiff to take up the former note; in a suit by the plaintiff against D., the maker of the last note, it was held that C., the indorser of both notes, was a competent witness to prove the usury, the plaintiff being himself the usurer, and of course having notice that the original note was infected when he received it, and the mere change of securities not purging the original illegal consideration. Tuthill v. Davis, 20 John. Rep. 285.

In an action by the holder against the maker of a promissory note, the defendant offered to prove by the payee that he, the payee, had no interest in the note, but took it for the benefit and on behalf of the plaintiff, and immediately delivered it to the plaintiff, advising him of all the facts relative to the making of the note, and upon what consideration it was made; held, that the payee was a competent witness to prove the note void for usury, and that the case of Winton v. Saidler (cited *supra*), was not law. Stafford v. Rice, 5 Cowen's Rep. 23. And so where, in an action on a promissory note by the indorsees against the indorser, the defence was that the note was discounted by the plaintiff, computing the interest by the standard of thirty days to a month, and 360 days to a year, it was held that the maker was a competent witness to prove that fact. Utica Bank v. Hillard, 5 Cowen's Rep. 153.

The rule formerly held by the Supreme Court, that one whose name appears on negotiable paper should not be received to testify that it was void *ab initio*, did not apply to one who held the paper *mala fide*. Powell v. Waters, 8 Cowen's Rep. 669.

Where a member of a copartnership, without the knowledge or assent of the other partners, drew a note in the name of the firm, and having procured the indorsement of the defendant, passed it to the plaintiffs for a debt due from him to the plaintiffs, it was held that the indorser was not liable to pay the note, and that the partner who drew the note was a competent witness for the indorser to prove the defence. Williams v. Walbridge, 3 Wend. Rep. 415.

Massachusetts. A grantor is not a competent witness to explain a latent ambiguity in his own deed, even when he is not interested. Revere v. Leonard, 1 Mass. Rep. 91. But see Baker v. Sanderson (3 Pick. Rep. 348), where it was decided that the grantor was a competent witness to establish a collateral fact, as the situation of the premises at the time of the grant.

A party to a negotiable security shall not be permitted to testify that at the time he gave it currency, it was void. But he may testify to any facts happening afterwards. Thus where, in an action by the indorsee against the indorser of a promissory note, the defendant offered the maker as a witness to prove that before the note became due, he paid to the plaintiff fifty dollars on account thereof, and gave him a new note for the balance, which was received in full satisfaction, the defendant having released the witness from all demands on account of the note, it was held that he was competent. Warren v. Merry, 3 Mass. Rep. 27.

A witness who had indorsed his name in blank on a bill of lading, was called to prove that he acted as agent for the plaintiff, and it was objected that he should not be permitted to falsify or invalidate his indorsement; but the court said that the rule was confined to negotiable instruments, and even if it extended to a bill of lading, the witness was not called to invalidate his indorsement, but to explain it, and held him competent. Brown v. Babcock, 3 Mass. Rep. 29.

Where the grantee of land was called as a witness to prove that the conveyance was made without consideration, and so void as to creditors, and was objected to on the ground that he was incompetent to impeach a deed to which he was a party, the court said that the common-law principle never went further than to exclude a witness from testifying to invalidate a security to which he had given a credit by his signature; that the late cases confined the rule to parties on negotiable paper, who had by their own acts given it a credit and currency, and held the witness to be competent. Hill v. Payson, 3 Mass. Rep. 559.

In an action by the indorsee of a note against the maker, who offered the payee and indorser as a witness to prove that the note was made on an usurious contract, the court, on a full con-

sideration of the cases of Walton v. Shelley (1 Term. Rep. 296), and of Buckland v. Tankard (5 Id. 578), ruled that the indorser could not be admitted as a witness to prove the note usurious, it being to destroy his own contract. Parker v. Lovejoy, 3 Mass. Rep. 565. The defendant made a promissory note payable to C., who indorsed it in blank, and which, to raise money, they delivered to B., a broker, who also indorsed in blank, and sold it to the plaintiff for an usurious consideration; held, that the indorsers were incompetent to prove the usury. Churchill v. Suter, 4 Mass. Rep. 156. And see Putnam v. Churchill, Id. 516.

A bill of exchange was indorsed by the payee to A. B. as their agent for collection only; A. B. indorsed it *without recourse* to C. D. in trust for the payees; in an action by C. D. against the drawers, A. B. was received as a competent witness to prove the trust, and its revocation by the payees, in order to defeat the action, these facts being subsequent to the due execution of the note. Barker v. Prentiss, 6 Mass. Rep. 430.

C. made a promissory note payable to the defendant, who indorsed it for the accommodation of C., to enable him to raise money on it; C. delivered the note to a broker, who negotiated it to the plaintiff at an usurious rate of interest; held, that C., although released by the defendant, was not a competent witness to prove the usury, and thus impeach a negotiable security to which he was a party. Widgery v. Munroe, 6 Mass. Rep. 449. And in an action by the indorsee of a note against one of two joint makers, the other maker was offered as a witness to prove the note usurious, the defendants having released him; but the court refused to admit him to impeach the note he had signed. Jones v. Coolidge, 7 Mass. Rep. 199.

But where the payee of a note, who had indorsed it with a saving of his own liability, was offered by the defendant, in an action by the indorsee against the maker, to prove an alteration of the note *subsequent* to its execution, he was admitted. Parker v. Hanson, 7 Mass. Rep. 470. And where the drawer of a bill of exchange, at the time of drawing the bill, exhibited to the payee an absolute engagement on the part of the drawee to accept the bill, and at the same time communicated to him certain conditions and restrictions to which the engagement was subject; in an action by the payee against the drawee, held, that the drawer was a competent witness to prove such communication, and that the conditions mentioned were not performed, these circumstances not affecting the validity of the bill in its inception. Storer v. Logan, 9 Mass. Rep. 55.

The defendant made a negotiable promissory note, payable to W., who indorsed it to the plaintiff; in an action on the note, the defendant offered to call the indorser to prove usury in the transfer of the note by him to the plaintiff; held, that he was incompetent to prove the usury. Manning v. Wheatland, 10 Mass. Rep. 502.

Where the maker of a note, before it became due, paid the sum due thereon to the payee, who subsequently indorsed it to the plaintiff, held, in an action by the plaintiff as indorsee against the maker, that the indorser was a competent witness to prove such payment. Fitch v. Hill, 11 Mass. Rep. 286.

Where a deed of conveyance was alleged to have been made to compound a felony, it was held, that the grantor was a competent witness to prove that fact, and that the rule that a party to a paper is incompetent to invalidate it, applies only to negotiable instruments. Inhabitants of Worcester v. Eaton, 11 Mass. Rep. 368. See also, to the same point, Loker v. Haynes, Id. 498, and Bridge v. Eggleston, 14 Id. 245.

It would seem from the remarks of the court in pronouncing judgment in the case of Butler v. Damen, that an indorser of a note could not be a witness to prove it to be merely an accommodation note, and not given for any value. The court said, "the principle of the case of Churchill v. Suter, is applicable here; a party to a negotiable security shall not be permitted to show facts antecedent to the transfer, whereby the holder is to be defeated of his recovery." Butler v. Damen, 15 Mass. Rep. 223.

If the instrument, although negotiable in form, has not in fact been negotiated, but the contest is between the original parties to the illegal transaction, the rule of exclusion does not apply. Thus, in an action by the administrators of the payee of a note against the administrators of the maker, a person who was a several promisor on the note as surety was held to be a competent witness to prove that the note was given for an usurious consideration. Fox v. Whitney, 16 Mass. Rep. 118.

In assumpsit by the indorsee of a promissory note against the indorser, the defence was, that

the note was indorsed for the accommodation of the maker, and that, subsequent to the indorsement, the maker procured the note to be discounted by the plaintiff at a greater than the legal rate of interest, and the maker was offered by the defendant to prove the usury; but he was rejected by the court, on the ground that the note was, for all substantial purposes, made at the time it was discounted and put into circulation, and that therefore the usury was not a fact subsequent to the execution of the note. Hartford Bank v. Barry, 17 Mass. Rep. 94.

One who had signed a negotiable promissory note, as agent for the promisors, was held to be incompetent, in an action by the indorsee against the promisors, to prove the note usurious. Chief Justice Parker, in delivering the opinion of the court, says: "The witness, although not answerable on the note, by reason of the signature, was the party who gave it currency and put it into circulation. He must be considered as having declared, by his signature, that the note was good and valid at the time it was made, for aught he knew to the contrary; and he ought not to be allowed afterwards to say that his declaration was false, and that the note was void, on account of facts known to him at the time it was signed." Packard v. Richardson, 17 Mass. Rep. 122.

Assumpsit on a promissory note made by the defendant, payable to W. P. and by him indorsed to the plaintiff. The defendant offered the indorser as a witness, to prove that the consideration of the indorsement was usurious; but he was rejected, on the authority of Manning v. Wheatland (cited *supra*), as incompetent. Knights v. Putnam, 3 Pick. Rep. 184.

In the same case, it was held that the indorser was not a competent witness to prove that the note was pledged to the plaintiff as indorsee, as collateral security for a debt less than the amount of it, although he had released all claims on the note.

On a motion for a new trial, the court seem to question the correctness of the principle as laid down in Manning v. Wheatland. Wilde, J., said, "the authority of that case had been questioned, and the objection to the doctrine, as there laid down, was entitled to great consideration. The witness was held to be incompetent, not because he was interested, but on the ground of legal policy, which will not permit one who has transferred a negotiable security as valid, to invalidate it by his testimony. But in that case, as in this, there was no illegality in the original contract, and no usury except in the transfer, in which the plaintiff himself was the guilty party. No deception was, therefore, practiced on him." The case finally was decided on a different ground, the court holding that the facts, when proved, did not constitute a defence to the action. See the case of Fox v. Whitney (cited *supra*), where the doctrine laid down in Manning v. Wheatland, seems to be overruled.

Pennsylvania. One who has signed an instrument in writing cannot be permitted to give testimony to invalidate it. Thus, where in an action brought by the indorsee of a promissory note, against the drawer, the payee, who had indorsed it, was called to prove that the note was given without any consideration, it was held that he could not be a witness to invalidate an instrument which he had signed. Stille v. Lynch, 2 Dall. 194. And see Respublica v. Ross, Id. 239.

But this rule is confined to negotiable instruments; and where a witness was offered to explain a receipt which he had given, M'Kean, C. J., admitted him, and said, "The general expression in Walton v. Shelley, must be limited as explained in Bent v. Baker (3 Term Rep. 33, 36), and, therefore, since the witness is disinterested, he must be admitted." Pleasants v. Pemberton, 2 Dall. 196.

The defendant, on the 6th March, 1776, gave a promissory note to A., payable on demand, which he afterwards indorsed to the plaintiff. On the 4th April, 1776, A. drew a bill on the defendant for the amount of the note, payable at sight, to C., who immediately indorsed it to the plaintiff, and which the defendants afterwards accepted. In an action on the bill against the defendant as acceptor, he offered the testimony of A. to prove that the consideration of the note and the bill were the same, and that the note had been previously paid. The court declared their opinion that this case was within the rule as restrained in Bent v. Baker (3 Term Rep. 33, 36), but avoided giving any decided judgment thereon, and declared that in the case of frauds they would go great lengths in the admission of evidence. Shaw v. Wallis, 2 Yeates, 17.

A mortgagor was offered to prove that a mortgage which was given to A., was, in fact, intended for the security of B., and he was held to be competent. Peterson v. Willing, 3 Dall. 506. A party to a fraud is competent to prove it; and within this principle a grantor who had acknowledged the receipt of the consideration money in a deed, was held competent to prove, that the acknowledgment was a fraud upon the grantee's principal, as intended to show that his

agent had paid over the money intrusted to him for the purpose by the principal, when in truth it was not paid, but the agent had taken a deed in his own name, and secured the money by mortgage on the same land. Langer v. Felton, 1 Rawle, 141. And where the defendant executed a bond payable to C., who assigned it to the plaintiff, it was held that C., the assignor, was a competent witness for the defendant to prove fraud in the execution and assignment of the bond, and that although a bond was assignable by a statute of Pennsylvania, yet it was not a negotiable security within the meaning of the rule which excludes a party to an instrument from giving testimony to invalidate it. Baring v. Shippen, 2 Binn. 154. So the master of a vessel is competent to impeach the validity of an invoice and bill of lading, in an action by the owner against the underwriters. Blagg v. The Phœnix Insurance Co., 3 Wash. C. C. Rep. 5. So a grantor in a deed was held to be a competent witness to prove that it was obtained by misrepresentation, and without any consideration. M'Farran v. Powers, 1 Serg. & Rawle, 102. So to prove he had no title to the land when he conveyed. Brownrigg v. Downing, 4 Serg. & Rawle, 494.

D., who was a member of the firm of C. & D., made a promissory note in the name of the firm, payable to M. or order, who indorsed it in blank and delivered it to the plaintiff after it became due. The process was served on C. alone. On the trial, C. offered D. as a witness, to prove that the note was given, not for a partnership debt, but for a private debt of D. Held, that the exclusion of a party to paper is confined to such *negotiable* instruments as are *negotiable in the usual course of business;* that the note not being negotiated until the day of payment was past, was out of the usual course of business, and that the witness was competent. Baird v. Cochran, 4 Serg. & Rawle, 397. And where the names of the payee and several others appeared on the note as indorsers, but the action was brought by the payee, one whose name was on the paper as a subsequent indorser, was admitted as a witness to prove that the note was given without consideration. Hepburn v. Cassel, 6 Serg. & Rawle, 113.

But where the defendant drew a note payable to G. and W., who indorsed it to the plaintiff, it was held that the indorsers were not competent witnesses to prove the note was made without consideration, for the accommodation of the indorsers, and that this was known to the plaintiff when he took the note. Bank of Montgomery v. Walker, 9 Serg. & Rawle, 229.

In an action by the indorsee of a promissory note, against the indorser, the maker, although released, was held not to be a competent witness to prove the consideration of the note usurious. Griffith v. Reford, 1 Rawle, 196.

Virginia. The only case which has arisen on this subject in Virginia is that of Taylor v. Beck, which was an action brought by the indorsee of a promissory note against the maker and indorsers, under a statute of that state. One of the indorsers confessed a judgment, and was offered by the other defendants to prove that the note was given for an usurious consideration. The witness was excluded, and the defendants appealed. In the Court of Appeals the case was twice argued with great learning and ability; and the court, in pronouncing judgment, examined the cases bearing on the subject at great length, and decided that a party to paper, whether negotiable or not, was competent to invalidate it. The witness, however, was excluded on the ground that he was a party to the suit. Taylor v. Beck, 3 Rand. Rep. 316. See, also, what was said in Baring v. Reeder, 1 Hen. & Munf. 154.

Maine. A party to a negotiable promissory note is not a competent witness to impeach it, and the rule applies, not only to actions directly on the note, but to all others where its validity comes collaterally in question. Thus, in a writ of entry, brought upon a mortgage deed, by the assignee of the mortgage, against the grantee of the mortgagor, the tenant pleaded that the note, to secure which the mortgage was given, was usurious, and offered the mortgagor, who was the maker of the note, to prove the usury; but he was held incompetent. Deering v. Sawtel, 4 Greenl. Rep. 191.

The rule extends to the maker of an accommodation note, and is applied where the note has been delivered up to the debtor, on his giving a recognizance to the creditor for the amount. And its application is not restricted to the case of an innocent indorsee, but is admitted where the usurer is himself a party. Thus, where in a writ of entry the tenant pleaded that the demandant levied upon the premises an execution, issued upon a recognizance entered into by the tenant, in which usury was included and taken, and offered as a witness the maker of an accommodation note, made for the tenant's benefit, which the tenant indorsed to the demandant,

and which afterwards formed a part of the consideration of the recognizance, to prove that the note so made and indorsed was usurious. This testimony, so far as it went to show the note to have been detained with usury, was excluded, and the witness held to be incompetent. Chandler v. Morton, 5 Greenl. Rep. 374.

Vermont. In Vermont the rule of exclusion is not adopted. Thus, in a suit between the assignee of a mortgage and the grantee of the mortgagor, the defendant offered the mortgagor to prove that the notes made by him, and which the mortgage was given to secure, were usurious, after having released him from all liability on his covenants contained in the deed; and he was held to be a competent witness. Nichols v. Holgate, 2 Aik. Rep. 138.

New Hampshire. In an action by the indorsee of a promissory note, against the maker, the only question was, whether the indorser was a competent witness to prove the note usurious, and the court said, that the rule that a party who has put his name to a negotiable instrument cannot be a witness to show it was originally void, even in a suit between the original parties to the instrument, was too well settled to be questioned. Houghton v. Page, 1 N. H. Rep. 60. And see Hadduck v. Wilmarth, 5 N. H. Rep. 187, per Richardson, Ch. J.; and Carleton v. Whitcher, 5 N. H. Rep. 196, 200.

But an indorser may be a witness to prove payment before the indorsement. Thus, in an action by the indorsee against the maker of a note, the indorser was held to be a competent witness to prove that the maker paid the note to him before he indorsed it to the plaintiff, and that the plaintiff was apprised of that fact when he took the note. Bryant v. Ritterbush, 2 N. H. Rep. 212.

Connecticut. In an action of trespass *quare clausum fregit*, the plaintiff offered in evidence a lease of the premises in question, from M., dated in 1796. The defendant claimed under a deed and lease from M., dated in 1797, and offered M. as a witness, to prove that the lease to the plaintiff was void. He was rejected, and the court said, that the rule laid down in Walton v. Shelley, that no man should be admitted to swear against his own deed, was sound law, and ought to be adhered to. Allen v. Holkins, 1 Day, 17. See Swift's Ev. 96, *et seq.*

The plaintiff brought an action of trover against the defendants, for one undivided half of a vessel, and claimed under a bill of sale from K. The defendants claimed also under a bill of sale from K., made subsequent to the plaintiff's bill of sale, and offered K. as a witness to prove, that after the execution of the bill of sale to the plaintiff, and before the execution of that to the defendants, the plaintiff made K. his factor or agent to sell and dispose of the vessel, and left the same in K.'s possession for that purpose: and that, in pursuance of this arrangement, K. sold to the defendant. K. was adjudged to be a competent witness, on the ground that a party to an instrument may be a witness to prove facts subsequent to its execution, which tend to defeat it. Webb v. Danforth, 1 Day, 301.

A party to a negotiable instrument, who is divested of his interest, is a competent witness to prove it void in its creation. This was an action on a bill of exchange, drawn by E. and A. T., payable to the plaintiff or order, and accepted by the defendants. The defence was usury, and on the trial the defendants offered E. and A. T. as witnesses to prove the usury, they having been divested of their interest. The question being reserved for the opinion of the judges, it was held, that the witnesses were competent. The remarks of the judges in Allen v. Holkins, and Webb v. Danforth (cited *supra*), adopting the rule in the case of Walton v. Shelley, as law, were said to be *obiter dicta*, and after a full examination of the authorities, the decision of the court in Jordaine v. Lashbrooke, was declared to be sound law. Townsend v. Bush, 1 Conn. Rep. 260.

Louisiana. In an action by the indorsee against the second indorser of a promissory note, the first indorser is a competent witness to prove an alteration in the note subsequent to his indorsement. In giving judgment in this case, the court intimate the opinion that the law is settled that a party to paper is incompetent to prove any facts to invalidate it at the time it passed from his hands. Shamburgh v. Commagere, 10 Mart. Lou. Rep. 18. The defendant, maker, called the payee and indorser to prove that he took the note as the mere agent of the indorsee and the plaintiff, in order to let in proof of want of consideration. Held admissible; and said that the rule is of modern date, and not settled, which would preclude a party to negotiable paper from impeaching it by his evidence. Admitting the rule to exist, however, the court denied its application to the case in question. Cox v. Williams, 5 Mart. Lou. Rep. (N. S.) 139.

South Carolina. In this state, the parties or witnesses to negotiable or other paper, being free

of interest, are receivable to impeach it in any way and on any ground, the doctrine of Walton v. Shelley, or any of its kindred cases, never having been recognized or acted upon since Canty v. Sumter, 2 Bay, 93; Willbourn v. Parham, 1 Harp. 375, 379; Knight v. Packard, 3 M'Cord, 71; Kecherly v. Cheer, 4 Id. 397, 401. And *vid.* Nichols v. Artman, 1 Harp. 285; Croft v. Arthur, 3 Dessauss. Eq. Rep. 223; Payne v. Trezevant, 2 Bay, 23; Haig v. Newton, 1 Rep. Const. Ct. 423; Mott v. Dorrell, 1 M'Cord, 350; Thomas v. Brown, Id. 557; Fleming v. Mulligan, 2 Id. 173; and Brummer v. Wilkes, Id. 178. Canty v. Sumter is misreported. 3 M'Cord, 71, note.

Maryland. In an action on a promissory note, drawn by the defendant, payable to W. or order, and by him indorsed to the plaintiff, the defendant offered W., the payee and indorser (W. and the defendant having executed mutual releases), to prove that the defendant drew the note in question, and delivered it to W. to raise money upon it, for the benefit of the defendant; that the plaintiff discounted the note at the rate of three per centum per month; and that W., as the agent of the defendant, had paid the amount of the note to the plaintiff; held, that W. was a competent witness to prove both the payment and the usury. Ringgold v. Tyson, 3 Har. & John. 172.

So, where a promissory note was drawn by B., payable to H., and by him indorsed to C., who indorsed it to E.; held, in an action on it by E. against H., that B. was a competent witness to prove that the note was given on an usurious consideration. Hunt v. Edwards, 4 Har. & John. 283.

North Carolina. The plaintiff claimed the property in question by gift and delivery from his father. The defendant alleged that the father afterwards conveyed the property to him by bill of sale. The plaintiff introduced the wife of the father to prove the gift. Taylor, Judge:—"She cannot be admitted; the father himself could not be a witness, because he shall not be suffered to defeat his own deed; and if he could not, neither can the wife, for she is not competent to prove a fact which he could not be admitted to prove." Anonymous, 2 Hayw. Rep. 127.

M'Kay, Judge:—"No doubt can be entertained that decisions have been made in this state, which reject the evidence of a man who is offered as a witness to detract from an instrument himself has given. Here, however, the instrument was given by the witness as an attorney; 'Samuel Landrum, attorney,' &c., is stated in the deed. He is therefore admissible, and is not subject to the rule insisted on." Executors of Alston v. Jones's Heirs, 2 Hayw. Rep. 298.

In an action of ejectment, the lessors of the plaintiff claiming title under a deed from C., the defendant offered C. to prove circumstances showing the deed to be invalid; held, that he was competent, and that the rule excluding a witness from impeaching his own instrument, did not apply, at least to an instrument not negotiable. Doe ex dem. Gwyn & Waugh v. Stokes & Welburn, 2 Hawks, 235.

Kentucky. In an action on a note drawn by the defendant, payable to K., which was indorsed, without recourse by K. to R., by him to A., and by A. to the plaintiff, it was held, that K. was a competent witness for the defendant to prove the note void for usury. Gorham v. Carrol, 3 Littell, 221. *Vid.* Ford v. Hale, 1 Monroe, 23.

The following cases, in further illustrations of the extent of the rule, that one shall not be received to impeach an act to which he was a party, may be consulted. In some cases, the rule has been very extensively applied, being extended to deeds, and even oral sales. Pierce v. Hindsall, 1 Tyler, 153; Plummer v. Lane, 4 Harr. & M'Hen. 72. But it has been generally denied as to these. Jackson ex dem. Hopkins v. Leek, 19 Wend. 339; Nichols v. Hotchkiss, 2 Day, 121; Caston's Ex'rs v. Ballard, 1 Hill, 406; Hunter v. Stevenson, Id. 415; Hudson v. Hulbert, 15 Pick. 423, 426; Simmons v. Parsons, 1 Bail. 62; Calloway v. Willie's Lessee, 2 Yerg. 1; Wilmot's Lessee v. Talbot, 3 Harr. & M'Hen. 2; Worthington v. Bicknell, 2 Harr. & John. 58; Hall v. Gittings, 2 Id. 380, 386, and note at the last page; Stump v. Roberts, Cooke, 350; Guy v. Hall, 3 Murph. 150; Taylor v. Luther, 2 Sumn. 228, 235; Seymour's Adm'r v. Beach, 4 Verm. Rep. 500, 502, 503; Wise v. Tripp, 1 Shepl. 9, 12. Though it is often allowed as to negotiable paper, subject to certain restrictions and qualifications. Drake v. Henly, Walker's Rep. 541; Lonsdale v. Brown, 3 Wash. C. C. Rep. 404; Adams v. Carver, 6 Greenl. 390; Lane v. Padelford, 2 Shepl. 94; Story, J., in Taylor v. Luther, 2 Sumn. 235; Buck v. Appleton, 2 Shepl. 284; Wendell v. George, R. M. Charl. 51; Freeman's Bank v. Rollins, 1 Shepl. 202; Van Schaack v. Stafford, 12 Pick. 565; Spring v. Lovett, 11 Pick. 417; Wood, J., in Stone v. Vance, 6 Ham. 248; Harley v. Emerick, Miles, 36; Bank of Pennsylvania v. M'Calmont, 4 Rawle, 307, 311; Gest v. Espy, 2 Watts, 265; O'Brien v. Davis, 6 Id. 498; Emerick v. Harley, 2 Wharton, 50;

United States v. Leffler, 11 Pet. 86; per M'Lean, J., in Scott v. Lloyd, 12 Pet. 149; and by many of the American courts without restriction, even to avoid negotiable and other paper, unless the witness be interested. Robertson v. Mills, 2 Har. & Gill, 98, in connection with other Maryland cases; per all the judges, in Billingsly v. Knight, 2 Tayl. 103, often cited as 3 N. Car. Law Repos., though several cases are cited from the North Carolina reports which go strongly the other way. This stood with a *quere* in Connecticut (Cowles v. Wilcox, 4 Day, 108), but it is now no longer so. The party even to negotiable paper is received to impeach it, in Georgia (Slack v. Moss, Dudley, 161), though this was formerly doubted. Wendell v. George, R. M. Charlt. 51. So he is received in Alabama (Todd v. Stafford, 1 Stew. 199, 200), and various other states. Johnson v. Blackman, 11 Conn. Rep. 342, 348; Harmon v. Arthur, 1 Bail. 83; Per Johnson, J. in Char v. Keckeley, 1 Bail. 481; Stump v. Napier, 2 Yerg. 35. Gibson, C. J. (in O'Brien v. Davis, 6 Watts, 498, 499, 500), anticipates the abolition of all restriction in Pennsylvania, except the interest of the witness, as in England and most of the American states. See the case of Keefe v. Archdeken (1 Vern. & Scriv. Irish Rep. 195, 196, and note), which recognized Walton v. Shelley as law, though we suppose the courts in that country have since, like the English courts, repudiated it.

NOTE 59.—Persons, other than the parties in the cause, guilty of offences against the provisions of the act to prohibit betting and gaming, are competent witnesses, and may be compelled to testify; but their testimony cannot be used in any prosecution against them. 1 Rev. Stat. of N. Y. 663, § 18. And in civil and criminal suits, persons may be witnesses against their accomplices, because their testimony tends to suppress fraud and injustice; and for the same reason, witnesses, whether subscribing witnesses or others, may disclose a fraud. Churchill v. Suter, 4 Mass. Rep. 156; Bean v. Bean, 12 Id. 20. On trial of an indictment for usury, the borrower is a competent witness for the commonwealth, if he is not entitled to a moiety of the penalty as informer, notwithstanding he has never paid the money borrowed (Commonwealth v. Frost, 5 Mass. Rep. 53;) and in all cases an alleged *particeps fraudis* may be a witness to prove or disprove the fraud. Major v. Deer, 4 J. J. Marsh, 586, 587; Glenn v. Kapff, 2 Gill & John. 132; Moore v. Tracy, 7 Wend. 229. The last case was that of a co-conspirator to obtain goods.

A witness standing in the same situation with a party, is not, on that account, disqualified, For additional cases on this head, see Lentz v. Stroh, 6 Serg. & Rawle, 34, 41; Bailor v. Smithers' Heirs, 1 Litt. 110; West v. Bolton, 4 Verm. Rep. 558; Moulton v. Moulton, 1 Shepl. 110; Smith v. Hubbs, 1 Fairf. 71; Moscati v. Lawson, 7 Carr. & Payne, 32; Lethbridge v. Phillips, 2 Stark. Rep. 544.

So of an alleged several wrongdoer, whose claim depends on the same question as the one in issue. Maus' Lessee v. Montgomery, 15 Serg. & Rawle, 221, 223.

The case of Cooper v. Miller (1 Browne, app. 68), that one is not competent for the defendant in replevin, because he went with him and gave countenance to the distress, is contrary to almost, if not quite, the whole current of authority. It was said in one case, that the tortious vendor of the wrongdoer defendant, was not competent for the plaintiff, because a verdict against the defendant would be a bar to an action against the witness. Pierce v. Hindsall, 1 Tyl. 153, 155. The case itself, as well as the reason given, seems to stand almost alone against a host of authority.

The son being sued in trespass for driving away the plaintiff's cow, the father, who directed his son, the defendant, to drive her away, was held competent for the defendant. West v. Bolton, 4 Verm. Rep. 558. In case against one conspiring with B. to defraud the plaintiff, B. is a competent witness for the plaintiff. Brown v. Marsh, 8 Verm. Rep. 310, 312, 313.

The appearance of an attorney generally for three wrongdoers, one not being summoned, will still not make them parties, if the plaintiff proceed against those only who were summoned; and so the third is competent for the others. Lentz v. Stroh, 6 Serg. & Rawle, 34, 41.

In trover, A. was called and held competent for the plaintiff to show that he (A.) bought the goods of the plaintiff fraudulently, without the means or intent to pay for them, and sold them to the defendant. Triebner v. Soddy, 7 Carr. & Payne, 718. In separate informations of *quo warranto* against separate members of a corporation, on the trial of one, the other parties are competent for the defendant. Rex v. Gray, 2 Selw. N. P. 1148 (6th ed.) In an action for infringing a patent, the purchaser from the plaintiff of a license to use the patent, is yet a competent witness for him. Derosne v. Fairlie, 1 Mood. & Rob. 457. And see Treadwell v. Bladen,

certain promissory notes, the Court of King's Bench held that the indorser of one of the notes ought not to be allowed to prove the consideration of the note usurious, on a supposed principle of public policy, that no party who has signed a paper or deed, and has, by his signature, given it credit, shall ever be permitted to give testimony to invalidate that instrument. But the contrary principle is now fully established.

In the later case of Jordaine v. Lashbrooke,(1) this subject was very fully discussed; and the court there determined, that in an action on a bill of exchange against the acceptor, the payee, who was also indorser, was a competent witness for the defendant to prove that the bill, which was unstamped, and purported to be drawn at Hamburgh, was in fact, drawn in London, and, therefore, void for the want of a stamp. Nor is there any distinction, with respect to negotiable or unnegotiable securities, when the point to be considered is the competency of the witness: for, supposing what he has done, in putting such instruments into circulation, to be ever so great a fraud and ever so mischievous, he still is a witness not more devoid of principle than many who have been before mentioned as admissible.(2)

This rule applies to all cases, civil as well as criminal, in which a witness's character is open to objection from the turpitude or impropriety of his conduct. Thus, in an action under the statute 2 Geo. II, c. 24, for bribery at an election, a person who has received a bribe may be a com-

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4 Wash. C. C. Rep. 703, 704. In an action on the case for waste, by the reversioner against a stranger, the tenant, though jointly concerned in committing the waste, was held to be a competent witness for the plaintiff. Speers v. Broomle, 2 Huds. & Brooke, 432. But the case in fact seems to have been no more than that of Duddington v. Hudson, cited and stated in the text. In Lethbridge v. Phillips (2 Stark. Rep. 544), the action was for injuring a picture, and the man who borrowed it of the plaintiff, and without his leave sent it to the defendant, was received for the plaintiff to prove his case.

In an action against the owner of a ship, for goods supplied, the master is competent for the plaintiff to prove the ownership. Le Blanc, J., said he was liable in respect to his contract; but the owners were liable from their character. Rowcroft v. Basset, Peak. Add. Cas. 199. He is equally a witness for the defendant. Descadillas v. Harris, 8 Greenl. 298. In one case, the owner was received as a witness for the plaintiff, in an action to charge another with work done on the schooner at the defendant's special request. Nicholson v. May, 1 Wright, 660. In an action for use and occupation of land, the defendant's tenant of the same land, who had paid all the rent to the defendant, was held to be a competent witness for the plaintiff. Grant v. Beall, 4 Har. & M'Hen. 419. In assumpsit against the owner of a ship, for money advanced to the master in a foreign port, for which he drew his bill on the owner, he was held a competent witness for the plaintiff. Descadillas v. Harris, 8 Greenl. 298. And said, he was indifferently liable to the plaintiff or the owner, for the principal only; not, as in Scott v. McLellan (2 Greenl. 199), liable to the party calling him for principal, &c., and costs, and to the other party for principal only.

(1) 7 T. R. 6, 601; Ashurst, J., *contra*. See Jones v. Brooke, 4 Taunt. 464.

(2) 7 T. R. 611. By this case of Jordaine v. Lashbrooke, the cases of Walton v. Shelley, Adams v. Lingard, 1 Peake N. P. C. 117, and some other case of the same kind, are overruled.

petent witness against the defendant.(1) And one who has set his name as subscribing witness to a deed or will, is admissible to impeach the execution of the instrument;(2) although his evidence is to be received with all the jealousy necessarily attaching to a witness, who, upon his oath, asserts that to be false, which he has, by his solemn act, attested as true.(3)

In an action to recover the price of goods supplied to a ship, against a party whose name appeared on the register as part owner,(4) it was decided that a witness, upon whose oath the register had been obtained, was competent to prove that he had inserted the defendant's name therein without his privity or consent; and the objection, that the witness's evidence was at variance with his oath, would only affect his credit. A person who has joined in an assignment of a ship, is a competent witness to prove that, in point of fact, he had no property in the vessel at the time of the assignment.(5) A vendor of property is competent to prove that

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(1) Bush v. Ralling, Say. 289, cited by Lord Mansfield, C. J., Cowp. 199; Mead v. Robinson, Willes, 423, and n. *c*, Id 425; Howard v. Shipley, 4 East, 180.

(2) Lowe v. Joliffe, 1 Black. Rep. 365. See 7 T. R. 604, 611; 6 East, 195.

(3) 1 Ves. & B. 208.

NOTE 60.—See Fox's Lessee v. Palmer, 2 Dal. 214, and Currie v. Donald, 2 Wash. Virg. Rep. 63. So a judge who has taken a proof of a deed is a competent witness to invalidate such proof. Jackson ex dem. Wyckoff v. Humphrey, 1 John. Rep. 498.

The doctrine in the text has often been held in this country. See Glenn v. Kapff, 2 Gill & John. 132, and per Robertson, C. J., and in Major v. Deer, 4 J. J. Marsh. 587.

A subscribing witness to a will is competent to disprove the sanity of the testator at the time of the execution of the will. Hampton v. Garland, 2 Haywood, 147. *Et vide* Poole v. Richardson, 3 Mass. Rep. 330. As the law abhors fraud, its rules are framed so as to prevent, by detecting and punishing it. For this reason, witnesses, whether subscribing witnesses, or others, may disclose a fraud. Per Parsons, C. J., in Churchill v. Suter, 4 Mass. Rep. 161, 162. A witness to a deed is competent to prove it a forgery. Major v. Deer, 4 J. J. Marsh. 587. And it is no objection to his testimony that it goes to invalidate a title derived by deed from him. Hadduck v. Wilmarth, 5 N. H. Rep. 181, 187.

It was once held in South Carolina, on the authority of Walton v. Shelley, that the obligee in a bond, who had assigned it, in an action by the assignee against the obligor, was not a competent witness to prove payment. Canty v. Sumter, 2 Bay, 93. In this case, the witness was also a party on the record; but no objection appears to have been made on that ground. In Croft v. Arthur (3 Dessauss. Eq. Rep. 223), however, it was held that the rule in Walton v. Shelley is confined to negotiable instruments. Canty v. Sumter was misreported (3 M'Cord, 71, note), and the case of Walton v. Shelley has been repeatedly overruled in South Carolina. Knight v. Packard, 3 M'Cord, 71; Payne v. Trezevant, 2 Bay, 23; Haig v. Newton, 2 Rep. Const. Court, 423; Mott v. Dorrell, 1 M'Cord, 350; Thomas v. Brown, Id. 557; Fleming v. Mulligan, 2 Id. 173; Brummer v. Wilkes, Id. 178.

(4) Rands v. Thomas, 5 M. & S. 244.

(5) By Willes, J., 1 T. R. 301.

NOTE 61.—The same has been repeatedly held in this and the like cases. Johnson v. Bourn, 1 Wash. Virg. Rep. 187. A factor having pledged goods wrongfully to several persons, is competent for the plaintiff, his principal, in trover by him to recover the goods; for he stands but in the light of a joint wrongdoer. Green v. Fisher, 1 Carr. & Payne, 190. So in an action against one for committing waste contrary to his agreement, the person who committed the waste by the defendant's authority is a competent witness against him. Malone v. Home, 1 Hudson & Brooke, 344. A *particeps fraudis* is a competent witness to prove or disprove the fraud; as the grantor in a

he had no title in the lands pretended to be sold and conveyed.(1) And a witness, who admits that, upon a former proceeding, he swore falsely with regard to the matters upon which he is examined, is not incompetent, however the objection may affect his credit.(2)

CHAPTER VII.

OF THE EXCLUSION OF EVIDENCE, WHERE THE DISCLOSURE WOULD BE IN VIOLATION OF PROFESSIONAL CONFIDENCE, OR PREJUDICIAL TO PUBLIC INTERESTS.

THE preceding chapters have treated of the grounds of incompetency, from want of understanding, from defect of religious principle, and from immediate and individual interest in the event of the suit; and of the confirmation requisite in the cases of accomplices and others. The objection to testimony from these causes depends upon one principle, the supposed want of personal credit attaching to the witnesses. Two other grounds for the exclusion of evidence are now to be considered: where the disclosure would be of matters communicated under professional confidence; and where the disclosure would be prejudicial to public interests. These grounds of exclusion will be the subject of the two following sections.

SECTION I.

Of the Exclusion of Evidence, where the Disclosure would be in Violation of Professional Confidence.

Communications, made on the faith of that professional confidence, which a client reposes in his counsel, attorney or solicitor, are not allowed to be revealed in a court of justice to the prejudice of the client.(3)

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deed to show that it was fraudulent (Jackson ex dem. Mapes v. Frost, 6 John. Rep. 135; Loker v. Haynes, 11 Mass. Rep. 498; Langer v. Felton, 1 Rawle, 141); or the grantee to show that the grant was without consideration, and so fraudulent as to creditors. Hill v. Payson, 3 Mass. Rep. 559; Croft v. Arthur, 3 Dessauss. Eq. Rep. 223. But see Fowler v. Norton, 2 Root, 231, *contra*. In an action on the case for a false affirmation, the person concerning whom the affirmation was made was held a competent witness for the plaintiff. Wise v. Wilcox, 1 Day, 22; Smith v. Harris, 2 Stark. Rep. 47.

(1) Title v. Grevett, 2 Ld. Raym. 1008. See 7 T. R. 609.

(2) R. v. Teal, 11 East, 309.

(3) NOTE 62.—In Louisiana, a statute enacts that attorneys shall not give evidence in a cause where they are employed. This is intended to preclude them only when they are offered for their clients. They may, therefore, be called on and compelled to testify against their clients, in

respect to matters not confidential. Cox v. Williams, 5 Mart. Lou. Rep. 139; Reeves v. Burton, 6 Id. 283.

The curious reader, who would look at the ancient foundations of this rule, may consult Cary, 88, 89, 126, 143, and Toth. 177, where he will find principles by which we are still governed, though less broad than those upon which some of our courts proceed. The cases in Cary are stated at large in the Am. ed. of Starkie's Ev. of 1828, pt. 4, p. 395, note 1.

An attorney's clerk is privileged to the same extent as the attorney. Mills v. Oddy, 6 Carr. & Payne, 728; Bowman v. Norton, 5 Carr. & Payne, 177; *post*, note 66.

As to the subject matter of the privilege, an attorney refusing to produce his client's papers on notice, is not admissible as a witness to prove their contents. Bottomley v. Usborne, Peak. Add. Cas. 99, 101; Mills v. Oddy, 6 Carr. & Payne, 728, and note *a* to that case, citing per Lord Lyndhurst, C. B., in Bate v. Kinsey, 1 Crompt. Mees. & Rosc. 38; Marston v. Downes, 6 Carr. & Payne, 381. See, also, Walker v. Wildman, 6 Madd. 47, and Cook v. Hearn, 1 Mood. & Rob. 201. A bankrupt went to an attorney's clerk to consult him as to the state of his affairs. In an action by the assignees, they called the clerk to prove the conversation. The offering counsel, conceding that the clerk was privileged, and that the conversation was in its own nature so, insisted that the privilege followed the right of suit, which having passed to the assignees, they might waive it. Beside, he added, that the assignees represented the bankrupt's person, and might waive the privilege for him. But the offer was disallowed. Tindal, C. J., put the case of the commission being set aside, and asked—"Are the man's secrets, told to his solicitor, to be let out?" Bowman v. Norton, 5 Carr. & Payne, 177.

But the attorney, &c., to protect the communication, must be consulted strictly in his professional character. See Rex v. Brewer, 6 Carr. & Payne, 363; and Hill v. Elliott, 5 Id. 436; Farquano v. Knight, 2 Mees. & Welsb. 100. In Annesly v. Ld. Anglesea (17 How. St. Tr. 1221), the attorney of the prosecutor of an indictment was allowed to state what his client had observed to him, pending the proceedings on the indictment, viz: that he would give a large sum of money to have the prisoner hanged. In the note *post*, 68, may be seen various instances in which the communications, though made to an attorney, &c., were holden unprotected because not made with a view to professional advice. The books furnish additional illustrations of the kind. Thus, though we have just seen that a bankrupt's communications shall not be disclosed, if he go to consult the attorney on the state of his affairs, yet in another case, although the communication was made to his acting attorney retained in his affairs, and though it related to them, it was holden not to be privileged. The attorney suggested to his client, that a meeting of his creditors should be called; and the client asking him if he could safely attend without being arrested, was advised to remain behind in the attorney's office till it could be ascertained whether his creditors would give him a safe conduct. This was offered in evidence as an act of bankruptcy, and the attorney was allowed to disclose it. Abbott, Ch. J., said the privilege must be confined to questions asked with a view to legal advice which it was a part of the duty of the attorney to give as attorney; but a question asked with a view to obtain information as a matter of fact, being addressed to an attorney where it might have been addressed to any other person, and being addressed to him where his character and office of attorney is not called in action, has never been held to be within the protection. Bramwell v. Lucas, 4 Dowl. & Ryl. 367, 372; S. C., 2 Barn. & Cress. 745. So he may be asked by whom he was employed in the cause (Brown v. Payson, 6 New Hamp. Rep. 443), and in what capacity his clients employed him, whether as executors (Gurney, B., in Beckwith v. Benner, 6 Carr. & Payne, 681); when the instrument in question was put into his hands, for collection or suit (Walworth, C., in Driggs v. Rockwell, 11 Wen. 504, 507, 508), though he cannot be compelled to state its situation or appearance at that time. Brown v. Payson, 6 N. Hamp. Rep. 443; Wheatley v. Williams, 1 Mees. & Welsb. 533. He was compelled to state the fact of giving a check to his client for money collected for him; and what he then said as to being in funds. Johnson v. Farmers' Bank, 1 Harringt. 117, 118, 119. So of the execution of a deed by his client in his presence (Sandford v. Remington, 2 Ves. jun. 189), and he compellable to disclose any other private communication or transaction independent of his character as attorney. Hodges v. Mullikin, 1 Bland, 509; Bogert v. Bogert, 2 Edw. Ch. Rep. 399, 403; Rogers v. Dare, 1 Wright, 136, 137. On this principle, he is bound to disclose a statement made by request of his client, to the adverse party. Ripon v. Davis, 2 Nev. & Mann.

310. And Gainsford v. Grammar (2 Camp. 9, *contra*), was questioned, and *semble*, overruled as there reported. Id.; Griffith v. Davis, 5 Barn. & Adolph. 502, S. P.

Whether the communications to an attorney, &c., in order to be privileged, must relate to a suit depending or at least prospective, as will be seen *post*, note 67; the authorities are conflicting. And see Brown v. Payson, 6 N. Hamp. Rep. 445, and the cases there cited, by Parker, J. That either is necessary was denied in Beltzhoover v. Blackstock (3 Watts, 20, 22, 27, 28). And this seems to be now the settled doctrine of Westminster Hall, besides being sustained by a decided preponderance of American authority. See Taylor v. Blacklow, 3 Bing. N. C. 235, and the cases there cited by the counsel and the court; Doe dem. Peter v. Watkins, Id. 421; Walker v. Wildman, 6 Madd. 47.

The question arose in Foster v. Hall (12 Pick. 89), where it was much considered. Mr. R., an attorney, was consulted by and gave advice to a grantor concerning a proposed deed. He knew nothing but what the grantor communicated in a conversation and consultation held in relation to the making of the conveyance. which was now assailed as fraudulent. Mr. R. had been recently licensed as attorney, and felt that he was entitled to a fee for the directions he gave; but had never received one. The counsel for the grantor objected to his being examined, though his advice had not been given in respect to any pending suit; nor with express reference to a prospective one. The objection was allowed; and on motion for a new trial, it was denied. The question was debated and decided on the assumption, that the advice had no connection with a present or prospective suit. Shaw, C. J., delivered the opinion of the court. He examined the English cases very fully (A. D. 1831), cited in the 6th ed. of Phillipps, p. 134 (A. D. 1824), repeated in the seventh edition at pp. 143, 144, which he approved, and concluded as follows: "On the whole, we are of opinion, that, although this rule of privilege, having the tendency to prevent the full disclosure of the truth, ought to be construed strictly; yet still, whether we consider the principle of public policy upon which the rule is founded, or the weight of authority by which its extent and limits are fixed, the rule is not strictly confined to communications made for the purpose of enabling an attorney to conduct a cause in court, but does extend so as to include communications made by one to his legal adviser, whilst engaged and employed in that character, and when the object is to get his legal advice and opinion as to legal rights and obligations, although the purpose be to correct a defective title, by obtaining a release, to avoid litigation by compromise, to ascertain what facts are necessary to constitute a legal compliance with an obligation, and thus avoid a forfeiture or claim for damages, or for other legal and proper purposes, not connected with a suit in court." In this case, the well known limits of the rule in most other respects are noticed by the learned Ch. J. on English authority (12 Pick. 93 to 99), not differing materially from those already pointed out in the text or notes. See also a learned examination of the same head of evidence upon the English and many of the American cases, by Parker, J., in Brown v. Payson, 6 N. Hamp. Rep. 444 to 449.

To Foster v. Hall, may now be added the still later cases of Bolton v. The Corporation of Liverpool, 1 Mylne & Keen, 88; and Greenough v. Gaskell, Id. 98 (A. D. 1833); Moore v. Terrell (same year), 4 Barn. & Adolph. 870). The reporter's note to Greenough v. Gaskell is thus: "And generally, *it seems*, that a solicitor cannot be compelled, at the instance of a third person, to disclose matters which have come to his knowledge in the conduct of professional business for a client, even though such business had no reference to legal proceedings, either existing, or in contemplation." In Moore v. Terrell, Parke, J., said, "In Greenough v. Gaskell, the lord chancellor consulted with Tindal, C. J., Lord Lyndhurst, and myself; and we all thought the client's privileges extended much beyond communications in respect of a suit." The language of the lord chancellor is also given in a note to Moore v. Terrell. An attorney for A. lending money to B. peruses the abstract of B.'s title. He is not admissible as a witness concerning them. Doe dem. Peter v. Watkins, 3 Bing N. C. 421. So of anything communicated by a client in respect to the sale or purchase of an estate. Mynn v. Joliffe, 1 Mood. & Rob. 327. And see Ex parte Aitkin, 4 Barn. & Ald. 47; and Ex parte Yeatman, 4 Dowl. Pr. Cas. 309, per Littledale, J. See also Hare on Discovery, ch. 3. In Doe ex dem. Shellard v. Harris (5 Car. & Payne, 592), Mr. Justice J. Parke extended it to a knowledge acquired on an application to an attorney to draw a deed in fraud of creditors, and he refused to make an exception, because the advice might relate to an unlawful transaction, repeating what he said in Moore v. Terrell, as to the decision of the lord chancellor. He concluded by saying, "I am of opinion that the privilege applies to all cases

where the client applies to the attorney in a professional capacity; and an application to draw a deed is, I think, of that description." He said, in the course of the trial, that he considered the cases to the contrary, as overruled. He said: "There is a great deal of difficulty in the witness's disclosing whether the conference between him and his client, was for a lawful or unlawful purpose, without our being told what it was. It might be that the party asked if a particular thing could legally be done." See also Bowman v. Norton, and Mills v. Oddy, *supra*, which are also substantially that the retainer need not relate to a suit.

The consequence is, that where no suit is pending, an attorney may be employed for both parties as in conveyances, and, therefore, cannot disclose the secrets of either, without his consent. Doe dem. Peter v. Watkins, 3 Bing. N. C. 421. See, also, Taylor v. Blacklow, Id. 235; Doe ex dem. Stroder v. Seaton, 2 Adolph. & Ellis, 171.

The privilege is that of the party, who may waive it. If the attorney in the cause submit to be examined, his assent, it seems, shall be taken for that of the client. Bishop of Winchester v. Fourner, 2 Ves. sen. 446; Maddox v. Maddox, 1 Id. 61, 62. But as we saw in Bowman v. Norton (*supra*), the assignees of a bankrupt have no power, as such, to waive his privilege.

An attorney making a communication between two parties, is compellable by either to disclose them. Cleeve v. Powell, 1 Mood. & Rob. 228; Braughe v. Cradock, Id. 182. A party assignor may waive his privilege, and let in the testimony of his attorney against his (the party's) assignee, as to what the assignor said previous to the assignment. Benjamin v. Coventry, 19 Wend. 353.

Whether, under the New York statute, the privilege of concealing knowledge acquired professionally, as a physician or surgeon, be that of the patient, and waivable by him? *Quere.* Johnson v. Johnson, 14 Wend. 637. Savage, Ch. J., at p. 641, said it was undoubtedly that of the party, not the witness. S. C., 4 Paige, 460, 468, and see S. C., but not S. P., in 1 Edw. Ch. Rep. 439.

All the cases seem to agree that the privilege continues after the particular suit is terminated, and extends to causes with which the client has no concern. See Parker v. Yates, 12 Moore-520. It extends to the professional advisers of a stranger to the suit. Though if the judge improperly receive the evidence, it has been held that the party to the cause cannot avail himself of the objection. Yet counsel may argue as to the admissibility at the trial. Rex v. Woodley, 1 Mood. & Rob. 391. *Quere;* for the privilege is not allowed out of regard to the interests of the parties. But see Doe dem. Peter v. Watkins, 3 Bing. N. C. 421.

In respect to the production of papers, the privilege of the attorney seems to be co-extensive with that of the client; but not more so. *Post*, note 69. But he is not bound to produce a case made for his client, a stranger, and submitted to counsel. Rex v. Woodley, 1 Mood. & Rob. 390.

The court will direct at the trial, as to the attorney's privileges. Nixon v. Mayoh, 1 Mood. & Rob. 76.

As to incompeteney or privilege, on the ground of policy, from disclosing knowledge acquired in the course of state, judicial, or other official duty, see notes to chapter on the examination of witnesses. A senator was held admissible to disclose facts which transpired in secret session, after he had applied to have the injunction of secrecy removed, and that was refused. Law v. Scott, 5 Harr. & John. 438. The court refused a subpœna *duces tecum* to compel a state governor to produce a paper filed with him, containing charges alleged to be libelous. Gray v. Pentland, 2 Serg. & Rawle, 23, commented on and approved in Youter v. Sanno, 6 Watts, 166. The county attorney is inadmissible as a witness to disclose the proceedings before the grand jury. McLellan v. Richardson, 1 Shepl. 82, 86. The court say the object of the grand juror's oath of secrecy, is to prevent escapes, and promote freedom of deliberation, by preventing timid jurors being overawed. In another case, a grand juror was received to prove who was the prosecutor. Huston, J., argues that the oath, "The commonwealth's counsel, your fellows and your own, you shall keep secret," restrains merely from all voluntary disclosure, because that may affect the prosecution, or jurors, or witnesses, injuriously; but not disclosures on oath to promote justice. Huidekoper v. Cotton, 3 Watts, 56, 57, 58. He cites Wheat. Selw. 815, as in point. And so it is. See that page of the 2d Am. ed. The case is Sykes v. Dunbar.

Communications, though made to official persons, are not privileged, where they are not made in the discharge of any public duty; as a letter written by a private individual to the secretary of the postmaster-general, complaining of the conduct of the guard of the mail. Blake v. Pilfield, 1 Mood. & Rob. 198.

The expediency of this rule must depend, not on the impropriety of violating the confidence reposed, but on a consideration that the collateral inconvenience, which would ensue if no such confidence were reposed, would preponderate over the direct mischief produced by a chance of the failure of justice, resulting from the exclusion of evidence. If, in the cases within the operation of the rule, the only confidence reposed were a confession of guilt or dishonesty, the rule would be obviously detrimental to the interests of justice; but it is conceived that, in a multitude of instances, a person possessed of just rights would be materially impeded in vindicating them, if every communication, made to his professional adviser, might be used against him; if such were the law, it would be necessary, in self-defence, to accompany all communications made to a professional adviser, with a statement of the several circumstances and explanations, which, however unnecessary for the purpose of the communication, would be requisite to prevent it from being unfairly used. And it is to be observed, that the evidence in question, being generally a species of hearsay evidence, is open to much objection upon that ground, especially as it would generally be delivered either by a very favorable or a very hostile witness.(1)

Privilege is that of client.

The privilege is that of the client and not of the professional adviser; an attorney will not be allowed, against his client's will, to disclose matters of professional confidence, though himself willing to do so.(2) The client, however, may waive his privilege;(3) in which case the court will compel

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When the purposes of public justice require that certain evidence should be given, which the court, from a regard to decency, would be disposed to suppress (whether upon indictment for crimes, or on questions of private right or private wrong), the evidence, however inconvenient, must be disclosed. It has, therefore, been considered that Mr. Justice Burnet was wrong in refusing to try an action of defamation, in which a woman charged a man with proclaiming to the world that she had a secret defect in her person, and the defendant, by plea, justified that it was true that she had such defect. Per Lord Mansfield, in Da Costar v. Jones, Cowp. 733. But the courts have frequently refused to try wagers, on the ground of their leading to the admission of indecent evidence, or as unnecessarily injuring the feelings of third parties. Id.; Dirchburn v. Goldsmith, 4 Camp. 152.

Semble. An arbitrator is privileged from disclosure out of protection to his situation. Note to Johnson v. Durant, 4 Carr. & Payne, 327, cited Ellis v. Saltau.

A petit juror may, of course, be examined to any material fact, though it come to his knowledge in the course of duty as juror. Dunbar v. Parks, 2 Tyl. 217. And in crim. con. the executor of the defendant's uncle was compelled to answer what amount of property the defendant had acquired by his death, this being material to the question of damages. Abbott, C. J., said: "I do not say that an executor is bound to answer all questions; but I do not see why you should not answer this." Peter v. Hancock, 1 Carr. & Payne, 375.

(1) See the remarks of Lord Brougham, C., in Greenough v. Gaskell, 1 Myl. & K. 103. See also Bolton v. Liverpool (Corporation), Id. 94, 95.

(2) B. N. P. 284; Wilson v. Rastall, 4 T. R. 759; Sandford v. Remington, 2 Ves. jun. 189; by Lord Lyndhurst, C., in Herring v. Clobery, 1 Phill. 96.

(3) Merle v. More, R. & M. 390; Baillie's Case, 21 How. St. Tr. 341, 358, 408.

the legal adviser to discover what he knows.(1) But he is not to be considered as waiving it, by calling his attorney as a witness, unless he examines him as to confidential communications.(2)

With respect to the character and situation of the persons receiving the communications, it is to be observed that this professional privilege extends to the three cases of counsel, attorney, and solicitor.(3)

A person who acts as interpreter(4) or agent,(5) as the organ of communication between an attorney and his client, stands precisely in the same situation as the attorney himself; he is considered as the organ of the attorney, and is under the same conditions of secresy. An attorney's clerk(6) cannot be called to prove a confidential communication. A barrister's clerk cannot be called to prove the date of his master's retainer.(7) It seems also that the privilege extends to the personal representative of a professional adviser.(8)

But a person by profession an attorney, if he be not so employed in the particular business which is the subject of inquiry (as, where he is undersheriff at the time), is not precluded from giving evidence, though he may have been consulted confidentially.(9) So a communication with an at-

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(1) By North, C. J., in Lea v. Wheatley, cited 20 How. St. Tr. 574, *n.*

NOTE 63.—But whether, where the attorney is retained by two persons, he can be absolved by one, so as to disclose information to the prejudice of the other? *Quere.* Devoy's Lessee v. Burke, 2 Fox & Smith, 191. This privilege is personal to the client, and if he consent, it does not lie with a third person to object. Merle v. More, 2 Carr. & Payne, 275; S. C., cited in the text from Ry. & Mood. The subject of waiver was much discussed in the case before the House of Lords concerning the abuses in Greenwich Hospital, and in three instances, the clients, after objection by their former counsel, were allowed to waive their privilege. Howell's State Trials, Vol. 21, pp. 341, 358, 408, and see note to Merle v. More, Ry. & Mood. 391. The consent of one who acted as counsel with the attorney on a former cause, where the attorney obtained his knowledge, without the client's consent, will not warrant the attorney's disclosing such knowledge as a witness. Francis and Jones' Case, 1 C. H. Rec. 121.

(2) Waldron v. Ward, Styl. 449; Vaillant v. Dodemead, 2 Atk. 524. See also Bate v. Kinsey, 1 C., M. & R. 38.

(3) Wilson v. Rastall, 4 T. R. 759; Waldron v. Ward, Styl. 449.

(4) Du Barre v. Livette, Peake, 78, recognized 4 T. R. 756.

NOTE 64.—All the reasons which apply to the attorney, apply to an interpreter between the client and attorney, of whom he is merely the organ. Andrews v. Solomon, 1 Pet. C. C. R. 356. *Et vide* Parker v. Carter, 4 Munf. R. 273; and Jackson d. Haverly v. French, 3 Wend. R. 337.

(5) Parkins v. Hawkshaw, 2 Stark. R. 239; Bunbury v. Bunbury, 2 Beav. 173; Walker v. Wildman, 6 Madd. 47.

(6) Taylor v. Forster, 2 C. & P. 195; Bowman v. Norton, 5 C. & P. 177; Mills v. Oddy, 6 C. & P. 731; R. v. Upper Boddington, 8 D. & R. 732.

(7) Foote v. Hayne, R. & M. 165; S. C., 1 C. & P. 545.

(8) See Fenwick v. Reed, 1 Mer. 114.

(9) Wilson v. Rastall, 4 T. R. 753. See Hill v. Elliott, 5 C. & P. 436; R. v. Brewer, 6 C. & P. 363.

NOTE 65.—Annesly v. The Earl of Anglesea, Macnally, 241. Thus, where the party consulted the attorney confidentially as a friend, but not in the character of an attorney or counsel for him, it was held not to come within the rule. Hoffman v. Smith, 1 Cain. Rep. 157, 159. So where the fact communicated had no relation to the action. Riggs v. Denniston, 3 John. Cas. 198. So where

torney's clerk, who is not acting in that capacity on behalf of his principal, is not privileged.(1) And it has been ruled, that a person who was consulted confidentially, on the supposition of his being an attorney, when, in fact, he was not one, is compellable to answer.(2)

Medical and other advisers.

The professional privilege is confined to the cases above enumerated, of counsel, attorney, and solicitor.(3) There are, indeed, cases, said Buller, J., in the case of Wilson v. Rastall,(4) to which it is much to be lamented that the law of privilege is not extended: those in which medical persons are obliged to declare the information which they have acquired by attending in their professional characters.(5) This point was much considered in the Duchess of Kingston's Case,(6) where Sir C. Hawkins, who had attended the duchess as a medical man, was compelled to disclose what had been committed to him in confidence.(7) Confidential communications to a friend are not privileged: in cases criminal, as well as civil, he is compellable, when required by courts of justice, to disclose what has been imparted to him in confidence.(8) Such evidence was received against the prisoner in Dr. Ratcliffe's Case,(9) and in Lord Russell's Case.(10)

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the confidential communication to the attorney, in respect to a cause of the client, was repeated by him to the same attorney, but after the relation of attorney and client had ceased. Yordan v. Hess, 13 John Rep. 492, 494. Otherwise if it appear to have been drawn out by artifice, with the view of being made evidence. Id.

D. delivered a note to his attorney, indorsed by N. & H., against whom the attorney obtained separate judgments. N. paid the judgment against him, and requested the attorney to collect that against H., for his (N.'s) benefit. It afterwards becoming material, on a proceeding against N., to have the note in evidence, it was held that the attorney must produce it on a subpœna *duces tecum*, notwithstanding N.'s objection; for the witness did not receive the note as N.'s, but as D.'s attorney. Neafie's Case, 4 C. H. Rec. 168, before Colden, Mayor.

(1) Doe d. Pritchard v. Jauncey, 8 C. & P. 99.

(2) Fountain v. Young, 6 Esp. 113. The witness was clerk of the papers in Newgate, and had formerly been clerk to an attorney. In the Jurist for 1837, the propriety of this decision is doubted. And it may be observed, that if the principle of the case were carried out, it might extend to the case of a communication made to an attorney who had omitted to take out his certificate. See *infra*, pp. 138, 143.

(3) 4 T. R. 758; Vaillant v. Dodemead, 2 Atk. 524; 2 Swanst. 221. It was formerly thought that a trustee was privileged. B. N. P. 184.

(4) 4 T. R. 759. See also R. v. Gibbons, 1 C. & P. 97; R. v. Sparkes, cited in Du Barre v. Livette, Peake, 77.

(5) See also the remarks of Lord Brougham, C., in Greenough v. Gaskell, 1 Myl. & K. 103. See note 66.

(6) 20 How. St. Tr. 613, 614.

(7) By the Revised Statutes of New York (Vol. 2, p. 406, § 73), and of Missouri (p. 623, § 17), physicians and surgeons are not allowed to disclose any information they may have acquired in attending a patient professionally, where such information was necessary to enable them to do any professional act for the patient. Greenl. Evid. 361, note 4, (3d edit.)

(8) See Lord Kenyon, in Wilson v. Rastall, 4 T. R. 758.

(9) 18 How. St. Tr. 428.

(10) 9 How. St. Tr. 599.

In an early case,(1) where the defendant, in an action of debt on a bond, pleaded the statute against buying and selling of offices, and called a witness to show on what occasion the bond was given, Lord Holt is said to have refused his evidence, because it appeared, that he was privately intrusted to make the bargain, and to keep it secret. But the principle and authority of this case must be considered as having been overruled by the case of Wilson v. Rastall, and the later decisions on this subject.

The bankers of one of the parties in a cause are bound to answer as to the amount of the balance of such party on a particular day.(2) And a steward is not, like the legal adviser of a party, protected by his relative situation from the disclosure of his knowledge of the affairs of his employer, or of the existence and contents of instruments, with which he has become acquainted in consequence of his employment.(3)

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(1) B. N. P. 284.

(2) Lloyd v. Freshfield, 2 C. & P. 329.

(3) Falmouth (Earl of) v. Moss, 11 Price, 455. See also Vaillant v. Dodemead, 2 Atk. 524; by Buller, J., 4 T. R. 756.

NOTE 66.—The head or confidential clerk in a mercantile establishment is not privileged from being examined as a witness in respect to the affairs of his principal. Corps v. Robinson, 2 Wash. C. C. Rep. 388. Nor an attorney's clerk in respect to the private and personal affairs of the latter, though his articles bind him to keep his master's secrets. Webb v. Smith, 1 Carr. & Payne, 337. So a confidential agent or factor must give evidence of matters confidentially communicated to him (Holmes v. Comeggs, 1 Dallas, 439); and a banker of one of the parties is bound to disclose what such party's balance was on a given day. Lloyd v. Freshfield, 2 Carr. & Payne, 325.

The privilege does not extend to the clerk or student of the attorney or counsel, and he is bound to testify to facts of which he acquired a knowledge while in the office of the attorney, though such as the attorney himself could not disclose. Andrews v. Solomon, 1 Pet. C. C. Rep. 356. But in Power v. Kent (1 Cowen's Rep. 172), it was decided that the clerk represents the attorney, during his absence, as to all the ordinary proceedings of the office, and has power to bind the attorney by waiving the usual formalities of practice, as entering a rule to amend. It would seem to follow that the clerk should be under the same restrictions in regard to the business of the attorney as the attorney himself; and in Jackson ex dem. Haverly v. French (3 Wend. 337), the opinion was intimated by the court that the rule was applicable to the clerk as well as to the attorney. In a late English case, it was ruled at Nisi Prius, by Best, J., that the privilege of not disclosing confidential communications extends to the clerk of the attorney employed in a cause, on the ground that attorneys are under the necessity of employing clerks, before whom such communications must be made. Taylor v. Forster, 2 Carr. & Payne, 195. And see Foote v. Hayne, *infra*. And in a still later case, it was held that the clerk of an attorney, who had been employed by a mortgagee to make an abstract of the mortgage deeds, was not a competent witness to prove the contents of the deeds (the mortgagee having refused to produce them), Mr. Justice Bayley saying that the clerk stood precisely in the same situation as his master. The King v. The Inh. of Upper Boddington, 8 Dowl. & Ry. 726. Otherwise if the deeds form no part of the client's title. Doe dem. Courtail v. Thomas, 9 Barn. & Cress. 288.

The privilege does not extend to other professional men. Dixon v. Parmelee, 2 Verm. Rep. 185. A physician is bound to testify to facts which were communicated in confidence to him in his professional capacity. Sherman v. Sherman, 1 Root, 486. So confessions made to a Protestant divine will be received in evidence. Smith's Case, 2 N. Y. C. H. Rec. 77; Gilman's Case, Carr. Suppl. 61, also cited in Broad v. Pitt, 3 Carr. & Payne, 518, S. P. So penitential confessions, made in confidence to members of the same church of which the prisoner is a member, are not privileged. Commonwealth v. Drake, 15 Mass. Rep. 161. But it was held by Clinton,

A confession to a clergyman,(1) or to a popish priest,(2) is not privileged. But in one case,(3) Best, C. J., said that he would never compel a clergyman to disclose communications made to him by a prisoner; but if he chose to disclose them, he should receive them in evidence.(4) Bentham,

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Mayor, in the New York Court of General Sessions, that confessions made to a Roman Catholic clergyman in confidence, and whose duty it is to receive auricular confessions according to the canons of that church, will not be received in evidence. Smith's Case, cited *supra*, and note to that case, 2 N. Y. C. H. Rec. 80; Butler v. Moore, Macnally, 253, *contra*.

Whether, where a clerk or servant is bound by articles to keep his master's secrets and is called on to disclose a communication prejudicial to his master, or a matter expressly confided to him as a secret, he will be holden to testify? *Quere*. The inclination of Littledale, J., seemed to be that he would not, in Webb v. Smith (1 Carr. & Payne, 337). In Foot v. Hayne (Id. 545), Scarlett complained that his clerk was compelled to attend on a subpœna *duces tecum* to produce his retainer book, in order to fix the time of his retainer; and Abbott, C. J., seems to have expressed himself very decidedly that the counsel's clerk should not be received to prove such a communication between the counsel and his client. And *vid.* Eicke v. Nokes, 1 Mood. & Malk. 303.

And now, by statute in New York, no minister of the gospel, or priest of any denomination, is allowed to disclose any communication made to him, in his professional character, in the course of discipline enjoined by the rules or practice of his denomination. 2 R. S. 406, § 72. And no practitioner of physic or surgery, duly licensed, shall be allowed to disclose any information which he may have acquired in attending any patient in a professional character, if the information was necessary to enable him to prescribe for his patient as a physician, or do any act as a surgeon. Id. § 73.

A physician consulted by the defendant in an action on the case for seduction, as to the means of producing an abortion, is not privileged from testifying, by the New York statute, forbidding a disclosure of information received by a physician to enable him to prescribe for a patient. Hewitt v. Prime, 21 Wend. R. 79.

Communications made to a confidential friend in confidence are not privileged; and such friend is bound to disclose them when called upon as a witness, although made under an injunction and promise of secresy. Mills v. Griswold, 1 Root, 383; Calkins v. Lee, 2 Root, 363. This was once made a grave question. Bulstrod v. Letchmere, 2 Freem. 5. So a person in no way connected with the attorney, who is present at a communication made to the attorney by the client, is bound to testify to such communication. Jackson ex dem. Haverly v. French, 3 Wend. Rep. 337; Gainsford v. Grammar, 2 Campb. 10, S. P.

But the same reasons which apply to an attorney apply equally to an interpreter between the client and attorney, of whom he is merely the organ. Andrews v. Solomon, 1 Pet. C. C. Rep. 356; Parker v. Carter, 4 Munf. 273; Jackson ex dem. Haverly v. French, 2 Wend. Rep, 337.

In New Hampshire, the privilege is not confined to communications with professional men, but extends to any person employed to manage a cause as counsel. Bean v. Quimby, 5 N. H. Rep. 94. The court put this on the construction of a local statute, authorizing a man to manage his cause by agent, whether he be licensed or not. Id. 97.

(A different rule prevails in Vermont, where it is held that communications made to a person who is not an attorney, nor clerk to an attorney, but is pursuing the study of the law, are not privileged, though made in reference to the management of a suit. Holman v. Kimball, 22 Vt. (7 Washb.) 555. So in Massachusetts, if a person goes to the office of an attorney to obtain advice and consults with a student at law, his statements to him are not privileged. Barnes v. Harris, 7 Cush. 576.)

(1) R. v. Sparkes, cited in Du Barre v. Livette, Peake N. P. 77; R. v. Gilham, R. & M. 186.

(2) Butler v. Moore, Macnally, 253.

(3) Broad v. Pitt, 3 C. P. 519; S. C., Mo. & M. 234.

(4) By the laws of New York (Vol. 2, p. 406, § 73), and of Missouri (p. 623, § 16), no minister of the gospel or priest of any denomination is allowed to disclose any confessions made to him

who is well known as the uncompromising advocate for the abolition of nearly all the rules of English law relating to the *exclusion* of evidence, makes an exception with regard to confessions made to a Catholic priest, which, he contends, the priest ought not to be compelled to disclose, upon the ground that confession, in the Roman Catholic church, is a religious duty, and that to compel the disclosure, by means of punishment, would be in effect to punish the party for religious opinions. He gives other cogent reasons for the propriety of excluding such testimony.(1)

In a case at Nisi Prius, where a clerk to the commissioners of the property tax was called to prove the defendant a collector, and refused to give evidence, on the ground of his having taken an oath of office not to disclose what he should learn as clerk, respecting the property tax, except with the consent of the commissioners, or by force of an act of Parliament, the court held that this oath would not exempt the witness, and that it must be construed as containing an implied exception of the evidence which he might be called to give in courts of justice, in obedience to the writ of *subpœna*.(2) And an articled clerk to an attorney, who is bound by his articles to keep his master's secrets, is at liberty to give in evidence statements of his master not made under a charge of secresy, nor affecting the interests of the master's client, though the disclosure may tend to support a civil action against the master.(3)

It appears that communications, made to a merely licensed conveyancer, would not be privileged :(4) but they would be if made to an attorney in that capacity,(5) or in the capacity of a scrivener to raise money,(6) provided the attorney was consulted as the party's own professional adviser.(7)

When privilege commences and ends.

With respect to the nature of the communications which are privileged,

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in his professional character, in the course of discipline enjoined by the rules or practice of such denomination. Greenl. Evid. 361, n. 3.

(1) See Rationale of Judicial Evidence, Bk. 9, pt. 2, ch. 6, and the remarks by the editor (Mr. John Mill), appended to Bk. 9, pt. 3, ch. 5, commenting upon the misrepresentations of Bentham's doctrine by a writer in the Edinburgh Review.

(2) Lee q. t. v. Birrel, 3 Campb. 337.

(3) Webb v. Smith, 1 C. & P. 337; S. C., Ry. & M. 106.

(4) By Parke, B., in Turquand v. Knight, 2 M. & W. 100. Sir D. Evans, in his edition of Pothier, suggested that it followed from Wilson v. Rastall, that communications to a conveyancer were not privileged, though he might happen to be a counsel or an attorney.

(5) Cromack v. Heathcote, 2 B. & B. 4.

(6) By Lord Abinger, in Turquand v. Knight, 2 M. & W. 100. See also Harvey v. Clayton, 221, n.; Anon., Skinn. 404.

(7) See R. v. Farley, 2 C. & Kir. 313, 318, *post.*

(Where an attorney is employed professionally to draw an instrument, the instructions given to him for that purpose are under the seal of professional confidence. The Bank of Utica v. Mersereau, 3 Barb. Ch. 528. He may be called upon to prove the existence of a paper, and that it is in his possession, but cannot be compelled to produce it, or prove its contents, it being intrusted to him by his client in his professional character. Coveney v. Tannahill, 1 Hill R. 33; Kellogg v. Kellogg, 6 Barb. 116.)

the cases may be divided into those which have reference to some suit, and those in which no suit was in contemplation.

It was observed by Lord Ellenborough, C. J., in Gainsford v. Grammar,(1) that it had been established in Cobden v. Kendrick,(2) and Wilson v. Rastall,(3) that communications by a party to a witness, if not made in confidence (whether prior or subsequent to the relation of client and attorney subsisting between them), are not privileged; but that this confidential relation might be formed before the commencement of any suit. An attorney may be retained and confided in as such before the commencement of any suit, and, in such a case, he is not bound to disclose whatever has been revealed to him previous to the suing out of the writ. In Clark v. Clark,(4) Lord Tenterden, C. J., observed, "Suppose a party to consult his attorney whether or no he should bring or resist an action,

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(1) 2 Campb. 10.

(2) 4 T. R. 431.

(3) Ibid. 753, and see Cuts v. Pickering, 1 Ventr. 197.

(4) 1 M. & Ro. 5. In this case, Lord Tenterden says, that the doctrine reported to have been laid down by him in Williams v. Mudie (Ry. & M. 34; S. C., 1 C. & P. 158), was too narrow, and it would seem that a formal retainer is not essential.

NOTE 67.—Kent, J., in Riggs v. Denniston (3 John. Cas. 198, 203), says that, to be privileged, the communications must be made as instructions for conducting the cause; not as mere gratuitous and irrelevant remarks. And communications, though they do not respect a suit, if they are made with a view to professional assistance by the client, to the attorney, counsel or solicitor, are protected. Walker v. Wildman, 6 Madd. 47.

A licensed counsel or attorney, employed as such to draw a deed, must be considered as acting in the line of his profession, and bound to conceal the facts disclosed by the person who employs him. Parker v. Carter, 4 Munf. Rep. 273.

Whether the evidence of a person employed by both persons as *attorney or scrivener*, to write a bond for a fraudulent purpose, is admissible to prove the fraud? *Quere.* Clay v. Williams, 2 Munf. Rep. 105.

Communications made to an attorney employed to foreclose a mortgage by advertisement and sale under the statute of New York, concerning mortgages, such communications having relation to the business of the foreclosure, and considered as confidential communications between attorney and client, and are entitled to the protection of that relation. Wilson v. Troup, 7 John. Ch. Rep. 25; S. C. affirmed in the Court of Errors, 2 Cowen's Rep. 195.

It was held, in a late case in England, that an attorney who had been employed by a mortgagee to make an abstract of the mortgage deeds, could not be at liberty to produce them, or the abstract, or give evidence of their contents. The King v. The Inhabitants of Upper Boddington, 8 Dowl. & Ry. 726. Otherwise, if they do not relate to his client's title. Doe dem. Courtail v. Thomas, 9 Barn. & Cress. 288.

In New York, the farthest our courts have gone, is to protect communications made in the course of a summary foreclosure. Wilson v. Troup, *supra.* Virginia goes even to the draft of a common deed. Parker v. Carter, *supra.* Vermont seems to confine herself to a suit pending or in contemplation. Dixon v. Parmelee, *post*, note 68. While Ireland extends the rule to a consultation upon the legal effect of a newspaper article.

(In order to render communications from a client privileged, they must come directly from the client, orally or by papers given to him. And the privilege in some cases terminates with the death of the client. Crosby v. Berger, 4 Edw. Ch. 254. *Quere.* Whether the seal of confidence can ever be removed except by the act of the party, or his implied consent? Chew v. Farmers' Bank of Md., 2 Md. Ch. Decis. 231.) See notes 68 and 69.

it could not be doubted that such a communication would be privileged, though no suit was pending at the time:" and he held, that where a matter was in dispute and controversy, although no cause was in existence with respect to it, the communication was privileged.

But, although a suit be pending or recently terminated, communications made to a counsel or attorney by his client are not privileged if they are not made to the person in his capacity of counsel or attorney, or for the purposes of the suit. Thus, in the great case of Annesly v. Lord Anglesea,(1) where the question of privilege was very fully discussed, the attorney of a prosecutor of an indictment was allowed to state what his client had observed to him pending the proceedings on the indictment, viz: that he would give a large sum of money to have the prisoner hanged.

Where a person (who had brought an action on a promissory note, which was afterwards compromised by the defendant) had informed the attorney, after the compromise and in the interval between the time when a warrant of attorney was given and the time when the money was to become due, that there never had been any consideration for the note, the Court of King's Bench held that the attorney was compellable to disclose that circumstance in an action brought to recover back the money. "The communication," said Lord Kenyon, C. J., "was not here made in contemplation of a suit; on the contrary, the purpose in view had been already obtained; and what was said by the client was from exultation, in having before deceived his attorney as well as his adversary."(2)

So, where an attorney brought an action for his professional services,(3) and the defence was that he had been employed by another party, and not by the plaintiff, it was held that the plaintiff's agent, an attorney, might be asked whether the plaintiff had not said, upon introducing that party to him, that he (the plaintiff) had been employed by that party. It was said by the court: "This is in no respect a privileged communication. It is something said by the plaintiff to his agent on introducing an individual who was to be the plaintiff in another action. The privilege does not attach to everything which the client says to his attorney; the test is, whether the communication is necessary for the purpose of carrying on the proceeding in which the attorney is employed; if it is necessary, it becomes privileged."

The privilege of professional confidence is not, however, limited to cases in which a suit is in contemplation. This is manifest from the authorities which will be presently noticed, in which the attorneys of parties not connected with the suit have not been allowed at the trial to reveal matters of which they have acquired knowledge through the pro-

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(1) 17 How. St. Tr. 1221.
(2) Cobden v. Kendrick, 4 T. R. 432.
(3) Gillard v. Bates, 6 M. & W. 547.

fessional confidence of their clients. But, as between the *parties* to a suit, it is only lately that the law has been relieved from much perplexity in those cases where professional confidence has existed unconnected with the immediate suit. Upon a consultation on this subject between Brougham, C., Tindal, C. J., Lyndhurst, C. B., and Parke, J., they considered that the privilege was not confined to cases where the communication related to the bringing or defending an action.(1)

It seems that the privilege extends to all cases where a communication is made to an attorney or other legal adviser in his professional capacity;(2) and that the rule is correlative with that which governs the summary jurisdiction of the courts over attorneys.(3) That rule has been

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(1) Greenough v. Gaskell, 1 M. & K. 98. And see 4 B. & Ad. 876; 5 C. & P. 593. See also Bolton v. Liverpool (Corporation), 1 M. & K. 88; Moore v. Terrell, 4 B. & Ad. 870; Doe d. Shellard v. Harris, 5 C. & P. 594. The authorities for restricting the privilege were Williams v. Mudie, Ry. & M. 34; S. C., 1 C. & P. 158; Broad v. Pitt, M. & M. 233; S. C., 3 C. & P. 518; Duffin v. Smith, Peake, 108; Wadsworth v. Hamshaw, 2 B. & B. 5, n.

(2) Doe d. Shellard v. Harris, 5 C. & P. 593; Walker v. Wildman, 6 Madd. 47; Doe d. Peter v. Watkins, 3 Bing. P. C. 421; by Lord Brougham, C., in Greenough v. Gaskell, 1 M. & K. 101, 102.

(3) By Alderson, J., in Turquand v. Knight, 2 M. & W. 101.

NOTE 68.—The secrets of his client, which an attorney or counselor is bound to keep, are the communications and instructions of his client relative to the management or defence of his cause, and not any extraneous or impertinent communications. Dixon v. Parmelee, 2 Verm. Rep. 185. Thus, that the client had concealed himself to avoid being served with process, was held not to be a privileged communication. Riggs v. Denniston, 3 John. Cas. 198.

An attorney may be called to testify to a collateral fact within his own knowledge, or to a fact which he might know without its being intrusted to him by his client. *Vid.* Reeves v. Burton, 6 Mart. Lou. Rep. (N. S.) 283, 284. As that a bond was lodged with his client by way of indemnity, or that he expressed himself satisfied with a certain security. Heister v. Davis, 3 Yeates, 4. So where, without any communication from his client on that subject, he acquires a knowledge of his client's handwriting, he may be called to testify to its identity (Johnson v. Daverne, 19 John. Rep. 134), though it be by seeing him sign a bail bond in the cause. Hurd v. Moring, 1 Carr. & Payne, 545. See note 72. So he may be examined as to a particular paper being received from his client (Eicke v. Nokes, 1 Mood. & Malk. 303), and whether a note, put into his hands for collection, was indorsed or not. Baker v. Arnold, 1 Caines' Rep. 258. So an attorney or counselor is competent to prove that an administrator, for whom he acts as attorney or counsel, directed an exhibit to be filed in the Court of Chancery, in which he acknowledged a debt as due by the intestate, which was adjudged to take the case out of the Statute of Limitations. Forbes v. Perrie's Adm'r, 1 Har. & John. 109. So that he has a paper in court relating to the cause, in order that a notice to produce it immediately may be sufficient. Rhoades' Lessee v. Selin, 4 Wash. C. C. Rep. 715, 718; *Post*, notes 69, 71.

It is held that if, after the relation of attorney and client has ceased, the latter voluntarily repeat what he had communicated while the relation existed, the attorney is not privileged from disclosing it. Yordan v. Hess, 13 John. Rep. 492.

In Massachusetts, it has been ruled by Putnam, J., that the attorney for the commonwealth could not be called upon to testify to what passed in the grand jury's room. The Commonwealth v. Tilden, Feb. 1828, Norfolk county.

The counsel of F. gave as such counsel a notice to B. of a deed. In an action by D. against P., this notice being material to P.'s defence; held, that the counsel was bound to swear to it as a witness, though the act was in the line of his profession. The court seemed to consider this act not privileged in its own character, and they confine the privilege to communications made

thus laid down: "Where an attorney is employed in a matter wholly unconnected with his professional character, the court will not interfere in a summary way to compel him to execute faithfully the trust reposed in him. But when the employment is so connected with his professional character as to afford a presumption that his character formed the ground

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intermediate the retainer and the termination of the suit, citing 4 T. R. 431; to facts delivered from the information of the client, citing 7 East, 357; and as to directions in the course of a suit, though given by the attorney, if privileged in any case, yet being such as any common person of ordinary prudence would give, they hold that they would not come within the rule, citing 9 Com. Law Rep. 233, and Bull. N. P. 284. Dixon v. Parmelee, 2 Verm. Rep. 185, 188, 189. They remark that where an attorney is retained generally, and a conversation is had on a subject which afterwards gives rise to a suit, the attorney is bound to disclose it, there being no suit in contemplation when the conversation was had; citing for this, Annesly v. The Earl of Anglesea, Macnally, 241. *Vid.* 2 Verm. Rep. 180. So counsel was held to answer as to a proposition of compromise made by him in behalf of his debtor to his creditors, as not being confidential in its nature, but published to the creditors. M'Tavish v. Denning, *Cor.* Spencer, J., Anth. N. P. Rep. 113. Yet, if confidential, the communication would have been privileged, whether made in respect to a suit commenced or to be commenced. Id. On trial of an indictment for a libel against the Lord Lieutenant of Ireland, R. W. swore that the traverser asked him professionally whether *it was safe to publish a certain paper*. The communication did not in any manner relate to any cause pending or in contemplation. On R. W. being asked as to the contents of the paper, held that the communication was privileged, as the traverser was seeking advice rather how to avoid than to commit a crime. The communication, to be privileged, need not necessarily concern a cause. Should one confide to counsel a treasonable design, and wish to know how he might execute it so as to escape punishment, *semble*, as concealment would be a misprision, the communication would not be privileged; but if a man meditates an act which, exceeding certain limits, would become criminal, and confined within certain bounds, would be perfectly justifiable, the person asking advice must be considered as seeking how he may avoid, and not how he may commit a crime; and such a communication is privileged. Rex v. Haydn, 2 Fox & Smith, 379. But see cases *contra*, *ante*, of the text, in note, that the communication must relate to a suit commenced or in contemplation. See note 67. Counsel may be examined as to the mere fact of being retained, but not as to the capacity in which the client retained him. Thus, in an action of trespass for mesne profits, the plaintiffs had recovered possession of the premises in an ejectment, in which C. had obtained leave to be made defendant as landlord of the premises. At the trial of the present suit, the plaintiff introduced H. & D., and asked them whether they were retained by the present defendant to conduct the ejectment suit for his benefit, as landlord of the premises. Held, that the counsel might answer as to the mere fact of retainer, but not whether the retainer was for the benefit of the defendant, as landlord of the premises, as the answer would involve a disclosure of the nature and extent of the title and claim set up by the defendant to the premises, for the purpose of conducting the defence of the suit. Chirac v. Reinicker, 11 Wheat. 280. See note 71. An attorney or his clerk cannot be compelled to testify on the trial in respect to the time when he was retained. Foote v. Hayne, 1 Carr. & Payne, 545. But he may as to the person who retained him. See notes 67, 71, 73.

(Privileged communications include all statements and writings made or given by a client to his attorney or counselor for the purpose of obtaining professional advice or assistance on the subject of his rights or liabilities. Wetherbee v. Ezekiel, 25 Vt. 47; Parkhurst v. McGraw, 24 Miss. 134; Swift v. Perry, 13 Geo. 138; Miller v. Weeks, 22 Penn. (10 Harris) 89. Communications made to an attorney as a friend are not privileged. Galtra v. Walcott, 14 Ill. 89. Nor are communications made by a client to his attorney privileged, unless the latter is acting as such in the matter to which the communication relates. Brandon v. Gowing, 7 Rich. (S. C.) 459.)

of his employment by the client, there the court will exercise this jurisdiction.(1)

A communication made to a solicitor, if confidential, is privileged, in whatever form it is made. If it would be privileged when communicated in words, spoken or written, it will be privileged equally when conveyed by means of sight instead of words. Thus, an attorney cannot give evidence as to the fact of the destruction of an instrument which he has been admitted in confidence to see destroyed.(2)

It has been held that communications made between a client and his attorney, respecting the sale and purchase of estates, are privileged, although no suit be either existing or expected.(3) And where instructions had been given to an attorney for drawing a deed, which the attorney refused to draw, and the deed was drawn by another person—the validity of the deed being afterwards questioned on the ground of fraud, in an action against the sheriff, in which the attorney first applied to was not employed—the Court of Common Pleas refused a rule *nisi* for a new trial, on the ground that the evidence of the attorney, as to the instructions he had received for drawing the deed, had been rejected.(4) An attorney will not be allowed to make a statement, derived from a knowledge of his client's title, that his client has no power to grant freehold leases.(5)

In an action of trover for a lease, brought by the assignees of a bankrupt, it was pleaded that before the bankruptcy the bankrupt deposited the lease with the defendant as a collateral security. At the trial the plaintiffs endeavored to show that the lease was deposited after an act of bankruptcy, and they proposed to ask a witness, who had been the attorney for the bankrupt after the act of bankruptcy, and who had been

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(1) Ex parte Aitken, 4 B. & A. 49. See also, Ex parte Yeatman, 4 Dowl. P. C. 309.

(2) Robson v. Kemp, 5 Esp. 54.

It is not necessary that the client or person seeking the advice of an attorney or counsel, should enjoin secrecy, or should be aware of his right to demand professional confidence, to render his statements and communications privileged. McLellan v. Longfellow, 33 Maine Reports, 494. Preliminary conversations, where no suit is brought, are also privileged. Read v. Smith, 2 Carter, 160. But the attorney is not restrained from stating facts communicated to him by a person seeking to engage him, which are stated to show that his cause does not conflict with the interests of a client for whom the attorney is already employed. Heaton v. Findlay, 12 Penn. State R. 304. Nor are communications between the attorneys or solicitors of opposite parties privileged. Gore v. Harris, 8 Eng. Law & Eq. 147. But if the attorney of the plaintiff acquires documents from the wife of the defendant, on the understanding that they are to be used for her husband, they are privileged. Cleve v. Jones, 8 Eng. Law & Eq. 554.

(3) Mynn v. Joliffe, 1 Mo. & R. 326. See also a case cited Ib. tried before Parke, J. And see by Richardson, J., in Cormack v. Heathcote, 2 B. & B. 6.

Bank of Utica v. Mersereau, 3 Barb. Ch. R. 528. In Kellogg v. Kellogg, the counsel was excused from producing deeds in his possession, received by him in his character as counsel, and from speaking of their contents. 6 Barb. 116.

(4) Cormack v. Heathcote, 2 B. & B. 4; and see Doe d. Shellard v. Harris, 5 C. & P. 594.

(5) Moore v. Terrell, 4 B. & A. 878.

applied to by him to raise the money, whether the bankrupt had not the lease in his possession at that time, and whether he had not brought it to him for the purpose of raising money upon it; it was held that the witness could not be allowed to answer the question.(1)

Production of documents.

The principle of protection afforded to professional confidence, in regard to communications made by a client, must obviously preclude an attorney from producing or disclosing the contents of deeds or other papers deposited with him confidentially, in his professional character. "The names, times or dates, contained in a written instrument," said Lord Ellenborough, C. J.,(2) "though not known from the communication of the client, yet come to the knowledge of the attorney from the delivery of the instrument by his client." An attorney cannot be compelled to produce a will which he holds as attorney for a devisee claiming under it; although it be suggested that it ought to be deposited in the Ecclesiastical Court, as being a will of personalty as well as realty.(3) Nor is the attorney for a party in a cause bound to state the contents of a document, of which he first obtained a knowledge by having read it at the suggestion of his counsel, in the course of a consultation in the cause.(4) In this case,

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(1) Turquand v. Knight, 2 M. & W. 98.

(2) In Beard v. Ackerman, 5 Esp. 119. And see Bate v. Kinsey, C., M. & R. 42.

(3) Doe d. Carter v. Lames, 2 Mo. & R. 47.

(4) Davies v. Waters, 9 M. & W. 608.

NOTE 69.—Where it appeared that a paper had been delivered to a counsel by his client, with instructions not to make use of it in court, it was held that he was not bound to produce it in evidence in another cause, in which he was also counsel. Lynd v. Judd, 3 Day, 499. Much less is he bound to produce it in the action depending, or to testify to its contents. Dale v. Livingston, 4 Wend. 558. An attorney or counselor is not obliged to produce a paper intrusted to him by his client, in order that the grand jury may inspect it on a charge of forgery against the client. Anon., 8 Mass. Rep. 370; State v. Squires, 1 Tyl. Rep. 147.

An attorney retained to obtain an insolvent's discharge, and coming to the possession of a receipt under the retainer, was held within the rule stated in the text. Parker v. Yates, 12 Moore, 521.

An attorney having been intrusted with certain papers by his client, which, after the termination of the suit, were left with the attorney by his client for the benefit of a party to another cause for whom he was also attorney, it was held that he was not bound to produce them in evidence. Jackson ex dem. King v. Burtis, 14 John. Rep. 391. But an attorney or counsel may be compelled to testify whether a deed or other instrument was delivered to him by his client, or is in his possession or not, and whether it is in court, so as to enable the adverse party, on his refusing to produce it after notice for that purpose, to give parol evidence of its contents. Eicke v. Nokes, 1 Mood. & Malk. 304; Bevan v. Waters, Id. 235; Brandt v. Klein, 17 John. Rep. 335; Jackson ex dem. Neilson v. M'Vey, 18 John. Rep. 330; Rhoades' Lessee v. Selin, 4 Wash. C. C. Rep. 715, 718. See notes 71, 66, 73, 68.

An attorney receiving a paper of his client, D., and obtaining judgment upon it, and who then proceeds to execution by the direction of N., is yet the attorney of D. in respect to the paper, and bound to produce it against N. Neafie's Case, 4 C. H. Rec. 168, before Colden, Mayor, stated more at large, *ante*, note 65.

(Where a solicitor is employed as counsel in a proceeding, neither the documents nor consulta-

Rolfe, B., doubted whether the information obtained by the attorney was obtained in such a manner as to render it privileged; but he concurred with the rest of the court (Alderson, B., and Gurney, B.), that as the witness held the document in question as trustee for the defendant, and upon that ground had properly refused to produce it, he could not be compelled to state its contents.(1)

But though an attorney cannot be *compelled* to disclose the contents of a client's deed in his possession, without the client's consent, yet if he do so *willingly*, with such consent, the evidence may be received, provided the proper foundation has been laid for the reception of it, by a notice to produce, or a *subpœna duces tecum*.(2)

As the same rule prevails in the courts of equity(3) and the ecclesiastical courts,(4) motions for the production of documents are refused in those courts, where such documents are in the nature of professional communications;(5) such as cases laid before counsel, with the opinions thereon,(6) or books containing entries made by a solicitor relating to the drawing the will of a deceased client.(7)

And it appears that the rule is applicable, where the legal adviser has received the information not directly from his client, but from a third party who had been directed by the client to communicate such information to the legal adviser: thus in a case in an ecclesiastical court,(8) it was held that letters were privileged which were written to the principal solicitor by another solicitor who was employed by the client to collect evidence in the matter, with directions to communicate it to the principal solicitor.

If the copy of a deed deposited confidentially with an attorney has been obtained out of his hands for the purpose of being produced in evidence by another witness, it seems doubtful whether such secondary evidence of its contents can be received, where the client refuses to produce

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tions in reference to it can be called for. Follett v. Jefferyes, 1 Eng. Law & Eq. 172; Goodall v.Little, 3 Id. 79. But where a solicitor acts as counsel for a husband and wife, in the execution of a deed releasing her jointure, and the latter afterwards files a bill in equity, and asks for the production of the documents, cases and opinions submitted and taken in the transaction, the solicitor is deemed to have been counsel for both husband and wife, and the documents must be produced. Warde v. Warde, 5 Id. 217.

In Phelps v. Prew, the attorney for the defendant subpœnaed an attorney to produce a deed in his possession, which he declined to do; then offered parol evidence of its contents, and the court directed the attorney to allow the witness to look at the indorsement upon the deed, as a means of identifying the instrument. 24 Eng. Law & Eq. 96.)

(1) See also R. v. Upper Boddington, 8 D. & R. 726.

(2) Hibberd v. Knight, 2 Exch. R. 11, explaining Marston v. Downes, 6 C. & P. 381.

(3) See Bunbury v. Bunbury, 2 Beav. 173.

(4) See Smith v. Fell, 2 Curt. Ecc. R. 667.

(5) See Hughes v. Biddulph, 4 Russ. 190.

(6) Reece v. Trye, 9 Beav. 316; Bunbury v. Bunbury, 2 Beav. 173. See also Hare on Discovery, ch. 3.

(7) Goodrich v. Jones, 2 Curt. Ecc. R. 671.

(8) Mackenzie v. Yeo, 2 Curt. Ecc. R. 866.

the original. The question, whether such evidence can be given, seems to depend rather upon the principle which regulates the admissibility of secondary evidence generally.(1) It may be sufficient to observe in this place, that there seems never to have been any doubt, but that where an attorney after receiving a proper notice to produce, or a *subpœna duces tecum*, refuses to produce the document, secondary evidence of its contents may be given, where the knowledge of such contents have not been derived from the attorney himself,(2) for in such a case it would be the same thing as if the client refused to produce the document. In a case tried before Bayley, J.,(3) the plaintiff's counsel having proved a certain deed in the possession of the defendant, and the defendant refusing to produce it, though he admitted having received notice, the counsel for the plaintiff offered in evidence a copy of the deed, which had been obtained from one who, many years ago, acted as attorney for the person under whom the defendant claimed, and who had been intrusted by him with the original deed in his professional character. The counsel on the part of the defendant objected that this evidence ought not to be received, as the original deed had been deposited confidentially with the attorney; and Bayley, J., refused to admit it. He said: "The attorney could not give parol evidence of the contents of the deed which had been intrusted to him; so neither could he furnish a copy. He ought not to have communicated to others what was deposited with him in confidence, whether it was a written or verbal communication. It is the privilege of his client, and continues from first to last." But on a recent occasion,(4) Parke, B., said, with reference to that case, "I have always doubted the correctness of that ruling. Where an attorney intrusted confidentially with a document communicates the contents of it, or suffers another to take a copy, surely the secondary evidence so obtained may be produced. Suppose the instrument were even stolen and a correct copy taken, would it not be reasonable to admit it?"

It may be remarked, however, that in the case put of the document being stolen, it may fairly be presumed that there was no breach of trust; whereas, in the case of an attorney giving a copy of a document intrusted to him professionally, there would not only be a clear breach of trust, but the principle of the inviolability of professional confidence would appear to be infringed. The rule, it is to be remembered, is established for the benefit of the client. Without the client's consent, the attorney will not be allowed to produce papers which he has received professionally from

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(1) *Vide post.*

(2) See by Tindal, C. J., in Houlditch v. Cauty, 1 Arn. C. P. R. 165; S. C., not S. P., 4 N. C. 411. See also Bottomley v. Usborne, Peake Ad. Ca. 101; Hibberd v. Knight, 2 Exch. R. 11.

(3) Fisher v. Heming, Leic. Lent Ass. 1809. See Bottomley v. Usborne, Peake Ad. Ca. 101; Cook v. Hearn, 1 Mo. & R. 201.

(4) In Lloyd v. Mostyn, 10 M. & W. 481.

his client; in other words, he will not be permitted to divulge his client's secrets. But if he may enable others to divulge those secrets, the privilege of the client may easily be defeated.(1)

The case of Lloyd v. Mostyn(2) in which Parke, B., made the remark just cited, was an action upon a bond of indemnity, which was in the possession of one W., an attorney, who held it as the representative of a former attorney of the obligor, and who was himself the defendant's general attorney (though not the attorney upon the record), and he had undertaken to produce the bond at the trial, if the judge should think he was bound to do so: before the assizes, the bond had been sent by W. to the defendant's attorney in the action, in London, for the purposes of inspection and admission under a judge's order; and the plaintiff's attorney had there taken a correct copy of it. It was held that, though W. might properly object to produce the bond at the trial, the copy taken by the plaintiff's attorney was, upon proof of notice to produce, admissible as secondary evidence of the contents of the bond.

In this case, however, there was clearly no breach of trust, and no violation of confidence. The plaintiff, upon principles that will be fully explained hereafter,(3) was clearly entitled to an inspection of the bond, which was in fact sent up to London for that very purpose, and having been inspected by the plaintiff's attorney, he was competent to prove its contents, either by the copy he had taken, or from memory.

Privilege continues after confidence has ceased.

When once the privilege has attached, it continues forever, even though the confidential relation between the parties may have ceased. Thus, where confidential communications have been made to an attorney with reference to a suit, the attorney will not be at liberty to divulge them when the suit is determined; his mouth is closed forever.(4) And the confidence continues, though the attorney has ceased to act for the party, and another attorney conducts the suit,(5) or though the attorney has been struck off the roll.(6)

Rule in criminal prosecutions.

Questions have sometimes arisen whether the obligation to secrecy between attorney and client should be maintained, in criminal prosecutions.

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(1) An action would lie against the attorney for a breach of duty in so divulging his client's secrets. See Taylor v. Blacklow, 3 N. C. 235.

(2) 10 M. & W. 478.

(3) *Post*, Vol. II.

(4) By Buller, J., in Wilson v. Rastall, 4 T. R. 753.

Crosby v. Berger (4 Edw. Ch. 254), allows that the privilege may terminate, in some cases, after the death of the client. But the rule is generally stated, as in Chew v. Farmers' Bank of Maryland, and in the text. 2 Md. Ch. Decis. 231.

(5) Parker v. Yates, 12 B. Moore, 520; Petrie's Case, cited 4 T. R. 756.

(6) Cholmondeley (Earl) v. Clinton (Lord), 19 Ves. 268.

There can be no doubt that an attorney could not be compelled in a criminal case to disclose any matter communicated to him professionally by his client with reference to his defence. But how far the obligation to secrecy should extend in a criminal case, where the attorney is in possession of any information or document which he has obtained without reference to the prosecution, appears to be doubtful.

In the case of The King agt. Smith,(1) which was a prosecution for the forgery of a promissory note, an attorney, who had the note in his possession, refused to produce it before the clerk of arraigns, who required it for the purpose of setting it out in the indictment: for this he was summoned to appear before the judge, and show cause why he should not produce the note. He accordingly attended, together with the counsel for the prosecution, and the counsel for the prisoner. Holroyd, J., inquired minutely into the circumstances by which he had the note in his possession; when it appeared, on the statement of the attorney, that he had been consulted by the prisoner on the note in question, and that by his direction he had commenced an action to recover the amount of the note against the person in whose name it was now supposed to be forged: that a short time afterwards he had been summoned before a magistrate, the prisoner having been apprehended on a charge of forgery, and he was then desired to produce the note: upon this, he inquired of the prisoner, who was present, whether he would consent to its being produced: the prisoner consented, asserting his innocence, and the note was accordingly produced. The magistrate, after taking the depositions of witnesses, remarked that he thought it would be proper to deposit the note in the hands of the high constable: on which the attorney said, that as the note had come into his hands professionally from his client, he expected to have it restored to him, at the same time asking the prisoner whether he would consent to its being deposited with the high constable, and the prisoner replied he wished it to be placed in the hands of his attorney. The magistrate returned the note to the attorney, observing that he would doubtless have notice to produce it at the trial. The attorney (who was not, however, employed professionally for the prisoner in the ensuing trial) had been *subpœnaed* to produce the note, which was still in his possession; but, before he was *subpœnaed*, a demand of the note had been made upon him by the attorney now employed in the prisoner's defence. On these facts, the question was argued by the counsel for the prosecution and the counsel for the prisoner; and Holroyd, J., said he would consider the point. On the following day the subject was again mentioned, when he refused to make an order upon the attorney to produce the note, or to give a copy of it to the clerk of arraigns. A bill charging the prisoner with forgery was prepared, and found by the grand jury. At the trial, the

(1) Derby Sum. Ass. 1822. See, also, R. v. Dixon, 3 Burr. 1687.

same attorney was called on the part of the prosecution for the purpose of producing the note; and, on his re-stating the facts above detailed, the learned judge declared his opinion, that he ought not to produce it. Secondary evidence of its contents was not offered; the prosecution consequently failed; and the prisoner was acquitted.

In the case of The Queen agt. Avery,(1) however, Patteson, J., is reported to have held the case of The King agt. Smith not to be good law. In The Queen agt. Avery, it appeared that the prisoner applied to a solicitor to procure for him a loan of money on mortgage, the solicitor being employed by another person to put out money on mortgage security; in proof of his title to freehold lands, he delivered to the solicitor a will, for the forgery of which he was then to be tried; the solicitor, upon this, advanced the money of his client, and prepared the mortgage deed: the question was, whether the solicitor could produce the will, and give in evidence what had passed between him and the prisoner as to the advance of the money. And Patteson, J., ruled in the affirmative.

There appears to be an obvious distinction between this case and that of The King agt. Smith. In The Queen agt. Avery, the prisoner deposited the instrument in the hands of his solicitor, not with reference to a suit, nor with reference to any transaction resting solely between themselves, but for the purpose of a money transaction between himself and a third person, and to be disclosed and communicated to that person. In The King agt. Smith, on the contrary, the instrument was deposited with the attorney for the purpose of a suit, in which he consulted him professionally, as a matter in confidence between him and his attorney, and solely for his own interests. The two cases, therefore, are not inconsistent, and the one does not overrule the other. For these reasons, and from regard to the high authority of the late Mr. Justice Holroyd, who was remarkable for the scrupulous and singular care with which he decided every question that came before him, and to this particular case gave more than ordinary time and attention, the case is still retained in the text. In a recent case,(2) Patteson, J., said that, in The Queen agt. Avery, he was reported to have said something too strong about The King agt. Smith, which was certainly distinguishable from The Queen agt. Avery.

In The Queen agt. Hayward,(3) where a party, having possessed himself of some title deeds of a deceased person, placed a forged will among them, and sent them to his attorney, for the ostensible purpose of asking his advice upon them, but in reality, as it pretty clearly appeared, that the attorney might find the will among the deeds, and act upon it, which he did; and the client was tried for the forgery of the will, and the attorney produced it in evidence, although the prisoner's counsel objected to its

(1) 8 C. & P. 596.
(2) R. v. Tilney, 18 L. J. (N. S.) Mag. Ca. 36.
(3) 2 C. & K. 234.

being read; it was afterwards held by the fifteen judges that the will was properly read in evidence, *not having been put into the hands of the attorney in professional confidence;* and, according to the report, it was added, *even if that would have made any difference.*

If this last remark is correctly reported, it would imply that the judges thought the decision in The King agt. Smith (which had been quoted at the trial) could not be sustained. Yet, from the circumstances of The Queen agt. Hayward, it would be difficult to say that the will was placed in the hands of the attorney in professional confidence, any more than the passing away a piece of bad money by a client to his attorney could be said to be an act of professional confidence: while in The King agt. Smith, the promissory note, for the forgery of which the prisoner was indicted, had been placed by him in his attorney's hands for the purpose of bringing an action upon it; it was, therefore, imparted to him strictly in professional confidence, and the possession of it by the attorney was to be considered as the possession of the client.

In the case of The Queen agt. Farley,(1) the wife of A. went to an attorney, who had never acted in any way professionally for her husband, and produced a forged will to the attorney, asking him to advance her husband some money upon the property mentioned in the will; she left the will with the attorney, who took a copy of it, and afterwards returned the original to the husband, declining to advance any money upon it. It was decided by the fifteen judges, that upon the trial of A. for forging the will, the conversation between the prisoner's wife and the attorney was not a privileged communication, and that the copy of the will was admissible as secondary evidence, a foundation having been properly laid for the admission of such evidence.

In this case, it will be remarked that the attorney had never acted in that capacity for the prisoner—a circumstance to which several of the judges adverted in the course of the argument—and the attorney was resorted to on this occasion not at all in that character, but simply as a money lender. There was nothing of professional confidence, therefore, in the transaction, which was, in fact, a bare attempt to defraud the attorney by means of the forged will.

In the recent case of The Queen agt. Tilney and others,(2) tried before Coltman, J., where several parties were indicted for forging a will, it appeared that one of the prisoners, a female, had gone to an attorney, whom she had on a previous occasion consulted professionally, and that she brought with her the will in question; that he judged, from what she said, that she came to consult him as to that document; and that it was for the purpose of enforcing it. The witness said—"She did not come to consult me as to what her rights were, but that I might enforce her rights under

(1) 2 C. & K. 313.
(2) 18 L. J. (N. S.) Mag. Ca. 36.

it." All the cases above mentioned were cited at the trial; and the learned judge considered the effect of the attorney's evidence to be, that the document was committed to him by the prisoner, not to be kept as a confidential deposit, but in order that it might be exhibited in court for the purpose of enforcing her rights, and thought it, under the circumstances, advisable to receive the document in evidence, with the view of obtaining the opinion of the judges on the point.

The case was afterwards argued before eleven of the judges; but no decision was come to upon this point, as it appeared that there was no evidence of an intention to defraud any one so as to support the indictment. But in the course of the argument, Parke, B., said: "Suppose it were given for the purpose of being shown to the tenant in possession, would it be privileged? And on the other hand, if title deeds are given to an attorney to use for the benefit of the party giving them, can he be required to produce them against him?" Wilde, C. J., added: "If title deeds are intrusted to an attorney, can it be doubted that he is not at liberty to produce them?" Lord Denman, C. J., then said: "But if a forged and false instrument is given to an attorney, ought not he take it to a magistrate?" To which Wilde, C. J., answered: "I apprehend that the magistrate could not receive the statement."

If the principle upon which the document was admitted in this case be the correct one, it would certainly apply to the facts in The King agt. Smith,(1) as in that case the promissory note had been intrusted to the attorney to enforce the prisoner's supposed rights under it.

In the still more recent case of The Queen agt. Hawkins,(2) where a defendant was indicted for perjury committed in the county court in respect of a paper which had been produced at the trial there, the defendant's attorney was *subpœnaed* to produce the paper on the trial of the indictment; he stated that he had received it from his client (the then defendant) for the purpose of conducting the cause in the county court as his attorney, and he claimed a lien upon it;(3) and Coltman, J., ruled that he ought not to produce it, as his possession of the paper was the possession of the defendant; and secondary evidence was given of its contents.

Where attorney acts for two parties.

Where a deed or other paper is intrusted to an attorney by two persons, the attorney must, as against strangers, keep it according to the nature of his original employment, and subject to the rights of both the persons by whom he is employed. Therefore, when a vendor had a draft of a conveyance made by his own attorney, from which title deeds were

(1) *Ante*, p. 149.
(2) 2 C. & K. 823.
(3) As to this, see Thompson v. Moseley, 5 C. & P. 501.

afterwards prepared, and the attorney was paid for his business by the vendor and purchaser in moieties by agreement, but the latter employed an attorney on his own part to look over the draft, and the draft remained afterwards with the vendor's attorney; it was held that such draft was confidentially deposited with the vendor's attorney by the purchaser as well as by the vendor, and that it could not be produced at the trial against the interests of the purchaser's devisees, though with the consent of the vendor and his attorney.(1) So an attorney who, being resorted to by a borrower to raise money for him, peruses, on the part of the proposed lender, the abstracts of the borrower, is not allowed to give evidence concerning them against the borrower.(2) An attorney employed by consent of two parties in preparing a deed from one to the other, cannot be examined as to what he so became informed of in the preparing of the deed, when the action is brought by the assignees of one against the other, suggesting fraud in the deed.(3)

But the privilege attaches to such communications only as are made by each party to the attorney in the character of his own professional adviser. Thus, where the same attorney was acting both for the vendor and purchaser of an estate, a communication from the latter, asking for time to pay the purchase money, was held not to be privileged, as being made to him in his character of attorney for the vendor.(4)

So where A., having a claim against B., they both went together to the office of A.'s attorney, who had never acted as the attorney for B., and B. made a statement relating to A.'s claim, and it was arranged that the attorney should, on behalf of B., write to a third party in respect of the subject matter of the claim; it was held, in an action by A. against B., that the statement of the latter in the presence of the attorney was not a privileged communication.(5)

Where attorney is of one not a party.

The protection afforded to professional confidence applies not only to the professional advisers of the parties to a suit, but also to the professional

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(1) Doe d. Stroder v. Seaton, 2 A. & E. 171.

(2) Doe d. Peter v. Watkins, 3 N. C. 421. And see Taylor v. Blacklow, Id. 235.

(3) Robson v. Kemp, 4 Esp. 235.

In Warde v. Warde, the solicitor who acted for the husband and his wife in the preparation and execution of a deed of release of the wife's jointure, was required in equity to produce the documents taken and used in the transaction; the solicitor having acted for them both. 5 Eng. Law & Eq. 217. So, in Hawkins v. Gathercole (2 Id. 109), the person who acted as solicitor for both the borrower and lender of money on the security of certain property, was held in equity (a bill having been filed by the lender alleging the insufficiency of the property, and fraud and collusion between the solicitor and the borrower), bound to produce the letters that passed between him and the borrower. 2 Id. 109.

(4) Perry v. Smith, 9 M. & W. 681. See, also, Braughe v. Cradock, 1 Mo. & R. 182; Cleeve v. Powell, Id. 228.

(5) Shore v. Bedford, 5 M. & G. 271.

advisers of strangers to the suit.(1) Though it is convenient to collect the cases respecting professional confidence in the same chapter, the protection afforded to such disclosures, when made by strangers, is founded on principles which are reserved for consideration in the chapter which treats of the examination of witnesses.

Questions of this nature can seldom occur in regard to verbal communications, in consequence of the rule which excludes hearsay evidence. But they have not unfrequently arisen, where an attorney has been called upon to produce the title deeds of a stranger to a suit, which have been confidentially deposited with him.

Where an attorney is called upon to produce deeds or papers belonging to his client, who is not a party to the suit, the court will inspect the documents and pronounce upon their admissibility, according as their production may appear to be prejudicial or not to the client, in like manner as where a witness objects to the production of his own title deeds.(2) And, notwithstanding some conflicting opinions, the same rule appears to be held in respect of proceedings or documents in the custody of solicitors for assignees of bankrupts.(3)

It would seem that, in the case of a stranger to the suit, the attorney's privilege is not more extensive than that of the client, which seems to be confined to the non-production of documents of title.(4)

On a question of settlement, it was held that a mortgagee, a rated inhabitant of the appellant parish, *subpœnaed* by the respondent parish, was not compellable to produce the title deeds of the mortgagors; and that his attorney was not at liberty to produce an abstract of the deeds, or to give parol evidence of their contents.(5) In like manner it has been held that the solicitor of one of the parties to a deed of composition is not compellable to produce it in an action between strangers.(6)

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(1) R. v. Withers, 2 Campb. 578.

A person holding a document prepared by him as solicitor for the person under whom both plaintiffs and defendants claim, and for a third party, a mortgagee, is held not bound to produce it; it is otherwise where no third person is interested in the preparation of the document. Chant v. Browne, 12 Eng. Law & Eq. 299.

(2) Copeland v. Watts, 1 Stark. R. 95; Hawkins v. Howard, Ry. & M. 64.

An attorney called upon to produce a document at a trial, may refuse, alleging that it was intrusted to him by his client; and he is not bound to state the nature of the document, nor to produce it; and it seems that the court ought not to examine the paper for the purpose of determining whether or not it ought to be withheld. Volant v. Soyer, 16 Eng. Law & Eq. 426.

(3) See Laing v. Barclay, 3 Str. 38; Bateson v. Hartsipk, 4 Esp. 43; Corsen v. Duboits, Holt, 239; Cohen v. Templar, 2 Stark. R. 260; Nixon v. Mayoh, 1 Mo. & R. 76; Hawkins v. Howard, Ry. & M. 64. In Pearson v. Fletcher (5 Esp. 9), Lord Ellenborough, C. J., considered the production of bankruptcy proceedings a matter of public duty.

(4) See Doe d. Courtail v. Thomas, 9 B. & C. 288. See, also, Ditcher v. Kenrick, 1 C. & P. 161. It does not appear whether the deed in that case was a document of title.

(5) R. v. Upper Boddington, 8 D. & R. 726.

(6) Harris v. Hill, 3 Str. 140.

But where by an order of the Court of Chancery, made in a suit depending between a lessor and a lessee, a lease was deposited in the hands of the lessor's attorney, and the lessee was at liberty to inspect the same, it was held, in an action of ejectment brought by the lessee against the tenant in possession, that the attorney of the lessor was bound to produce the lease, as it was not part of the lessor's title.(1)

In an action of ejectment by the reversioner against the lessee of the tenant for life,(2) notice to produce certain deeds had been given by the defendant to the lessor of the plaintiff; these were not produced at the trial, but an abstract of them, which had been compared with the deeds, was in court, in the hands of a solicitor for a third party, who had been in negotiation with the lessor of the plaintiff for an exchange of the property; it was proposed, on the part of the defendant, to produce this abstract as secondary evidence of the contents of the deed; the solicitor stated that he had not received permission from his client to produce it, but he was ready to do so if the judge thought he was at liberty to do it. The judge ruled that the abstract might be received in evidence, although the counsel for the lessor of the plaintiff objected to its production; and the Court of Queen's Bench upheld this ruling. Lord Denman, C. J., observed in this case: "I think this privilege is of a strict nature, and not to be encouraged. Why am I to be deprived of the benefit of a fact which a witness knows, because he may fancy that his client may be a loser by its disclosure?"

The attorney of a stranger to the cause cannot be compelled to produce a case with the opinion of counsel, which he holds confidentially for his client.(3)

In an action against the sheriff for an escape, it has been held that the attorney for the original defendant could not be called to prove the debt, where he became acquainted with the business only from the information of his client.(4) So in an action by the assignees of a bankrupt, communications made by him to his attorney cannot be given in evidence for the purpose of showing his motives,(5) unless with the consent of the bankrupt, in which case the defendant cannot object to the disclosure.(6)

An action for breach of promise of marriage had been brought by A. against B. The cause was referred under an agreement in two parts, one of which signed by A.'s attorney but unstamped, was in the possession of B.'s attorney; the other part signed by B.'s attorney and stamped, was in the possession of A.'s attorney; the expense of the stamping having been

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(1) Doe d. Courtail v. Thomas, 9 B. & C. 288.
(2) Doe d. Egremont (Lord) v. Langdon, 18 L. J. (N. S.) Q. B. 17.
(3) R. Woodley, 1 Mo. & R. 390.
(4) Sloman v. Horne, 2 Esp. 696.
(5) Bowman v. Norton, 5 C. & P. 177.
(6) Merle v. More, Ry. & M. 390; S. C., 2 C. & P. 275.

borne by B. B. brought an action against his attorney for negligence in conducting the reference. It was ruled(1) that the then plaintiff (B.) was entitled to the production of the stamped part of the agreement by A.'s attorney, although he was directed by A. not to produce it.(2) It was also ruled that A.'s attorney was not bound to produce letters written by the then defendant as attorney for B. to the witness as attorney for A.; but that if, after notice to produce, the letters written by the witness as attorney for A. to the then defendant as attorney for B. were not produced, the witness was bound to give secondary evidence of their contents, although desired by the defendant A. not to do so.

It has been held that the counsel in a cause have a right to argue the admissibility of this kind of evidence which relates to the rights of persons not being parties to the cause:(3) but it has been said in argument(4) that this right is limited to cases where the attorney objects to produce the document, and does not extend to cases where the attorney makes no objection.(5)

There are conflicting cases upon the question whether the improper admission or rejection of this kind of evidence is a sufficient ground for a new trial. In Marston v. Downes,(6) the Court of King's Bench decided that, even supposing the judge acted erroneously in admitting such evidence, the parties to the action had no right to insist upon the objection, and a rule for a new trial was refused. But in the later case of Doe d. Peter v. Watkins,(7) the Court of Common Pleas granted a new trial, on the ground that such evidence had been improperly received.

Where attorney is examined as to collateral facts not in confidence.

The attorney of a party in the cause may be examined, like any other witness, as to any collateral fact, with which he has become acquainted otherwise than from a disclosure or confession by his client.(8) Thus, if he is the subscribing witness to a deed, he may be examined concerning its execution.(9) If there be a question about an erasure in a deed or will, he may be asked whether he had ever seen the instrument in any other

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(1) Higgs v. Taylor, 1 C. & Kir. 85.

(2) This was upon the ground that that part of the agreement appeared to have been stamped for the mutual benefit of A. and B., upon the same principle that the court will compel the production of documents for inspection in which other parties are interested. *Vide post*, Vol. II.

(3) R. v. Woodley, 1 Mo. & R. 390. See, also, Mills v. Oddy, 6 C. & P. 733; Higgs v. Taylor, 1 C. & K. 85.

(4) In Doe d. Egremont (Lord) v. Langdon, 18 L. J. (N. S.) Q. B. 19.

(5) But see Doe d. Peter v. Watkins, 3 N. C. 421.

(6) 1 A. & E. 31, A. D. 1834.

(7) 3 N. C. 421, A. D. 1837.

(8) See Sawyer v. Brickmore, 3 M. & K. 572.

(9) Doe d. Jupp v. Andrews, Cowp. 846; Robson v. Kemp, 4 Esp. 235.

NOTE 70.—Devoy's Lessee v. Burke, 2 Fox & Smith, 191, 199, S. P. This case holds that he is bound to testify, having witnessed the deed, although he obtained his knowledge as attorney.

state.(1) But this doctrine must be limited to a case where the attorney has his knowledge independently of any communication from the client; it does not mean that where the attorney, coming to the client for a confidential purpose, obtains some other collateral information which he would not otherwise have possessed, he can be compelled to disclose it.(2) If an attorney were present when his client was sworn to an answer in chancery, he might be a witness, on an indictment for perjury, to prove the fact of taking the oath, which is not a fact peculiarly within his knowledge as an attorney, and not communicated to him in secrecy.(3) In one case, an attorney was admitted by Lord Kenyon, C. J., in an action of debt upon a bond, to prove that the bond had been given on an usurious consideration.(4) This appears to have been done upon the assumption that the attorney had made himself a party to the transaction; but it is doubtful whether the facts of the case would sustain that assumption, and whether the decision would be now acted upon.(5)

An attorney, conducting a cause in court, may be called as a witness by the opposite side, and asked as to his employer, in order to show the real party, and let in his declarations.(6) He may be called to prove the identity of the defendants to a suit, though, except from his intercourse with them professionally, he knows nothing of them.(7) He may prove his client's handwriting,(8) and may be required to state whether he is himself in possession of a particular document, so as to let in secondary evidence of its contents, after a notice to produce, although he obtained the possession from the client.(9)

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(1) B. N. P. 284; Cuts v. Pickering, 1 Ventr. 197.

(2) By Lord Abinger, C. B., in Wheatley v. Williams, 1 M. & W. 451.

(3) B. N. P. 284; by Lord Mansfield, C. J., in Cowp. 846.

(4) Duffin v. Smith, Peake, 108.

(5) See the remarks of Lord Brougham, C., in 1 M. & K. 109.

(6) Levy v. Pope, M. & M. 416.

NOTE 71.—An attorney was compelled to testify as to the person who retained him in the cause, in order to let in the confession of the real party as evidence. Levy v. Pope, 1 Mood. & Malk. 410. But see Chirac v. Reinicker, 11 Wheat. 280, cited *supra*.

(7) Studdy v. Sanders, 3 D. & R. 347. For other examples, see Beckwith v. Benner, 6 C. & P. 681; Hurd v. Moring, 1 C. & P. 372; Eicke v. Nokes, M. & M. 303; R. v. Watkinson, 2 Str. 1122, with the *quere* of the reporter.

(8) 2 Hawk. c. 46, § 89.

NOTE 72.—Johnson v. Daverne, 19 John. R. 134. The attorney may prove his client's handwriting, having acquired knowledge of it without any confidential communication in respect to it; even though this be by seeing his client put his name to a bail bond in the very cause. Hurd v. Moring, 1 Carr. & Payne, 545.

(9) Bevan v. Waters, M. & M. 235; Coates v. Birch, 2 Q. B. 252.

NOTE 73.—So an attorney is compellable to testify that a deed delivered to him as attorney is in existence and in his possession, in order to let in secondary evidence of its contents under a notice to produce it. Brandt ex dem. Van Cortlandt v. Klein, 17 John. Rep. 335. (He may be called upon to state whether a document so received by him is in court, or in his possession. Dwyer v. Collins, 12 Eng. Law & Eq. 532, note 537; Coveney v. Tanahill, 1 Hill R. 33, reviewing the authorities on the subject at length.)

A bill in equity, filed by the insurers of a life against the insured, to which the solicitor of the insured was a party as a defendant, stated that on a particular day, an agent of a company with whom the insured wished to effect an insurance, came to the office of the insured, and told their agent that the life was bad, handing to him at the same time an unfavorable medical report upon the life. The solicitor of the insured was present at this interview, but in his answer to the bill he refused to state what passed, because he was then "the solicitor and attorney and the professional adviser" of the insured, and was present at the said interview as such solicitor, &c., "and acquired his information touching the matters" which he refused to answer, "solely from the fact of his being present at the time in his capacity of such solicitor and attorney and professional and confidential adviser:" it was held that this answer was insufficient.(1) Lord Cottenham, C., after some very important observations upon the general principles on which communications are entitled to be considered as privileged, and having stated that the privilege only applies to cases in which the client makes a communication to his solicitor with a view of obtaining his legal advice, remarked: "Such being the rule, the only question is, whether the defendant (the solicitor) in the present case has used such words in his answer as clearly and distinctly to bring himself within it." And then, after stating the facts as set forth in the defendant's answer, his Lordship continued: "It may be that the defendant was present accidentally, and so heard what passed: but at all events, those who claim the privilege are bound to bring their case within it. I cannot say till I have learned how the defendant came to be present, who sent for him, and so forth, whether the communication was privileged."(2)

So, where a motion in the Ecclesiastical Court for the production of certain papers, referred to by a witness in his deposition (the witness being the solicitor of the party in the cause opposing a codicil), was resisted on the ground of privilege, it was held that information collected by the solicitor from a subscribing witness to the codicil, was not privileged; though it would have been otherwise if such information had been communicated by the client to the solicitor; and it was also held, that letters written by the testator to the same solicitor, with regard to a bond executed by the former in favor of the party propounding the codicil, were not privileged communications as between that solicitor and his client, the party opposing the codicil.(3)

The privilege, however, extends to all knowledge obtained by the at-

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(1) Desborough v. Rawlins, 3 Mylne & Cr. 515.

(2) 3 Mylne & Cr. 525. See, also, Pritchard v. Foulkes, 1 C. P. Coop. 14; Greenlaw v. King, 1 Beav. 137.

(3) Mackenzie v. Yeo, 2 Curt. Ecc. R. 866.

The communication must come to the attorney or solicitor directly from his client, or it will be not privileged. Crosby v. Berger, 4 Edw. Ch. 254.

torney, which he would not have obtained if he had not been consulted professionally by his client. And it has accordingly been held that an attorney is not compellable to state whether he has seen a document in the possession of his client;(1) or whether a document, shown to him by his client, in the course of a professional interview, was in the same state as when produced on the trial; as, for example, whether it was stamped or not.(2)

It is obvious that communications by an attorney to the opposite party or to strangers, and communications between a plaintiff and defendant in the presence of an attorney, do not fall within the principle or terms of the rule which protects private communications between parties and their professional advisers.(3) So, communications from the opposite party to the attorney, or to the client, in his presence, are not within the rule.(4) Thus, the attorney of one of the parties may be examined as to the contents of a written notice, which had been received by him from the adverse attorney, requiring him to produce papers.(5)

The rule is also inapplicable to admissions or proposals of compromise made by counsel or attorneys; these will be considered afterwards, in that part of the work which treats of admissions by agents.

Communications made by a client to his attorney, not for the purpose of asking his legal advice, but to obtain information concerning a matter of fact, are not privileged. "A question for legal advice," said Tenterden, C. J., in Bramwell v. Lucas,(6) "may come within the description of a

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(1) Bingham v. Stanley, 9 C. & P. 374. See, also, Moore v. Terrell, 4 B. & A. 878.

(2) Wheatley v. Williams, 1 M. & W. 533.

(3) By Parke, J., and Patteson, J., in Griffith v. Davis, 5 B. & A. 503, questioning the authority of Gainsford v. Grammar, 2 Campb. 9. See, also, Ripon v. Davis, 2 N. & M. 210; Turner v. Railton, 2 Esp. 274.

NOTE 74.—Spencer, J., held that terms of compromise, offered by an attorney to his client's creditors, were not to be considered confidential, as he had already published them. M'Tavish v. Denning, Anthon's N. P. Cas. 113; *Post*, note 152, S. C. And see Yordan v. Hess, 13 John. Rep. 492. (Nor are communications that pass between the attorneys of opposite parties privileged. Gore v. Harris, 8 Eng. Law & Eq. 147.)

(4) See Desborough v. Rawlins, *ut supra.*

(5) Spenceley v. Schulenburgh, 7 East, 357.

(6) 2 B. & C. 744.

Communications to an attorney or legal adviser, are held privileged for the protection of the client, who may waive the privilege; and in the case of a stranger to the suit, it is laid down in the text that the attorney's privilege is not more extensive than that of his client. Doe d. Courtail v. Thomas, 9 B. & C. 288. Under recent statutes, making parties to the suit competent and compellable to testify in the same manner as other witnesses, *quere*, whether many communications between client and attorney, formerly considered privileged, can be any longer so regarded? If the party himself may be called upon to answer a question or produce a document, there would seem to be no good reason why his attorney should be held privileged from answering it, or producing it. In such a case, the legal adviser cannot be said to have betrayed the professional confidence reposed in him, because the subject matter of the communication might have been inquired into by calling and examining the party himself. In effect, the law rendering a party compellable to testify, declares, that in civil cases, the parties shall have no secrets pertinent to the issue on

confidential communication, because it is part of the attorney's duty, as attorney, to give legal advice; but a question for information as to matter of fact, regarding a communication which the attorney has made to others, where the communication might have been made by any other person as well as an attorney, and when the character and office of an attorney has not been called into action, has never been held within the protection, and is not within the principle upon which the privilege is founded."

The rule here laid down by the Court of King's Bench has never been questioned; but its application to the particular facts of that case has been much doubted both by Lord Brougham, C.,(1) and Lord Cottenham, C.(2) "Undoubtedly," observed the latter, "looking at the facts of that case, it is not very easy to come to the conclusion to which the court there came in point of fact. The question was, whether the client had committed an act of bankruptcy on a particular day. On that day, the client inquired of his solicitor whether he could safely attend a meeting of his creditors without being arrested for debt. The solicitor advised him to stay in his office; and he accordingly did stay there for upwards of two hours to avoid being arrested. The question was, whether what passed between the solicitor and his client was receivable in evidence. That looks undoubtedly very like a professional communication for the purpose of obtaining advice; and the court said, if it was a professional communication it was privileged. If, therefore, the client asked the solicitor his advice in point of law, whether he could with safety attend the meeting of his creditors, the communication would be privileged; but the court said that, in its nature, it could not be privileged, but that it was merely an inquiry of fact, whether the client's creditors, because they had clearly all their legal rights, would arrest him; and that the only question was, whether they had agreed not to do so; and the court held the question was one of fact and not of law."(3)

SECTION II.

Of the Exclusion of Evidence, where the Disclosure would be Prejudicial to Public Interests.

The discovery of truth in inquiries necessary for the administration of criminal justice, as also where the rights of private individuals are con-

trial that may not be inquired into. Perhaps, however, it is as well to permit the privilege to cover confidential communications between client and attorney, leaving the opposite party at liberty to call and examine his adversary. Our notion of good faith, and the very idea of professional confidence, requires that it be kept inviolate, while the right to examine an opponent on oath gives a fair opportunity to search out the whole truth.

(1) In Greenough v. Gaskell, 1 Mylne & K. 98.

(2) In Desborough v. Rawlins, 3 Mylne & Cr. 515.

(3) 3 Mylne & Cr. 521.

cerned, is an object, which, however desirable in itself, may nevertheless be counterbalanced by serious inconveniences from disclosures prejudicial to public interests. And the danger of such disclosures has been deemed, in particular instances, an adequate ground for the exclusion of evidence.(1)

Information given to government.

Witnesses are not to be examined respecting information given by them to government for the discovery of offenders against the law. The names of persons who are the channels by which detection is made, are not to be disclosed. This is not the privilege of the witness, but may be justly called a public privilege, on account of its importance to the public; it is observed by courts of justice on a principle of public policy, and from regard to public interests.

On the trial of Hardy for high treason, a man who had been employed by an officer of the executive government to collect information at a meeting of one of the corresponding societies, was not allowed to disclose the name of his employer, or the nature of the connection that had subsisted between himself and the officer.(2)

Another witness, in the course of the same trial, had made reports from time to time of the proceedings of some corresponding societies, and had made these reports by the advice of a third person, and under the impression that the information contained in the reports would be transmitted to another quarter for the purpose of disclosure; the witness was asked whether he had communicated his reports to a magistrate of any description; Eyre, C. J., considered this a proper question.(3) The witness, on answering in the negative, was asked to whom he had made a communication. This question was objected to; Eyre, C. J., upon this said: "It is perfectly right, that all opportunities should be given to discuss the truth of the evidence given against a prisoner; but there is a rule which has universally obtained on account of its importance to the public for the detection of crimes, that those persons who are the channel by means of which that detection is made, should not be unnecessarily disclosed. If it

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(1) NOTE 75.—On trial of an indictment for counterfeiting, and having possession of counterfeit bank notes, &c., a question, on cross-examination, was put to a witness for the prosecution, whether one Johnson, at whose house the prisoner was apprehended, had told the witness that, if he would come to his house on a certain day (being the day on which the prisoner was arrested), he would have the prisoner there. Washington, J., would not allow the question to be answered. He took the ground that such a disclosure could be of no importance to the defence, and might be highly prejudicial to the public in the administration of justice, by deterring persons from making similar disclosures of crimes which they knew had been committed. United States v. Moses, 4 Wash. C. C. Rep. 726.

(2) 24 How. St. Tr. 753, on cross-examination of Groves. The same principle was acted upon in the prosecution of Horne Tooke for high treason; in the prosecution of Walker and others for a conspiracy; and in the prosecution of Watson for high treason. Gurney's Report, 159. See, also, 32 How. St. Tr. 100.

(3) 24 How. St. Tr. 808; on the cross-examination of Lynam.

can be made appear, that it is necessary to the investigation of the truth of the case, that the name of the person should be disclosed, I should be very unwilling to stop it; but it does not appear to me that it is within the ordinary course to do it, or that there is any necessity for it in this particular case."

The cross-examination of the same witness then proceeded, and he admitted that he had related what he knew to a friend, who advised him to communicate his reports of the proceedings to another person. He was then asked whether that friend was a magistrate; this he answered in the negative: then came the question, who was the friend? This was objected to;(1) the objection was, that the person by whose advice the information was given to a person standing in the situation of a magistrate, was, to all intents and purposes, the informer, and that his name, therefore, could not be disclosed.(2) The judges differed in opinion upon this point; Macdonald, C. B., and Buller, J., were of opinion that the question was proper; but the majority of the court, consisting of Eyre, C. J., Hotham, B., and Grose, J., were of the opposite opinion. Eyre, C. J., said: "Those questions, which tend to the discovery of the channels by whom the disclosure was made to the officers of justice, are not permitted to be asked. Such matters cannot be disclosed, upon the general principle of the convenience of public justice. All persons in that situation are protected from discovery. It is no more competent to ask who the person was that advised the witness to make the disclosure, than it is to ask to whom he made the disclosure in consequence of that advice, or than it is to ask any other question respecting the channel of information, or what was done under it." Grose, J., considered the adviser of the witness to be substantially in the situation of an informer, and that his name, therefore, ought not to be revealed. Hotham, B., also considered the person to be an informer; the witness, he said, had made the communication to his friend, under an impression and full persuasion that through him the intelligence might be conveyed to a magistrate; and there was no distinction, he added, between making a disclosure to the magistrate himself, or making it to another person who was to communicate it to the magistrate. The judges who were of opinion that the question might properly be asked, admitted the general rule, and differed only in the application of that rule to the particular facts of the case. Macdonald, C. B., said: "If he were satisfied that the friend to whom the witness disclosed this matter was in any way a link in the communication, he should certainly agree that the rule applied to him; but this person not being connected either with the magistracy or the executive government, the case did not appear to him to fall within the rule." Buller, J.,

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(1) 24 How. St. Tr. 711.
(2) 24 How. St. Tr. 814.

admitted the rule with respect to the informer to the utmost extent: "If the name of the informer," he said, "were to be disclosed, no man would make a discovery, and public justice would be defeated." He admitted, also, that if a middle man is made the channel of communication, he ought to receive the same protection as the first person to whom it was mentioned. But he differed in opinion only as to the situation of the friend respecting which this question arose: in his view of the evidence, he considered that the witness had communicated the information to another man, not for the purpose of prevailing on him to make the disclosure to a magistrate, but merely to consult him for the purpose of making up his own mind whether he should himself make the discovery; he was, therefore, of opinion that the witness ought to be allowed to answer the question.

Result of cases.

Hence, it appears that a witness who has been employed to collect information for the use of government, or for the purposes of the police, will not be permitted to disclose the name of his employer, or the nature of the connection between that employer and himself, or the name of any person to whom he may have conveyed the information for the purpose of being transmitted. And, as it would not be proper to inquire to what officer of government the information had been given, so neither can it be asked whether the information has been made by that officer to the government.(1)

The same rule applies to cases of information in the Exchequer for breaches of the revenue laws: thus, in such a case, a witness of the crown cannot be asked, in cross-examination, whether he was himself the informer.(2) But the rule does not seem to apply in cases where the witness is obviously put forward as the informer.(3)

It may be questionable also, whether it is applicable in cases of ordinary prosecutions, in which the government is not directly concerned.(4) In The King agt. Blackman,(5) on an information under the 17 Geo. II, c. 40, § 10, for possessing naval stores, a witness was asked on the *voir dire* if any officer or other person had given information to the admiralty respecting the stores in question. Upon this case being cited in argument,(6) as an authority that such questions might be put, Pollock, C. B., remarked, it did not appear that that was a prosecution by a government officer.(7) It

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(1) See further upon this point, Horne v. Bentinck, 2 B. & B. 130; R. v. Akers, 6 Esp. 125.
(2) Att. Gen. v. Briant, 15 M. & W. 169.
(3) R. v. Candey, 15 M. & W. 175. See, also, Watson's Case, 32 How. St. Tr. 98.
(4) By Pollock, C. B., 15 M. & W. 181.
(5) 1 Esp. 95.
(6) In Att. Gen. v. Briant, *ut supra.*
(7) 15 M. & W. 180.

does not appear either that the question was objected to, which perhaps was the real reason why it was allowed to be asked.(1)

Upon the trial of Watson for high treason, a clerk of the works in the ordnance department, who had resided many years in the Tower of London, was called, on the part of the prosecution, to prove that a plan produced was part of the interior of the tower. He was afterwards asked, upon cross-examination, whether another printed plan, which was shown to him, was a correct plan of the tower; this was asked, with the view of proving afterwards, that such maps might be purchased without difficulty in the shops of London. But the court held, that the evidence could not be received, on the ground that it would be attended with public mischief, to allow an officer of the tower to be examined as to the accuracy of such a plan.(2)

Official communications.

On a like principle of public policy, official communications between the governor and law officer of a colony respecting the state of the colony;(3) orders given by the governor of a colony to a military officer;(4) a correspondence between an agent of government and a secretary of state;(5) or between the Court of Directors of the East India Company and the Commissioners of the Board of Control (pursuant to the statute 3 & 4 Wm. IV, c. 85);(6) the report of a military court of inquiry respecting an officer whose conduct the court had been appointed to examine;(7) the official correspondence between the commissioners and an officer of the customs;(8) a letter from a secretary of state to a person acting under his authority;(9) all these are confidential and privileged communications, which courts of justice will not allow to be disclosed.

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(1) See 15 M. & W. 175.

(2) R. v. Watson, 2 Stark. R. 148.

(3) Wyatt v. Gore, Holt's N. P. C. 299.

(4) Cooke v. Maxwell, 2 Stark. R. 183.

(5) Anderson v. Sir W. Hamilton, 2 B. & B. 156, n.

NOTE 76.—A former secretary of state is not bound to disclose confidential communications made to him in the line of his office (Marbury v. Madison, 1 Cranch, 144); nor *semb.* the president of the United States, to disclose communications made to him officially. 1 Burr's Tr. by Robertson, 186, 187.

(6) Smith v. East India Co., 1 Phil. R. 50.

(7) Horne v. Bentinck, 2 B. & B. 130; Lee q. t. v. Birrel, 3 Camp. 355.

(8) Black v. Holmes, Fox & Smith's Rep. 28, K. B. in Ireland.

(9) Case cited 2 Stark. R. 185. As to minutes taken before the Privy Council, see Layer's Case, 6 T. R. 281.

It has been held, that a senator will be admitted to disclose facts which transpired in a secret session, after having applied to have the injunction of secrecy removed without avail. Law v. Scott, 5 Harr. & John. 438. But where papers were filed with a governor, containing charges alleged to be libelous, the court refused a subpœna *duces tecum* to compel him to produce them. Gray v. Pentland, 2 Serg. & Rawle, 23; approved in Youter v. Sanno, 6 Watts, 166. The same principle has been repeatedly recognized and acted upon in this state, on the ground that such communications are privileged, and cannot be made the foundation of an action for libel. Thorn

But although the orders given by the governor of a colony to a military officer cannot, as we have seen, themselves be produced; yet the witness may be asked in general terms, whether he did not do a certain act under the direction of the governor.(1) And communications, though made to official persons, are not privileged, if they had not been made in the discharge of any public duty. Thus, a letter written by a private individual to the secretary of the postmaster-general, complaining of the conduct of the guard of a mail, has been held not to be within the principle of the rule justifying the exclusion of evidence.(2)

Proceedings in Parliament.

In the case of Plunkett v. Cobbett,(3) which was an action against the defendant for publishing a libel reflecting on the conduct of the plaintiff as a member of the Commons' House of Parliament in Ireland, the counsel for the defendant, in cross-examination, inquired of the speaker of the House of Commons, who was called as a witness, as to the expressions and arguments which the plaintiff had used in Parliament on a particular subject, when Lord Ellenborough, C. J., interposed and stopped the examination, observing that it would be a breach of duty in the witness, as a member of the Irish Parliament, and a breach of his oath, to reveal the councils of the nation. But his Lordship said, that as to the fact of the plaintiff having spoken in the debate, the witness was bound to answer; as that was a fact containing no improper disclosure of any matter then under discussion in Parliament.(5)

In court.

Upon the same principle of public policy, as it seems, a judge cannot be compelled to state what occurred before him in court. Thus, the chairman of quarter sessions cannot be called upon, on an indictment for perjury alleged to have been committed in a trial at the sessions, to give evidence as to what the defendant swore at that trial.(3)

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v. Blanchard, 5 John. 508; Vanderzee v. McGregor, 12 Wend. 545; Howard v. Thompson, 21 Wend. 319.

(1) Cooke v. Maxwell, 2 Stark. R. 186.

(2) Blake v. Pilfield, 1 Mo. & R. 198.

Such communications are privileged, in regard to the writer; so that he is not liable to an action for libel in making them. But the party to whom they are made has no privilege to conceal them, where the ends of justice require a disclosure. Howard v. Thompson, *supra;* Thorn v. Blanchard, 5 John. 508.

(3) 29 How. St. Tr. 71, 72; S. C., 5 Esp. 136.

(4) 5 Esp. 137.

(5) R. v. Gazard, 8 C. & P. 595.

Judges are frequently called and examined as witnesses in relation to proceedings before them. Huff v. Bennett, 4 Sand. 120. Though it is well settled that they cannot be called in question collaterally for the manner in which they have conducted the trial. The forms of a suit or trial cannot be employed to slander or defame. Gillett v. The People, 1 Denio, 41. And where this

Nor can an arbitrator be compelled to disclose what took place upon the reference before him.(1) But as this is rather to be considered as the privilege of the arbitrator, he may waive it and be examined with his own consent.(2)

On the same ground it has been ruled that a counsel cannot be compelled to relate what was stated by him in making a motion before the court.(3)

Where a party has conducted a cause as an advocate, such as an attorney in a cause before the under-sheriff, he will not be permitted to give evidence as a witness in the same cause.(4)

Before grand jury.

A grand juryman may be questioned as to matters laid before the grand jury in the course of a criminal proceeding; where the question was whether a defendant in an action for a malicious prosecution was the prosecutor, Lord Kenyon, C. J., allowed the counsel for the plaintiff to make that inquiry of a grand juryman; being of opinion that this inquiry did not infringe upon the official oath taken by the witness.(5) And the same course has been adopted in a later case before Park, J.(6)

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is attempted, there is no reason why the justice or jury should not be called as witnesses to prove what did take place.

(1) Habershaw v. Troby, 3 Esp. 38; S. C., Peake Ad. Ca. 181; Johnson v. Durant, 4 C. & P. 327; Ellis v. Saltau, Ib. n.

(2) Martin v. Thornton, 4 Esp. 181.

The general rule is that an arbitrator cannot be admitted as a witness to impeach the award: he cannot be sworn to prove a mistake in making it up. Newland v. Douglass, 2 Johns. 62. Having signed it, he cannot be permitted to say that he did not concur in it. Campbell v. Western, 3 Paige, 124. But where an umpire is called in, one of the arbitrators (whose functions thereupon cease), who did not concur in the award, may be received as a witness to show that the umpire exceeded his authority. Mayor, &c., of N. Y. v. Butler, 1 Barb. R. 326. The submission and award being in writing, cannot be explained or contradicted by parol; but oral evidence may be given to show that the arbitrators exceeded their powers, thereby invalidating their award. S. C., 1 Hill, 489; 7 Hill R. 329. So, where an award signed by two of three arbitrators contains a recital stating that the matters in controversy were heard and decided by them, it may be proved by parol evidence that the three were present. Such evidence does not contradict nor alter the award in any respect. Schultz v. Halsey, 3 Sand. 405. The rule, however, is general and well settled that the award of arbitrators cannot be shown by parol testimony to mean something different from what it plainly declares; and that not even the testimony of the arbitrators can be received to contradict or impeach it. Doke v. James, 4 Comst. R. 568; Fidler v. Cooper, 19 Wend. 284; Dater v. Wellington, 1 Hill R. 319.

(3) Curry v. Walter, 1 Esp. 456. See Sparke v. Middleton (1 Keb. 505), where the counsel for the defendant was called by the plaintiff and was allowed to take a special oath. See also Baillie's Case, 21 How. St. Tr. 358, 361.

What an attorney or solicitor said on the trial may be proved, where it is essential to the ends of justice; but if pertinent to the issue, it cannot be made the foundation of a suit for libel. Warner v. Payne, 2 Sand. 195; Garr v. Selden, 6 Barb. 416; Suydam v. Moffatt, 1 Sand. 459.

(4) Stones v. Byron or Bacon, 4 Dowl. & L. 393; S. C., 1 B. C. R. 248, S. P.; Dunn v. Packwood, 1 B. C. R. 312.

(5) Sykes v. Dunbar, 2 Selw. N. P.

(6) Freeman v. Arkell, 1 C. & P. 137.

On the trial of Watson for high treason, a witness was questioned by the counsel for the prisoner, as to his having produced and read a certain writing before the grand jury: this being objected to by the solicitor-general, Lord Ellenborough, C. J., said: "He had considerable doubt upon the subject: he remembered a case in which a witness was questioned as to what passed before the grand jury, and though it was a matter of considerable importance, he was permitted to answer." The solicitor-general then intimating, that if such a case had not occurred, he should have thought that "what passed before the grand jury could not properly be inquired into, as they are sworn to secrecy," Lord Ellenborough, C. J., added, that "He had doubts, and that many very eminent men at the bar had entertained doubts upon the point; but that he remembered the case perfectly."(1) Here the matter seems to have dropped; and the question as originally put, was not repeated.

The Court of King's Bench have refused to receive an affidavit from a grand juryman as to the number of the grand jury who concurred in finding a bill.(2) And where the grand jury had found a bill of indictment containing ten counts, with the indorsement "a true bill on both counts," the last three words being smeared, so that it seemed doubtful whether they were not meant to be blotted out, Patteson, J., would not, after the grand jury had been discharged, allow any of them to be called to explain their finding.(3)

The principle upon which a grand juryman is not allowed to give evidence to certain matters sworn to before him, would rather seem to rest upon general grounds of public policy, than upon the fact that he is sworn to secrecy, as suggested in Watson's Case.(4)

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(1) 32 How. St. Tr. 107. And see the discussion in Sir J. Fenwick's Case, 5 Harg. St. Tr. 72. In a case cited 12 Vin. Ab. Ev. 5, the evidence of the clerk of the grand jury was rejected.

NOTE 77.—Grand jurors are bound to testify whether the testimony of a witness before the grand jury was different from his testimony in court; and to disclose the testimony given before the grand jury by one who is afterwards prosecuted for perjury in such oath, both upon the complaint and trial; but he will not be allowed to testify in what manner any grand juror voted, or what opinions he expressed. 2 N. Y. R. S. 724, § 31. The attorney of the commonwealth shall not be required to disclose what passed in the grand jury room. Commonwealth v. Tilden, 1823, before Putnam, J., cited in a note to the Am. ed. of 2 Stark. Ev. 400. So of a clerk to a grand jury. Vin. Abr. Ev. 38. See 1 Stark. Ev. 106, and Id. 400.

(At common law, a juror has been held incompetent to prove misconduct in his fellow jurors to impeach the verdict. State v. Freeman, 5 Conn. R. 348. And a grand juror incompetent to prove that a witness sworn before the petit jury swore differently before the grand jury. Imlay v. Rogers, 2 Halsted, 347. But a juror has been admitted to prove improper attempts by a party to influence the minds of the jury. Denn ex dem. Chews v. Driver, Coxe, 166.)

(2) R. v. Marsh, 6 A. & E. 236.

(3) R. v. Cooke, 8 C. & P. 584. See, further, Vin. Abr. Evidence, H; 4 Bl. Com. 126, and note by Christian.

(4) *Ut supra.* And see Lee q. t. v. Birrell, 3 Campb. 337.

Conduct of petty jurymen.

The courts also are constantly in the habit of rejecting affidatits sworn by petty jurymen for the purpose of showing that their verdicts have been decided by lot;(1) or the affidavits of strangers, stating an admission by a juror to that effect;(2) or that a similar declaration had been made by one of the jury in open court in the presence and hearing of his fellows.(3) And these decisions must rest entirely upon the ground of public policy, as the petty jury are not sworn to secrecy.

When the purposes of public justice require that certain evidence should be given, which the court from regard to decency would be disposed to suppress (whether upon indictments for crimes, or on questions of private rights or private wrongs), the evidence, however inconvenient, must be disclosed. It has therefore been considered, that Mr. Justice Burnet was wrong in refusing to try an action of defamation, in which a woman charged a man with proclaiming to the world that she had secret defect in her person, and the defendant by plea justified, that it was true that she had such defect.(4) But the courts have frequently refused to try wagers, on the ground of their leading to admission of indecent evidence, or as unnecessarily injuring the feelings of third parties: such as a wager respecting the sex of a third person,(5) or whether an unmarried woman had had a child.(6)

We have seen before that, upon principles of public decency and policy, a husband or wife shall not be permitted to say, after marriage, that they have had no connection, and therefore, that the offspring is spurious.(7)

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(1) Vaise v. Delaval, 1 T. R. 11; Owen v. Warburton, 1 N. R. 326.

See State v. Freeman, 5 Conn. R. 348, *supra.*

(2) Straker v. Graham, 4 M. & W. 721.

(3) Burgess v. Langley, 5 M. & G. 722.

(4) By Lord Mansfield, in Da Costa v. Jones, Cowp. 733.

But it was held in this case that the court would not, on a wager as to the sex of a particular person, allow witnesses to be examined on the subject, such as servants and physicians of that person.

(5) Da Costa v. Jones, *ut supra.*

(6) Ditchburn v. Goldsmith, 4 Campb. 152. By the 8 & 9 Vict., ch. 109, § 18, no wager is now recoverable either at law or in equity.

(7) *Ante,* ch. 4, § 4.

CHAPTER VIII.

GENERAL RULES RELATING TO THE EXCLUSION OF HEARSAY EVIDENCE.

HAVING investigated several rules for the exclusion of evidence, as regarding the peculiar character or situation of a witness, or the peculiar subject of his testimony, we proceed to consider some rules of a more general nature, which have been adopted principally with a view to provide against the danger of juries being perplexed or misled by evidence of doubtful credibility.

The first general rule of this description which will be treated of, is the rule relative to hearsay evidence. In the first section it will be convenient to consider the distinction between original and hearsay evidence; and, in the second section, to treat of the rule which excludes hearsay. The exceptions to the rule will afterwards be considered in separate sections.

SECTION I.

Of the Distinction between Original and Hearsay Evidence.

When a witness, in the course of stating what has come under the cognizance of his own senses concerning a matter in dispute, states the language of others which he has heard, or produces papers which he identifies as being written by particular individuals, he offers what is called *hearsay* evidence. This evidence may sometimes be the very matter in dispute, or something from which a pertinent inference, relative to the matter in dispute, may be drawn; or, on the other hand, it may consist of a verbal or written narrative of facts, received by the witness from some other person, which he delivers at second hand to the court. The term, *hearsay* evidence, is used with reference both to that which is written and to that which is spoken. But, in its legal sense, it is confined to that kind of evidence (whether spoken or written) which does not derive its credibility solely from the credit due to the witness himself, but rests also in part on the veracity and competency of some other person from whom the witness may have received his information.

It may be here stated that the general rule is, and it is a rule of very extensive influence, that hearsay evidence is not receivable.(1)

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(1) As to the principle and policy of this rule, see *infra*.

Letters as proof of information given or received.

In some cases the words or writings offered in evidence are transactions, concerning which the only inquiry instituted is whether they have taken place or not, and in that view they are receivable. For example, letters written to a bankrupt before his bankruptcy, containing matters material to an act of bankruptcy, are admissible, without calling the writer of them, as evidence against the bankrupt that he received intimation of certain facts; but not to prove that the facts were true.(1) So letters written to a person a short time previous to his bankruptcy, and containing a refusal to advance money, are evidence of the fact of such refusal.(2)

Where letters are admissible in evidence as transactions, it is customary for the judge to allow only that part to be read which relates to the particular transactions.(3) It is, however, an established rule, that letters, which are admissible for one purpose, will not be rejected merely because

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(1) Cotton v. James, 1 M. & M. 273.

NOTE 78.—The rule that hearsay is no evidence, is obviously not violated by introducing letters, conversations, &c., of third persons as merely collateral, introductory or incidental to, or in illustration of the testimony which the witness gives. 1 Chit. Cr. Law, 368, 369, and authorities there cited. It was accordingly held, that where a witness prefaced the facts he swore to with an account of letters from third persons, which induced him to take the steps he related, though the story of the letters was objected to, that its admission was not improper. The question was on the solvency or insolvency of a distant debtor. To show his solvency, the witness was called, and stated that he was a creditor; that letters excited his suspicion that the party was not insolvent, as he pretended. He, therefore, proceeded against him and collected his debt. Otherwise, if the story of letters had been received as evidence of the fact. Lewis v. Manly, 2 Yeates, 200. So of any other merely introductory inconsequential matter, as that another by certain conversation, not stating any fact which would be evidence, drew the witness's attention to the subject. Morris v. Lessee of Harmer's Heirs, 7 Pet. Rep. 554. To prove a larceny of cotton, the witness stated that a negro telling him the cotton was in the prisoners' house, he searched and found it there. This not being objected to, was held well. And Henderson, J., inclined that it would have been well with an objection, in order to show the witness's motive for searching. But *quere*, unless called out by cross-examination as to the motive. State v. Barden, 1 Dev. 518.

(So a letter written by a person who is not a party to the suit, may be proved as evidence of an act done, though its contents may be inadmissible. Lawrence v. Thatcher, 25 Com. Law Rep. 631; 6 C. & P. 669.)

(2) Vacher v. Cocks, 1 M. & M. 353.

(3) Ibid.; Fairlie v. Denton, 2 C. & P. 103.

So, in Healey v. Thatcher, an action for an assault, the plaintiff having proved the assault, proposed to give in evidence a letter written by his attorney to the defendant, in which the attorney stated that he had known the plaintiff for more than twenty years, and that he was a person of the highest respectability, &c.; and the court refused to allow that part of the letter extolling the plaintiff to be read. The following passage was then read from the letter: "I am authorized to say, without prejudice, that if you forthwith make a suitable apology . . . ." Gurney, B. This is not receivable in evidence. It is written without prejudice. If you write without prejudice, so as not to bind yourself, you cannot use the letter against the other party. 8 C. & P. 388; 34 Eng. Com. Law, 442.

they contain hearsay evidence of the truth of facts; but the jury will be directed in the proper use of them as instruments of evidence.(1)

In like manner, in an action for a malicious prosecution,(2) a letter and an affidavit were received in evidence, not as proving the facts therein stated, but as proving some collateral fact to be inferred from them; the first, as showing how the plaintiff came to be bailed; the latter, as showing a step taken by the persons conducting the prosecution. The evidence, as Lord Tenterden, C. J., observed, was admissible for one purpose, but not for another.

In an action for libel, evidence that the publisher of the alleged libel followed it up by a charge, the particulars of which corresponded with the imputation in the alleged libel, is admissible on the part of the defendant, not as evidence of the facts contained in the charge,(3) but to show that the defendant, in publishing the alleged libel, acted *bona fide* and without malice.(4)

On an issue to try whether a testator had, at any period between the time of his attaining his full age and the time of his death, possessed ordinary powers of understanding, letters written and sent to him during this interval, by persons acquainted with him and since deceased, and found among other papers of the testator in his room after his death, are not receivable in evidence to show that he was rational and intelligent at the several times when he was addressed as such by the writers, without some previous proof that the testator did some act upon the letters, or with reference to them, that is, some act of an intelligent man. Such previous proof is indispensably necessary; without it, the letters could only be produced in evidence as showing that the deceased correspondents wrote to him as possessing understanding, or, in other words, as showing their opinion of his sanity; and in that point of view they would be clearly inadmissible. This rule was settled in the case of Wright v. Doe

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(1) Willis v. Bernard, 8 Bing. 376. See, also, Whitaker v. Bank of England, 6 C. & P. 700; Whitehead v. Scott, 1 Mo. & R. 2.

(2) Taylor v. Willans, 2 B. & A. 845. In Penn v. Scholey (5 Esp. 243), an affidavit made by a stranger was read in evidence.

(3) See Melen v. Andrews, M. & M. 336.

(4) Finden v. Westlake, M. & M. 561.

So, in Taylor v. Church (4 Selden R. 452), it was held, that what the defendant said to the printer, in directing the publication complained of as libelous, was admissible in evidence for the purpose of disproving actual malice. Jewett, J.:—"The terms and conditions on which the defendant requested the printing and publication to be done, and on which the witness agreed to do it, were admissible in evidence as a part of the *res gestæ* given in evidence by the other side. The evidence called for was pertinent and material in respect to the *motives* of the defendant in procuring the publication. It tended to disprove that the defendant was influenced by *actual* malice to injure the plaintiffs by the publication, and was therefore pertinent upon the question in respect to the amount of damages to be given beyond a full compensation for the injury, by way of punishment or example."

d. Tatham,(1) which underwent frequent discussion. All the judges agreed as to the principle of the rule, though there was a difference of opinion among them on the question, whether certain letters, which had been rejected, ought not to have been admitted under that rule. Tindal, C. J., who disapproved of the rejection of one particular letter, laid down the principle of the rule very clearly and fully in the following terms:(2) "I consider such treatment only of a person by his friends or others to be admissible in evidence, upon a question concerning his competency, as appears to have come home to his understanding, and upon which he has been shown in some degree to have acted; for, after all, it is not the treatment itself which is of any value, but the mode in which the party conducts himself, when such treatment takes place. It is not what the third person does, or says, or writes, which furnishes of itself any indication of the state of mind of the party respecting whom the inquiry is made, but what such party himself does, or says, or writes, or how he conducts or bears himself on the occasion." And in the latter part of his judgment he said: "The question which the judge had to determine with respect to this letter, was whether there is reasonable evidence to satisfy his mind that it came to the testator, and that he exercised upon it some act of judgment or understanding, though in ever so small a degree."

Proof of a denial of a person at his residence by a wife or servant is original evidence. Whether the denial is true or false in fact, that is, whether the party denied was or was not at home at the time, may be proved or inferred, if necessary, from other circumstances. The fact of the denial itself may clearly be proved by the party to whom it is made; and nothing could be added to the credibility of that fact, by calling the person who made it, even supposing that the witness were perfectly disinterested; although the jury may draw an inference from that fact, they are not required to attach credit to the statement of any person not before them.(3) And, clearly, all verbal instructions (as of a bankrupt ordering himself to be denied to creditors) are in their nature original evidence.(4) The same is to be said of communications of various kinds, where the object of giving them in evidence is not that their truth may be inferred solely from the fact of the communication having been made, and from

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(1) 7 A. & E. 313–408; S. C., 4 Bing. 489.

(2) 7 A. & E. 402. See, also, the judgments of Bosanquet, J., and Parke, J.

The general rule is, that letters written to a person and unanswered can only be proved against him as evidence of a notice, or of a demand made. Fairlie v. Denton, 3 C. & P. 103; M'Namara v. Gibbs, 41 Eng. Com. Law R. 227; Richards v. Frankum, 9 C. & P. 221. And where the letters are expressly written "without prejudice," they cannot be given in evidence against either party. Paddock v. Forrester, 42 Eng. Com. Law, 470.

(3) Att. Gen. v. Good, M'Clel. & Y. 286. See, also, Key v. Shaw, 8 Bing. 320; Charington v. Brown, 1 B. Moore, 341; Crosby v. Percy, 1 Taunt. 364.

(4) Jameson v. Eamer, 1 Esp. 281; Gillingham v. Laing, 6 Taunt. 532; Fisher v. Boucher, 10 B. & C. 710; Vincent v. Prater, 4 Taunt. 603.

the credit of the person making it, but merely to establish the fact that the communication had been made.(1)

Reputed ownership.

Upon an inquiry respecting reputed ownership under the bankrupt laws, hearsay evidence of the opinion of neighbors is admissible, either to prove or disprove the reputed ownership of the bankrupt. In one case, Gibbs, C. J., observes: "What is reputed ownership? It is made up of the opinions of a man's neighbors—it is a number of voices concurring upon one or other of two facts."(2) The existence of a public rumor has

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(1) Shott v. Streatefield, 1 Mo. & R. 8; Whitehead v. Scott, Id. 2.

(2) Gurr v. Rutten, Holt's N. P. C. 327. See Oliver v. Bartlett, 1 B. & B. 269; S. C., 2 B. Moore, 592; Muller v. Moss, 1 M. & S. 335.

NOTE 78.—(Hearsay evidence is inadmissible to create or destroy a title to property, though admissible for other purposes. Carter v. Buchanan, 9 Geo. 539. For instance, in an action by C., for property seized on execution against A., it was held improper to admit evidence that it was notorious that the property belonged to A. Jones v. Jennings, 10 Humph. 428. But declarations accompanying the delivery of property made by owner or by the bailee, may be proved to show or rebut the fact of a gift. Garner v. Smith, 7 Gill, 1.) The position of our author, that hearsay of a fact is inadmissible as evidence of that fact, is still adhered to with very great strictness. The general rule has been repeatedly advanced and vindicated by the American courts, and the various aspects in which it is maintained very clearly presented by our reports, as well as by several English cases decided since our author wrote. See Commonwealth v. Hart, 1 Ashm. Rep. 77, 78, 79; Dean and Chapter of Ely v. Caldecott, 7 Bing. 433; Wilson v. Harding, 2 Blackf. Rep. 241.

The leading American case on the subject was before the Supreme Court of the United States, February 5, 1813, upon a writ of error. The suit in the court below was by a black woman and her child against one who claimed them as slaves. The issue was upon the freedom of the plaintiffs. On the trial, they offered a witness to a *fact* respecting their ancestors, which the witness heard his mother say she had frequently heard from her father. This was overruled. The plaintiffs also offered another witness to prove what he had heard the ancestor of the plaintiffs say respecting her (the ancestor's) *place of birth and residence.* This was also overruled. The plaintiffs then read a witness's deposition to what he had heard respecting the manner of the importation of the ancestor of the plaintiffs; and the court instructed the jury, that if they should believe from the evidence, that the existence of the report was not stated by the deponent from his own knowledge, but from what had been communicated to him respecting the existence of such a report many years after the ancestor's importation, without its appearing by whom and in what manner the same was communicated to him, then the evidence was incompetent to prove either the existence of the report, or the truth of it. Exceptions were taken on all these points; and the verdict being against the plaintiffs, on error brought, Marshall, Ch. J., said several exceptions depended on one general principle; that hearsay evidence is incompetent to establish any specific fact which is, in its nature, susceptible of being proved by witnesses who speak from their own knowledge. It is a rule of evidence that "hearsay" is, in its own nature, inadmissible. That this species of testimony supposes some better testimony, which might be adduced in the particular case, is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible: the general rule supports the case; and the case is not within any exception heretofore recognized. This court is not inclined to extend the exceptions further than they have already been carried. Mima Queen and child v. Hepburn, 7 Cranch, 290. Duvall, J., dissented. But in Negro John Davis v. Wood (1 Wheat. 6, 8), Marshall, Ch. J., said the court had revised its decision in the

case of Mima Queen and child v. Hepburn, and confirmed it. In the first case the court approved of the reasoning of Lord Kenyon, Ch. J., and Grose, J., in Rex v. The Inhabitants of Eriswell, 3 T. R. 707, against the *ex parte* deposition of a pauper (though the pauper had become insane after the deposition had been taken officially before magistrates), being received as hearsay evidence in respect to a hiring, in order to constitute a settlement. *Vid.* 3 T. R. 708, 709; Id. 723. This reasoning, they said, had been afterwards adopted. We suppose they alluded to Rex v. The Inhabitants of Nuneham Courtney, 1 East, 373; Rex v. The Inhabitants of Ferry Frystone, 2 East, 54; and Rex v. The Inhabitants of Abergwilly, Id. 63; all which go clearly to exclude hearsay or *ex parte* depositions in respect to facts constituting a pauper's settlement, though he be absent or dead.

The decisions in Maryland formerly stood in conflict with Mima Queen v. Hepburn. In one case the plaintiff, in a suit for freedom, was allowed to prove by the witness that she (the witness) had heard her mother-in-law say, "Just so they served Ann Joice's family" (of which the plaintiff was a member). "By all accounts they are in confinement now, and they ought to have been free long ago." Mahoney v. Ashton, 4 Har. & M'Hen. 295. At p. 309, Johnson, arg. mentions six cases decided in the same state, in which the like hearsay evidence had been admitted to prove freedom. And in ejectment, the lessor to the plaintiff was allowed to prove by hearsay from deceased members of the family, that some of the ancestors of the lessor of the plaintiff emigrated from England, and that another had been kidnapped in England and sold in Maryland. Pancoast's Lessee v. Addison, 1 Har. & John. 350. It was also held, that hearsay and reputation in the lessor's family, that one under whom the lessor claimed as heir, died possessed of land, and that this land was held by the family in which he lived, was admissible. Id. These cases, however, are all shaken, and those in respect to freedom directly overruled, by a subsequent case in that state, which adopts the principle of Mima Queen v. Hepburn. The plaintiff was descended from a black woman named Violet, who was his grandmother. He offered a witness to show that he had lived in Violet's neighborhood, where it was reputed that she was entitled to her freedom. This was held admissible. Walkup v. Pratt, 5 Har. & John. 51, 56.

In Virginia, too, the authorities at one time looked much like receiving this kind of evidence. By two early cases, hearsay and reputation derived from deceased persons seemed to have been admissible, in order to show the freedom of a person, though it related not merely to his pedigree, but also to the particular quality or character of his ancestor; as that he was an Indian, and had the appearance of an Indian, and was so called; and was said to have been imported at such a time. Jenkins v. Tom et al., 1 Wash. Rep. 123; Pegram v. Isabell, 2 Hen. & Munf. 193. In a later case, one of the judges expressly adopted Mima Queen v. Hepburn, with the general reasoning of that case. Gregory v. Baugh, 4 Rand. 611, 615. The court decided that a belief in the neighborhood, some 50 or 60 years before, that the female ancestor of the plaintiff was entitled to her freedom, was not receivable. Id. On the case coming again before the court, they were equally divided on the question decided in Mima Queen v. Hepburn. Gregory v. Baugh, 2 Leigh, 665.

On a proposition to prove by hearsay, that the body of a particular man was found, and was buried at a particular time and place, this was held inadmissible. Sutherland, J., said that particular and insulated facts cannot be proved by hearsay or general reputation. The evidence of such facts is not supposed to exist only in general reputation and hearsay, as it is in cases of pedigree, prescription and custom. Jackson ex dem. The People v. Etz, 5 Cowen's Rep. 319, 320.

In one case, the declaration of a father as to the age of his son, was received to support the defence of infancy, the father, according to the *lex loci* (which was the civil law), not being a competent witness for his son. But this was where the declaration was in nature of the proof of pedigree, and therefore admissible in itself as secondary evidence. David v. Sittig, 1 Mart. Louisiana Rep. (N. S.) 147, 149; S. C., *post.* It is, in general, however, no argument for receiving the hearsay of a person, that he is dead, or otherwise disqualified, under the notion that it is the best evidence the nature of the case admits. And where a justice received evidence of what a deceased witness present at an exchange of horses, said as to the terms of the bargain, the judgment was reversed for the error. Gray v. Goodrich, 7 John. Rep. 95. Indeed this was held as to the judicial *ex parte* examination of a pauper on oath, who afterwards died. Rex v. Ferry Fryston, 2 East, 54; Rex v. Abergwilly, Id. 63. So the letters of an agent to his principal, giving an account of his agency, are not admissible for the principal even after the agent's death.

Morton's Adm'rs v. Smith, 4 Monroe, 314. See also Kent v. Walton, 10 Wend. 256, S. P.; and Westbrook v. Harbeson, 2 M'Cord's Ch. Rep. 112, 117, S. P. Nor can the declarations of the deceased, that he was agent, be received. Floyd v. Woods, 4 Yerg. 165. *A fortiori* where the witness is alive, though he has become insane (Rex v. Eriswell, 7 T. R. 707), or where he is absent and cannot with any diligence be procured (Rex v. Nuneham, 1 East, 373), or where he keeps out of the way to avoid a subpœna (Woodward v. Paine, 15 John. Rep. 493). In trespass, for seizing and selling the plaintiff's horses at auction, the defendant set up, to mitigate damages, that they were in truth purchased by one H., with money which the plaintiff himself furnished H. for that purpose. This he offered to show by H.'s declarations. And it appeared that H., who had bid off the horses, lived in the plaintiff's family at the time, and was very poor, and had first kept out of the way to avoid being subpœnaed; and that finally being subpœnaed, he had absented himself from the trial. His declarations were, however, rejected; and on motion for a new trial, held well. Woodward v. Paine, 15 John. Rep. 493.

Under what qualifications the above doctrine, that death creates no exception, is to be received, we shall see when we hereafter come to notice the memoranda of deceased persons, made in the course of their office or business, &c. These are many times admissible on the ground of death.

So, though a witness be excused from answering, on account of his privilege, as to a fact (his having promised marriage for instance) which might affect his rights, what he was heard to say on that question is not, therefore, admissible for proof of the fact. Nettles v. Harrison, 2 M'Cord, 230.

Nor is it a reason for receiving the declaration of a third person, that he is a slave, and therefore an incompetent witness. Fox v. Lambson, 3 Halst. 275.

Nor is it a reason for receiving such a declaration against the party, that the witness is interested to testify in favor of the party; as if he claim under the same will, or is bail or security for costs. Walkup v. Pratt, 5 Har. & John. 57. Accordingly, on trial of freedom, the defendant claimed the plaintiff as a slave, under a residuary clause in one Ruth's will, and the plaintiff offered as evidence in his favor the declarations of Ruth's widow, who had an interest in part of her deceased husband's estate; but held inadmissible. Id. 51, 57, 58.

Upon the same principle, in an action against two surviving obligors, on a bond executed by three persons to the plaintiff, the confession of a judgment by the executor of the deceased obligor on the same bond, was rejected as incompetent evidence against the survivors. Wilmer v. Harris, 5 Har. & John. 1, 9.

Nor is the abstract reason that the admission is against the interest of the party making it, an argument for receiving it against another. Thus, the admission of the indorser of a note, that the indorsement is in his handwriting, is no evidence to charge the maker. Robertson v. Crockett, 1 Yerg. 203. See Watson v. Williams, 1 Harp. Rep. 447. The admission of creditors and others, that they had been paid money, in favor of the person paying as surety or on request, and to charge the principal in an action for money paid, has been received; but with how much propriety, is brought under examination.

So, though we shall see hereafter, that hearsay may be received as to boundaries, yet it cannot be extended to questions in respect to other characteristics of the property or jurisdiction. Thus, on a question as to the boundaries of a town, Chambre, J., rejected hearsay evidence from aged persons since deceased, that there had formerly been houses where none now stood, observing that this was evidence of a particular fact, and not of general reputation. Ireland v. Powell, Salop Sp. Ass. 1820; Norris' Am. ed. Peak. Ev., from 5th Lond. ed. 27. See Stratford v. Sandford, 9 Conn. Rep. 275, 284, 285.

So, though we have seen that the declarations of an agent are receivable when part of the *res gestæ*, yet we also noticed that when made subsequent to the act of agency, and in the past tense, they must be taken as mere hearsay. In pursuance of this principle, the chancellor suppressed that part of the answer to an interrogatory which stated the declarations of agents that they had made the agreement in question between the parties in the cause. Phillips v. Thompson, 1 John. Ch. Rep. 131, 137, 138. And see Morton's Adm'rs v. Smith, stated *supra*. An agent to collect an account, acknowledged that he had collected it; and this was received by the court below as evidence against the plaintiff, his principal; but held error. Davis v. Whitesides, 1 Dana's Rep. 177.

The declarations of third persons as to the loss, &c., of papers which they had possessed, can-

not be received in order to let in secondary evidence of the contents. Jackson ex dem. Watson v. Cris, 11 John. Rep. 437; Governor v. Barkley, 4 Hawks, 20; Rex v. Denio, 1 Mann. & Ryl. 294. These cases are all stated *infra, passim.*

If the hearsay evidence be received without objection by the other side at the time, it is of course too late afterwards to raise any objection upon the abstract ground of incompetency. State v. Barden, 1 Dev. 518

That the declarations of a witness as to his interest, or other questions as to his competency in a cause, not under oath, are objectionable, we saw *ante*, note 48, with the cases. The same point has been recently held in Indiana. Sims v. Givan, 2 Blackf. Rep. 461.

Other instances and aspects, in which hearsay testimony has been presented, but quite uniformly rejected, will appear by the following short notes of the cases.

Where the question, on the trial of an action of trespass, *de bonis asportatis* brought by A. against B., was whether a previous sale of the goods from C. to A. was *bona fide* and for valuable consideration; A. claiming that the consideration was a debt due by note to her from a manufacturing company, which note C. had received of her, promising to account with her for it, offered D. to testify that he had seen on the note book of the company, kept by C. as their agent, and from time to time exhibited to them, an entry of such note, particularly describing it; held, that the testimony of D. and the books themselves were inadmissible, both being in the nature of hearsay, besides being secondary evidence. Treat v. Barber, 7 Conn. Rep. 274. Where land had been devised by A. to his widow for life, remainder to B., evidence of declarations by the widow that the will was made by her under undue influence and imposition practiced on the testator, was ruled to be inadmissible against the remainderman, in an action brought by him to recover the estate. Gallagher's Lessee v. Rogers, 1 Yeates, 390. The declaration of the widow of an obligee in a bond, who had possessed herself of the bond against the consent of the executors, and who was not interested in the bond, were ruled to be inadmissible to prove that the bond was discharged. Boltz v. Bullman, 1 Yeates, 584. In an action against A. for having falsely represented B. as a man of property and integrity, thereby inducing the plaintiff to trade with him, a letter from B. to the plaintiff, acknowledging the receipt of merchandise from him, is inadmissible as evidence against the defendant. Longenecker v. Hyde, 6 Bin. 1. Declarations of a witness cannot be given in evidence, except in answer to other declarations of the witness, inconsistent with what he had before sworn to. Wright v. Decklyne, 1 Pet. C. C. Rep. 203. Where a German party conspired against an English party in a church, to prevent the use of the English language there; on trial of the conspiracy, held, that what a witness who had been examined for the commonwealth had been heard to say as to the views and intentions of the prosecutors, was not evidence, it not appearing that he was connected with the prosecutors, and the evidence not being offered to discredit him. The Commonwealth v. Eberle and others, 3 Serg. & Rawle, 9, 16, 19. Whether it is evidence on any ground except to discredit him, as he might himself be examined in respect to their views and intentions—*quere.* Id. 9, 17.

In ejectment, the plaintiff was permitted, in the court below, in order to impeach a survey, to prove what a chain bearer said showing his misconduct and want of fairness in carrying the chain; but this was held clearly inadmissible on error, and the judgment was reversed for that cause. Claiborne v. Parish, 2 Wash. 146. Note. This was probably what he said after the service was completed. If at the time, we shall see in a future note that the declaration would have been been receivable as a part of the *res gestæ.* On appeal from an order of two justices, respecting the settlement of a negro, the sessions admitted the declaration of R., in behalf of the respondents, that the negro was formerly his slave, and was manumitted by him, and decided against the appellants; but the order of the sessions was reversed by the Supreme Court, though they said it might have been different had R.'s declaration been made while he was in possession of the negro. Overseers of Germantown v. Overseers of Livingston, 2 Caines' Rep. 106. See *post*, where we speak of declarations constituting part of the *res gestæ.* In ejectment, where the defendant derived his title from A., who derived from B., it was held that he could not give in evidence the declarations of A. and B. as to the loss of the deed from B. to A. Jackson ex dem. Watson v. Cris, 11 John. Rep. 437. An ejectment was brought by M. to contest a will; and, in in the course of the trial, her counsel admitted that he had a letter written by the testator to T. This letter was alleged to be material by the defendant's counsel, who said that its materiality would appear by the letter from T. in reply; that this letter in reply disclosed the contents of

the testator's letter, and showed that it was important on the point of mental capacity. On a subsequent trial between other parties as to the validity of the same will, the admissions of the counsel and the letter of reply were offered as evidence to prove the contents of the testator's letter. Held inadmissible; for both the admissions, and the letter of reply, were mere hearsay. M'Cully v. Barr, 17 Serg. & Rawle, 445, 451. Hearsay evidence is inadmissible to prove a sale; *e. g.*, the sale of a slave. Walkup v. Pratt, 5 Harr. & John, 51, 52, 55, 56. So of what two settlers said as to one having sold his right to another. Lanning's Lessee v. Case, 4 Wash. C. C. Rep. 169, marginal note; but the point is not mentioned in the report of the case. So, on a question of settlement, the declaration of a pauper that he was warned to leave the town. Braintree v. Hingham, 1 Pick. 245. The plaintiff in ejectment deduced a title by descent from V. The defendants then proved a deed of V. in 1800, by which she conveyed the premises in question to her mother. The plaintiff then proved the mother's certificate, executed in 1824, that the deed was never delivered to her. Held, mere declaration of a third person, and not admissible. Jackson ex dem. Ten Eyck v. Richards, 6 Cowen's Reports, 617. In slander for accusing a baker of using adulterated flour, *per quod* A. B., &c., discontinued taking his bread, witnesses cannot be asked what reason A. B., &c., assigned for not taking the plaintiff's bread. They should be sworn. Tilk v. Parsons, 2 Carr. & Payne, 201. So in slander, *per quod*, the plaintiff lost her marriage with B., the declarations of the latter, that he did not refuse to marry by reason of the words, were held inadmissible in evidence for the defendant. Moody v. Baker, 5 Cowen's Rep. 351, 357. In an action on a note given for the price of a negro sold as a slave, the defence was, that he was not a slave. Held, that proof of his claiming to be free, and being liberated from confinement by the police of New York as a free negro, were not evidence against the plaintiff. Smith v. Hoff, 1 Cowen's Rep. 127. Whether his declaring that he was a slave would be evidence against the defendant? *Quere.* Id. To prove the loss of a constable's bond, in order to let in oral evidence, the plaintiff offered the declarations of B., administrator of W., deceased, to whose hands the bond was traced, that on search among his papers, it could not be found. Held inadmissible. Governor v. Barkley, 4 Hawks, 20. So showing an instrument in A.'s hands, who, when asked for it, said it was with others, whose successors had searched for it, but could not find it, is mere hearsay, and no proof of loss. The parties who possessed it should have been subpœnaed. Rex v. Denio, 1 Mann. & Ryl. 294. The plaintiff claimed that the defendant had guarantied a bank bill, passed by the latter to the former, on which point the proof was balanced. The defendant then offered to show, that just before the bill was passed to the plaintiff, he, in offering it to another refused to guaranty. Held inadmissible. Anderson v. Hawkins, 1 Dev. 445. R. being indebted to J. and also to W., delivered to the former certain staves, which he was to sell and make both debts, pursuant to an agreement between all three. The sale took place. Held, that any subsequent agreement between J. and R. could not affect W.'s rights; nor could any declarations on the subject, made by J. and R. Jennings v. Webster, 7 Cowen's Rep. 256. Third persons are not bound by the recitals in an act of sale. Delahoussaye v. Delahoussaye, 7 Mart. Lou. Rep. (N. S.) 199. The declarations of the vendor and vendee, to support a sale alleged to be fraudulent in respect to creditors, made after such sale, are inadmissible. Palfrey's Syndic v. Francois, 8 Mart. Lou. Rep. (N. S.) 260, 262. The part of a witness's testimony relating to what he heard others say, must be rejected. Perillat v. Fuesch, 8 Mart. Lou. Rep. (N. S.) 671. A statute declared that the proceedings of a company, entered in their books, should be evidence, and read in all courts, &c.; yet *quere*, whether they shall be so against a stranger. Clarke v. The Imperial Gas Light and Coke Co., 4 Barn. & Adolph. 315. Statements of facts made by a board of property, are not evidence. Holtzapple's Lessee v. Phillibaum, 4 Wash. C. C. Rep. 356, 357. The letters of an agent to his principal cannot be read in evidence against a third person. United States v. Barker's Adm'x, 4 Wash. C. C. Rep. 464, 465, 466. Where the official certificate of a fact is receivable, yet if it certify on hearsay (*e. g.*, a draft of land *said* to have been surveyed), this is not admissible. Dubois' Lessee v. Newman, 4 Washington's C. C. Rep. 74, 75. The defendant made a promissory note payable to the plaintiff in the plaintiff's absence; and would have proved what a third person standing by at the time said as to the consideration. Held inadmissible, being mere hearsay. Healy v. Jacobs, 2 Carr. & Payne, 616. What witnesses swore on trial of an indictment cannot be shown by a third person, in an action against the prosecutor for malicious prosecution, they being alive and capable of being produced. They should themselves be sworn; and a short-hand writer's oath, aided by his notes, was rejected in

such a case. Willans v. Taylor, 3 Moore & Payne, 350; Richards v. Foulke, 3 Hamm. Rep. 52, S. P.

In an action by one surety against another for contribution, the declarations of the person to whom they became surety are inadmissible to show which of them paid the debt, or indeed for any other purpose. Thomas v. Thomas, 2 J. J. Marsh. 60, 64. But see Sherman v. Crosby, 11 John. R. 70. In assumpsit against the defendant for use and occupation of negroes and land, it appeared that S., deceased, had conveyed them to the plaintiff; that after this (S. still continuing in possession) he died, leaving L. his widow his sole devisee and sole executrix, who continued the possession till her death. She made the defendant her executor, who acted, and he also took out letters of administration *de bonis non* to S., and entered and took possession of the same land and negroes, avowedly taking them as administrator *de bonis non*. Held, that the widow's declarations were not evidence against the defendant; for though he might take and hold under her, being her executor, yet the whole was subject to S.'s debts in the defendant's hands. Stockett v. Watkins' Adm'rs, 2 Gill & John. Rep. 326, 343, 344. That a grantor proposed to the witness to convey him in fraud of creditors, that the witness declined to receive a conveyance, but said the defendant would do it, to whom the grantor did in truth afterwards convey, but not in the witness's presence, was denied as evidence against the defendant. Beach v. Catlin, 4 Day, 284. *Quere.* See note, *post*, as to admissions of vendors to affect vendees. On justifying a slander charging that the plaintiff had sworn falsely as to the residence of A., his declarations as to his residence in the absence of the plaintiff, are not admissible against him. Cherry v. Slade, 2 Hawks, 400. Deeds made by others to one of the parties, and introduced in evidence to operate on another of the parties to the suit, but who is not a party to the deed, though they are evidence that such a deed was executed, are, if evidence at all, very weak as to the facts they recite. Mitchell v. Maupin, 3 Monroe, 185, and see M'Connell v. Bowdry's Heirs, 4 Monroe, 394. Where it became material for the defendant to show that C. & C., as partners, had a claim against the plaintiff, the books of C. & C., charging the debt in favor of themselves as partners, were held inadmissible as evidence to show their connection. Juniata Bank v. Brown, 5 Serg. & Rawle, 226. Public reputation that the Ethosian was an infidel club was rejected as inadmissible to prove the fact. Stow v. Converse, 4 Conn. Rep. 17, 40 to 43. On a bill filed to correct a mistake in a deed, the declarations of a deceased magistrate, who superintended its execution, are inadmissible. Westbrook v. Harbeson, 2 M'Cord's Ch. Rep. 112, 117. In assumpsit for work, the defence was that the plaintiff had not done the work according to contract. He answered that the defendant had not furnished materials according to contract. To rebut this, the defendant offered letters from third persons to him, and his answers. Held inadmissible. Chain v. Kelso, 7 Mart. Lou. Rep. (N. S.) 263. In an action on a policy to recover a loss by the barratry of the master, the defence was, that this master was the owner, of whom barratry could not be predicated; and his declarations that he was owner were offered to prove it. Held inadmissible, being mere hearsay. Barry v. Louisiana Ins. Co., 12 Mart. Lou. Rep. 193, in connection with S. C., 11 Mart. Lou. Rep. 630. The plaintiffs, in an action against underwriters on a policy upon a vessel, and in reply to the deposition of a surveyor, to discredit him on the point of seaworthiness, offered his own certificate in evidence. The court told the jury they were not to regard the survey as proving any facts contained in it. Watson & Hudson v. The Ins. Co. of North America, 2 Wash. C. C. Rep. 480; U. States v. Mitchell, Id. 478, S. P. conceded, viz: that a survey is not *per se* evidence; Cort v. The Delaware Ins. Co., 2 Wash. C. C. Rep. 375, S. P. Again; in an action on a policy of insurance, the defence was unseaworthiness. To prove seaworthiness, the plaintiff offered a report of survey. Held admissible to show that a survey was made; but not to prove the facts stated in it. Watson v. The Ins. Co. of North America, 2 Wash. C. C. Rep. 152. In assumpsit for work and labor, the defence was, that the plaintiff being an infant, his mother and only surviving parent sent him to work for the defendant, for his (the plaintiff's) victuals and clothes. The mother's declarations to this fact were held inadmissible. Berry v. Waring, 2 Har. & Gill, 103. In an action for not delivering the kind of flour contracted for, a witness was interrogated on its value, under a commission; and answered, "that he was called on in the spring of 1817 to state the difference usually allowed on the sale of flour, between fine, superfine, &c., that he then stated the difference was as follows," &c. Held, no more than hearsay, and not admissible. It might be true, and yet the witness have no knowledge of the facts. Williamson v. Dillon, 1 Harr. & Gill, 444. Though the prisoner, on trial of an indictment for larceny, may

prove that another stole the property, this cannot be shown by the other's declaration. Commonwealth v. Chabbock, 1 Mass. Rep. 144. But it is suggested, that another confessing the crime, and surrendering himself to justice, would be admissible. 3 M'Cord, 232, note. *Quere*, upon what principle? It becoming material for the lessor of the plaintiff in ejectment to show that his ancestor had paid for the *locus in quo*, he offered for that purpose a memorandum of the payment in his ancestor's handwriting, which had been found among the title deeds of the estate. Spencer, J., overruled the evidence, saying it was *ex parte;* and being so found, could not make it evidence. Jackson ex dem. Kip v. Murray, Anth. N. P. Cas. 105; and *vid.* Jackson ex dem. Beekman v. Witter, 2 John. Rep. 180. Letters written by a person in no way connected with the title, are not evidence to prove that a person, under whom a party in ejectment claims, was in possession at a particular time. Morris' Lessee v. Vanderen, 1 Dall. 66. The statement of facts by the judges, on granting a new trial, is not evidence in the cause. Drayton v. Wells, 1 Nott & M'Cord, 409. In ejectment, against a tenant who claimed under a corporation, an entry, by direction of the trustees, in the corporate book, was held to be inadmissible, as evidence in favor of the defendant; nor were their oral declarations allowed in proof. Jackson ex dem. Donally v. Walsh, 3 John. Rep. 226. In ejectment, the plaintiff claimed under one Cookson, who and whose executor were dead. To show that Cookson had acquired the right of one M., who took title by a land warrant, a list of Cookson's lands, indorsed as such by the executor, which mentioned the warrant to M. and a deed poll from him to Cookson, was offered in evidence. The original deed referred to could not be found. The evidence was holden inadmissible, as mere hearsay without oath. Galloway's Lessee v. Ogle, 2 Binn. 468, 472, per Yeates, J. The declarations of a warrantor in a deed of land, made after the deed given, are not evidence to support the title of his warrantee. Jackson ex dem. Youngs v. Vredenburgh, 1 John. Rep. 159. A constable seized Ward's horses in execution. The plaintiff, M., brought trover against him, the constable; and proved that in the conversation between him and Ward, they agreed that some time before, Ward had sold the oxen to the plaintiff, who recovered; but, on error, held wrong. The court say enough appeared to satisfy them that the conversation proved was after the judgment and execution. Taylor v. Marshall, 14 John Rep. 204.

In *de homine replegiando*, the plaintiffs claimed their freedom, on the ground that the defendant had made an attempt illegally to export them from New York, a statute of which state makes them free in such a case; and offered evidence that when the writ *de homine*, &c., was served, the officers, in whose custody the plaintiffs then were, and who were acting in behalf of the defendant, were just proceeding from the shore; and *confessed* that the defendant was then about to proceed to New Orleans with the plaintiffs as her slaves. But Thompson, J., overruled the evidence. Aza v. Etlinger, Anth. N. P. Rep. 73. The reporter adds a *quere*, whether these declarations were not admissible as a part of the *res gestæ*, within the cases in 1 Campb. Rep. 339, and note; and 10 John. Rep. 478. See ed. of 1820, of Anth. N. P. Rep. 74, note *a*. Where the defendant, being sued for a debt, set up for defence, that, by a new contract with him, the plaintiff accepted a third person as his debtor in place of the defendant; an indorsement of the amount of the debt made, without the privity of the plaintiff, on a note held by the defendant against such third person, is not admissible to prove such new contract, not being a part of the *res gestæ* but *res inter alios acta*. Jacobs v. Putnam, 4 Pick. 108. A note was made by a failing debtor, on which the payee made an immediate attachment of the debtor's property. Part of the alleged consideration of the note was an acceptance made by the payee of an order drawn on him by the debtor in favor of another creditor. A subsequent attaching creditor being admitted, under the statute, to defend, the plaintiff offered evidence of his own declarations made on the day when the note was given, that he had agreed to pay the debt secured by the order, to show the acceptance was made before the attachment. Held inadmissible, as this declaration was of a past independent fact, and not a part of the *res gestæ*. Carter v. Gregory, 8 Pick. 165, 168, 169. In a case where it became material to inquire whether one party had not seduced a man from the service of the other, a letter from the man, denying that he had been persuaded away, was rejected as inadmissible evidence for the man to whom the seduction was imputed. It is put on the ground of not being the best evidence. Yet, plainly, it could not be admitted if the writer had been dead. The true ground seems to be, that it was not a part of the *res gestæ*. Munns v. Dupont, 3 Wash. C. C. Rep. 41, note. Trover for silks. Jacoby purchased coffee of the defendant at Philadelphia on a credit, and gave his notes. He sent the

been allowed to be proved in the same way. Thus, in an action for keeping a mischievous dog, by which the plaintiff's child was bitten,(1) Lord Kenyon, C. J., allowed a witness to be asked respecting a report in the neighborhood, that the dog had been bitten by another dog. And of this nature is evidence respecting general character, which, as will be seen in the course of this work, is relevant to various inquiries.(2) The case of Foulkes v. Sellway,(3) is a strong example of this kind of evidence. That was an action for breach of promise of marriage, where the defence was that the plaintiff was a woman of bad character; and a witness, who had gone to the place where the plaintiff lived, was allowed to give evidence of what he there heard.

General opinion.

In like manner, in an action for destroying a picture,(4) where the defence was that it was a libel, and the subject of inquiry was as to the impression produced by the picture on the minds of the public, the declarations of spectators in looking at it were admitted in evidence; what was said by the spectators was the effect produced by the picture; it was not received as evidence of the painter's design, upon credit given to assertions of persons not before the court, but to show that the public generally understood, by looking at the picture, that certain individuals were there intended to be portrayed. The declarations of a testator have been held to be receivable in evidence, to show his intentions, when

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coffee by sea to Marseilles, under his letter of instructions to the supercargo who was also consignee, and went out with the vessel, to invest the proceeds in silk, which was done; and Jacoby assigned the silks to the plaintiffs in trust for his creditors. The supercargo sent the silks to Philadelphia, consigned to the defendant for the use of Jacoby. The defendant insisted that these were, by agreement of Jacoby when he purchased the coffee, to remain with him as security for his notes; and he refused to deliver them to the plaintiffs. The supercargo, a witness, swore to the agreement; but Jacoby, a witness, denied it. Then the defendant offered his letter of instructions, delivered to the supercargo at the time the ship sailed with the coffee, reminding him of the agreement. Held inadmissible. The court said Jacoby's letter was properly received, being instructions to the consignee touching his own goods. The defendant's letter was offered to show that he had a special property in the goods of *another person*. It it is not a letter of instructions, but a paragraph thrown into a letter of instructions to answer his own purpose. Jacoby et al. v. Laussat, 6 Serg. & Rawle, 300, 307.

(1) Jones v. Perry, 2 Esp. 482.

(2) See *infra*, respecting *Relevancy of Proofs*.

On an indictment for rape, the character of the prosecutrix for chastity may be impeached by general, though not by particular evidence. Rex v. Clarke, 2 Stark. 241. So, in seduction cases, where the character of the person seduced has been assailed on the cross-examination, it may be supported by showing her general good character. Bate v. Hill, 1 C. & P. 100; Safford v. The People, 1 Parker C. R. 474.

(3) 3 Esp. 236.

(4) Du Bost v. Beresford, 2 Campb. 512.

So, on an indictment, where a placard alleged to be libelous refers to letters, and is not intelligible without them, the letters may be given in evidence without proving the handwriting of them. Rex v. Slavey, 5 C. & P. 213.

his will is impugned on the grounds of either fraud, circumvention or forgery;(1) or to show the state of his mind.(2)

Expressions used, evidence of feelings, conduct, &c.

In cases where it is material to inquire into the demeanor, the conduct and mental feelings of an individual at a particular period, the expressions used by the individual at the period in question are, in their nature, original evidence. For they are the thing itself which is inquired into, as far as outward behavior is important; and as evidence of existing inward sentiments, they are unlike a statement of past occurrences; for they derive their credit from being usually identified with, and naturally resulting from, particular corresponding feelings.

Accordingly, in actions for criminal conversation, where it is material to inquire into the terms upon which the husband and wife lived together, before the connection of the wife with the defendant, it is usual to give evidence of what the husband and wife have said to or of each other, in order to show their mutual demeanor and conduct, and whether they were living upon better or worse terms.(3) With the same object, evidence has been given of the anxiety expressed by the wife about her husband, and of her mode of speaking of him in his absence.(4) On the other hand, it is admissible, in reduction of damages, to give general evidence that the wife had complained of her husband's treatment.(5) The letters of the wife to the husband,(6) or even to a third person with reference to her husband,(7) are evidence to show what her feelings were towards him. And such letters to a third party are less open to exception or suspicion, than if they were written to the husband. Letters also written to the defendant, before the criminal facts are proved to have been committed, are receivable.(8) In such cases the jury do not substitute the knowledge of

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(1) Ellis v. Hardy, 1 Mo. & R. 525.
(2) Doe d. Reed v. Harris, 7 C. & P. 350.
(3) Trelawney v. Coleman, 2 Stark. R. 191; S. C., 1 B. & A. 90.
(4) Trelawney v. Coleman, *ut supra.*
(5) Winter v. Wroot, 1 Mo. & R. 404.
(6) Trelawney v. Coleman, *ut supra;* Edwards v. Crock, 4 Esp. 39.
(7) Willis v. Bernard, 8 Bing. 376.
(8) Elsam v. Faucett, 2 Esp. 562.

If it appear that the plaintiff in an action for criminal conversation with his wife, consented to the adulterous intercourse, such consent is a bar to the action; and negligence on his part, and loose and improper conduct, may be shown in mitigation of damages. Duberley v. Gunning, 4 T. R. 656; Smith v. Masten, 15 Wend. 270. The scope of the inquiry permitted in such cases is very broad; the moral character and conduct of the husband himself may be inquired into; the previous relations subsisting between himself and his wife, and his habits and course of life. Bromley v. Wallace, 4 Esp. N. P. Cas. 257; Sanborn v. Nelson, 4 N. Hamp. 501; Foot v. Tracy, 1 John. 51. So also in an action for enticing away and harboring the plaintiff's wife, character and conduct of the plaintiff may be shown, and the declarations of the wife may be proved, expressive of her wishes in relation to living with plaintiff as his wife; and in such

an absent person for their own, but they reason as from an effect to a cause.

It is, however, always required that proof should be given that the declarations or letters of a wife, purporting to express her feelings, were of a time antecedent to the date of any facts calculated to raise suspicion of a criminal intercourse, and when there existed no ground for imputing collusion.(1) It has been held, that the letters of the wife are inadmissible, if written after an attempt to commit adultery by the defendant.(2) The letters of the wife are not, in general, evidence for the defendant.(3)

Expressions as to state of health.

The expressions of a person afflicted with bodily pain or illness, relative to his health and sensations, have been considered to be in their nature original evidence; such expressions being ordinarily the natural consequence and the outward indication of co-existing sufferings. "It is every day's experience," said Lawrence, J., in Aveson v. Lord Kinnaird,(4) "that what a man has said of himself to his surgeon is evidence to show what he suffered by reason of an assault."

The representations of a patient to his medical attendant, who has an opportunity of observing whether they correspond with the symptoms to which they refer, appear to be entitled to greater weight than if made to an inexperienced person, and to afford a stronger presumption that they

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cases the *intent* with which the defendant has acted, is a material point of inquiry. Schureman v. Palmer, 4 Barb. 225; Bennett v. Smith, 21 Barb. 439.

(1) Edwards v. Crock; Trelawney v. Coleman, *ut supra;* Houliston v. Smith, 2 C. & P. 24.

(2) Wilton v. Webster, 7 C. & P. 198.

(3) B. N. P. 28.

(4) 6 East, 188.

NOTE 79.—In an action for breach of warranty of the soundness of a slave, his declaration that he had a pain in his side, by which the disease was detected, were holden admissible against the defendant. Grey v. Young, 4 M'Cord, 38. This evidence was put on the ground of its being mere inducement, and as admissible from necessity; but it also plainly stands on the doctrine of the *res gestæ*, within several cases mentioned in the text. See, too, the note of the learned reporter, Id. 41, 42. But see Tumey v. Knox, 7 Monroe, 88, *contra;* for the negro would not be a competent witness. Yet held that they may be received in connection with and as the foundation of the opinion of a physician, the communication being made to him. Id. In case for giving the plaintiff (a female) a dose to intoxicate and inflame her passions, her declarations the next morning after the dose was administered, made to her mother, were held admissible. Goodwin v. Harrison, 1 Root, 80. But this was treated as an exception from the general rule, founded in the necessity of the case. Conduct and declarations the morning after the homicide were denied as evidence to establish mental disease, in State v. Scott, 1 Hawks, 24.

(The declarations of a slave in reference to a disease under which he is laboring, are admissible in evidence, whether made to a physician or to any other person. Rowland v. Walker, 18 Ala. 749. So, where an action is brought for fraud in the sale of a slave, the declarations of the latter are from the nature of the case admissible to show the state of his health at the time of making them. Rowlac v. White, 9 Ired. 63. For the same reason they are admissible to show the effects of a blow upon the head of the slave; though he is in general held not to be a competent witness against a white man. Biles v. Holmes, 11 Ired. 16.)

are genuine:(1) but though the representations have been made to another person, not a medical attendant, they are still admissible in evidence. Thus, in a case of poisoning,(2) a witness who was not a medical man, was admitted to prove a conversation between himself and the deceased a day or two prior to his death, in order to prove the state of health of the latter at the time.

When a patient enters into a history of his complaint, and relates some earlier symptoms experienced at a former period, he is giving a narrative from memory, rather than yielding to the impressions forced upon him by his situation; and it would seem, upon principle, that what he says respecting the earlier symptoms ought not to be received in evidence. The case of Aveson v. Lord Kinnaird,(3) as to this point, appears to have been decided on its peculiar circumstances. That was an action upon a policy of insurance, by which the plaintiff had insured the life of his wife. The plaintiff produced a surgeon, who had given a certificate upon which the policy had been effected, to prove that the wife was in good health on a particular day; and he swore at the trial to his belief of the fact. On cross-examination, he stated that his opinion was formed principally from her answers given at the time. The defendant, in order to meet this evidence, produced a witness who had been an intimate friend of the wife, and had called accidentally upon her within a week after the day to which the certificate related, and found her in bed with the appearance of being ill; and the wife related to this witness that she had not been well from a time which included the day specified in the certificate. This evidence of the defendant's witness was allowed: first, on the ground that it was the declaration of a patient on the subject of her own health at the time; and secondly, that it was a species of cross-examination of the surgeon produced by the plaintiff, who had formed his opinion principally in consequence of the wife's answers. It is to be observed, however, that a part of the wife's conversation with the defendant's witness, which was material to the case, did not relate to her cotemporary sensation, but to the state of her health at an earlier period; an objection which does not appear to have applied to the answers given to the surgeon.

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(1) See the observations of Copley, A. G., in the Gardiner Peerage Case, p. 79.

(2) R. v. Johnson, 2 C. & K. 354.

Where a person that had been just wounded and was still bleeding, declared that the defendant stabbed her, her declaration was received in evidence, after her decease, as a part of the *res gestæ*. The Commonwealth v. Pike, 3 Cush. 181.

(3) 6 East, 188.

When the declarations of a third person are made in the performance of an act which is admissible in evidence, such declarations may be proved as explanatory of the act. Stewart v. Hanson, 35 Maine R. 506. If the act cannot be proved, the explanations cannot be given. Gilbert v. Gilbert, 22 Ala. 529.

A letter addressed to and found in the hands of a prisoner, unanswered, cannot be read in evidence against him. The People v. Green, 1 Parker C. R. 11. But his examination taken before

Medical evidence.

In the Gardiner Peerage Case, where the inquiry turned upon the ordinary period of gestation, the medical witnesses were not allowed to state what they had been told by women whom they had attended in their confinement, as to the date of their conception. It was held to be an objection to the evidence tendered, that it related to a circumstance which took place before the medical men were consulted.(1)

Where a party who had been robbed went within a few hours after the robbing to a constable and mentioned the name of the person who had robbed him, Patteson, J., ruled(2) that the prosecutor might be asked whether he named any person to the constable, but not what name he mentioned; but, he added, the constable might be asked whether in consequence of the prosecutor mentioning a name to him he went in search of any person, and, if he did, who that person was. However, upon a late occasion,(3) Cresswell, J., commenting upon this case, said he was not convinced as to the latter part of it, and that it seemed to him to be rather too refined a distinction to prevent the name from being mentioned, yet to permit a question to be asked whether, in consequence of what was said, the witness apprehended a particular person.

In prosecutions for rape, or for assault with intent to commit a rape, proof of the fact that the prosecutrix made a complaint soon after the commission of the alleged crime, is admissible, and indeed is generally required; but the particulars of the complaint made cannot be admitted in evidence as to the truth of her statement.(4) The particulars stated as to the violence used, or the person who committed the violence, cannot be received. The evidence should be confined to the bare proof of the fact that a complaint of personal violence was made, and that an individual was charged, without mentioning his name.(5)

In the case of Thompson and Wife agt. Trevanion,(6) what the wife

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the coroner is evidence against him (Hendrickson v. The People, Id. 406), if he testifies voluntarily; but not otherwise, 15 N. Y. State Rep. 384.

(1) Gardiner Peerage Case, pp. 79, 136, 170.

(2) R. v. Wink, 6 C. & P. 397.

(3) In R. v. Osborne, 2 Car. & M. 624.

(4) R. v. Clarke, 2 Stark. R. 242; R. v. Walker, 2 Mo. & R. 212; R. v. Wink, 6 C. & P. 397; R. v. Megson, 9 C. & P. 420; R. v. Osborne, 2 Car. & M. 622; R. v. Nicholas, 2 C. & K. 248.

(5) R. v. Osborne, *ut supra.*

The statements of the female, made immediately after the transaction, may be proved to corroborate her testimony. Laughlin v. The State, 18 Ohio, 99. So in a civil suit, the declarations of a wife accompanying the act of acknowledging a deed, made during several hours before and after the acknowledgment, objecting to it, are admissible as a part of the transaction. Lynden v. Blythe, 16 Penn. State R. 532. See also Ogden v. Peters, 15 Barb. 560. To render the declarations a part of the *res gestæ* they must be cotemporaneous with the main fact. Mitchum v. The State, 11 Geo. 615.

(6) Skinn. 402, cit. 6 East, 188.

The declarations of a person injured by stabbing, made while yet bleeding, are admissible

said immediately on receiving an injury was admitted in evidence: And in The King agt. Foster,(1) in a prosecution for manslaughter, what the person killed had said immediately upon receiving the fatal injury, as to the cause of the injury, was admitted as part of the *res gestæ*.

Declarations, part of the *res gestæ*.

Verbal and written declarations are often said to be admissible, as constituting a part of the *res gestæ*. As such they are most properly admissible when they accompany some act, the nature, object, or motives of which are the subject of inquiry. In such cases, words are receivable as original evidence, on the ground that what is said at the time affords legitimate, if not the best, means of ascertaining the character of such equivocal acts as admit of explanation from those indications of the mind which language affords. For where words or writings accompany an act, or where they indicate the state of a person's feelings or bodily sufferings, they derive their credit from the surrounding circumstances, and not from the bare expressions of the declarant. And the language of persons at the time of their doing a particular act, in the same manner as their demeanor or gesture, is more likely to be a true disclosure of what was really passing in their minds, than their subsequent statements as to their intentions, even if such statements would not be excluded on other grounds.(2)

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after her death. The Commonwealth v. Pike, 3 Cush. 181. And the declarations of the person inflicting a wound, made directly after it, are admissible. Mitchum v. The State, *supra*.

(1) 6 C. & P. 325.

(2) NOTE 80.—To be a part of the *res gestæ*, the declarations must have been made at the time of the act done which they are supposed to characterize, and well calculated to unfold the nature and quality of the facts they were intended to explain, and so to harmonize with them as obviously to constitute one transaction. Per Hosmer, C. J., in Enos v. Tuttle, 3 Conn. Rep. 250. Suppose, for instance, that goods consigned by A. to B. are injured by the defendant whilst they are in the hands of the carrier, in an action for the wrong, brought either by A. or B., according to the circumstances, it would be competent to either of them, being plaintiff, to establish his right of property in the goods, by proof of such an agreement between them as either left the right of property and action in himself, or vested it in him by the delivery to the carrier. This would be, it is true, nothing more than an agreement between A. and B., to which the defendant was not privy; but it would be evidence against him, not as concluding any right of his without his assent, but as affecting the nature of the transaction itself, and showing to whom the injury was done. 1 Stark. Ev. 53. See per Sutherland, J., in Murray v. Bethune, 1 Wend. Rep. 196. In the example put, it may be material to see the letters which had passed between A. and B., the direction of A. to his clerks or to the carrier, from which to infer the terms of the agreement and the identity and destination of the goods. In a late case the plaintiff sued out a foreign attachment against B., summoning the defendant as garnishee. The summons was served in November, 1828. On the 21st of the previous July, the garnishee had thirty barrels of B.'s gin in his hands, which, by letter of that date, he was directed by B. to hold, with the proceeds of that sold, if any, subject to the order of G.; and, by letter of the August following, the garnishee had acknowledged that he held the gin and proceeds on account of G. These letters were at first excluded as not being evidence of the garnishee, under the notion that they were naked declarations; but on appeal, the Supreme Court held them clearly admissible, as evidence of the agreement by which the gin was transferred to G. Cox v. Gordon, 2 Dev. 512. See per O'Neall, J.,

Thus, in an action on the case for fraudulently representing the solvency of a person, whereby the plaintiffs trusted him with goods,(1) their declarations at the time they were applied to for the goods are admissible, to show that they gave trust in consequence of the representation. A letter,

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in Jones v. M'Neil, 2 Bail. Rep. 471. On the other hand, the holder of a check went into the bank, and when he came out, said he had demanded its payment. This declaration was held inadmissible to prove a demand, as being no part of the *res gestæ*. The demand was the fact to be proved. Brown v. Lusk, 4 Yerg. 210.

It is difficult, however, as remarked by Shaw, C. J., in Allen v. Duncan (11 Pick. 309, 310), to lay down any precise general rule as to the cases in which declarations are admissible as part of the *res gestæ*. And see Pool v. Bridges, 4 Pick. 378. We have adopted the rule of Hosmer, Ch. J., as the best. It is, perhaps, sufficiently comprehensive. But after we have the rule, it will be found, like all other legal generalities, to present the main difficulties in its application. As in other instances, so in this, we shall find ourselves in the way of useful instruction, only by looking at the principle, and then proceeding to examine its experimental operations in the hands of the learned judges; which we shall endeavor to do in several of the ensuing notes.

(The following are some of the recent authorities, explanatory of the rule: Russell v. Frisbie, 19 Conn. R. 205; Price v. Powell, 3 Comst. 322; Davis v. Newkirk, 5 Denio, 92; Rowlac v. White, 9 Ired. 63; Jones v. Jones, 3 Strobh. 315; Wheaton v. Weld, 9 Humph. 773; Parker v. The State, 8 Blackf. 292; Noyes v. Ward, 19 Conn. R. 250; Humphries v. McGraw, 4 Eng. 91; Redden v. Spruance, 4 Harring. 417; Wilson v. Simpson, 9 How. (U. S.) 109; Handley v. Call, 30 Maine, 29; Kidder v. Lovell, 14 Penn. State R. 214; Smith v. Powers, 15 N. Hamp. 546; Porter v. Ferguson, 4 Florida, 102; Ogden v. Peters, 15 Barb. 560; Stewart v. Hanson, 35 Maine, 506; Handy v. Johnson, 5 Md. 450; Hooper v. Edwards, 25 Ala. 528.)

NOTE 80 *a*.—See an instance which we put *ante*, of directions by a consignor of goods. Such declarations are, as we shall notice more at large in a subsequent note, evidence in favor of the party who makes them. Where, in a suit on a policy of insurance upon a ship, it becomes material to inquire what instructions the plaintiff gave to the master, he may give his own written instructions in evidence, to limit the power of the master. Story v. Strettel, 1 Dall. 10. Otherwise, if his letters or instructions are not a part of the *res gestæ*. Fowle v. Stevenson, 1 John. Cas. 110; Champlin v. Tilley, 3 Day, 303, 306. And his declarations, without being a part of the *res gestæ*, are not evidence for him, even to show his insanity. State v. Scott, Ruffin, 24; 1 Hawks, 24; S. C., *ante*, note 79.

In a mercantile dispute, the plaintiffs were allowed to prove a letter of instructions which they had written to the master of the vessel in respect to which the controversy arose. It does not appear on what ground the letter was received. The plaintiff's counsel put it, on the ground that it was written before the controversy arose. Most likely it related to the powers of the master derived from the plaintiffs, in respect to the matter in litigation; and so a part of the *res gestæ*. M'Clenachan et al. v. M'Carty, 2 Dall. 51. See, also, Ship Portland v. Lewis, stated *post*, note 81.

(1) Fellows v. Williamson, M. & M. 306. And see Moore v. Strong, 1 N. C. 441; Shrewsbury v. Blount, 2 M. & G. 503.

Between the parties to the suit, the declarations of the opposite party may be given as evidence of the contract between them, or to show the amount due. Reed v. Reed, 12 Penn. State R. 117. Such declarations are in the nature of an admission; and though made by an agent, acting within the scope of his authority, they bind the principal. The State v. Farish, 23 Mississippi Rep. (1 Cush.) 483. But a nominal plaintiff, having no interest in the suit, cannot bind the real party by his admissions. Dazey v. Mills, 5 Gilman, 67. And the declarations of a person who is not a party to the suit cannot be given in evidence, unless they are really a part of the *res gestæ*, or accompany and serve to qualify the transaction in question. Wads v. Banks, 14 N. Hamp. 101.

inclosing a promissory note, has been admitted to show for what purpose it was sent.(1)

In an action for criminal conversation, where the defence was that the plaintiff had connived at his wife's elopement, evidence was received, on the part of the plaintiff, of the wife's declarations as to her intentions and purposes in going.(2) And in Aveson v. Lord Kinnaird,(3) Lord Ellenborough observed, that if a wife, upon quitting her husband's home, declared at the time that she fled from immediate terror of personal violence, he should admit the evidence; though not if it were a collateral declaration as to some matter which happened at another time.

A strong exemplification of this principle was afforded in the case of Perkins v. Vaughan,(4) in an action for false imprisonment. The defendant justified on the ground that the plaintiff had forged the acceptance of A. B. to a bill of exchange. The plaintiff called a witness who proved that on the day after the dishonor of the bill, he went in company with the plaintiff and the defendant to A. B., when the defendant reminded the latter, that, on the presentment of the bill for payment, he had stated that the plaintiff had forged his acceptance, and that A. B. neither admitted nor denied that he had made such a statement. The defendant then called a witness, who stated that A. B., when he dishonored the bill, did say, that the acceptance was forged by the plaintiff; and the court held, that this statement was admissible in evidence, in mitigation of damages. Tindal, C. J., said, "Even if the inquiry before us had depended on the determination of the point, whether evidence, on the part of the defendant, of the dishonor of the bill, and of the circumstances attending such dishonor, was relevant to the question, then before the jury, of the *forgery of the*(5) ac-

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(1) Bruce v. Hurley, 1 Stark. R. 24.

(2) Hoare v. Allen, 3 Esp. 276.

NOTE 80 *b*.—A husband, in defending an action against him for the board, &c., of his wife, may show her declaration, confessing adultery, made immediately before he turned her off; and also letters from men found about that time in her desk. Walton v. Green, 1 Carr. & Payne, 621. He may also show her letters, to rebut the allegation of cruel treatment; but if they are not postmarked, the time must be fixed by proof, and the dates are not proof; for on a reconciliation, they might combine to defeat the plaintiff. Houliston v. Smith, 2 Carr. & Payne, 22. In an action against the defendant and his wife, for the act of the latter in dissuading the plaintiff's wife to live with him, declarations made by the defendant's wife in the presence of the plaintiff's having a tendency to such dissuasion, are admissible against the defendant. Park v. Hopkins et ux., 2 Bail. Rep. 408.

(3) 6 East, 188. And see Walton v. Green, 1 C. & P. 621, as to a confession by a wife of adultery immediately previous to being turned out of doors; and letters found in her writing desk.

But where the husband brings an action for conspiracy to entice his wife away, her declarations as to former differences are not admissible, though made only the day before she left. Kidder v. Lovell, 14 Penn. State R. 214.

(4) 4 M. & G. 988. See also R. v. Osborne, Car. & M. 622.

(5) These words in italics are omitted in the report; but they seem necessary for the sense of the passage.

(Declarations that accompany the act done, and qualify it, are admissible; thus, where a per-

ceptance by the plaintiff, it would have been difficult altogether to exclude such evidence on the score of its irrelevancy; but, upon the trial, the plaintiff had made it part of his own evidence.

In an action against a sheriff for a false return,(1) where the defence was a fraudulent bill of sale, declarations by the party executing the bill of sale, made by him at the time of the execution, were held to be admissible, but not those made at another time. Where a trader, being in embarrassed circumstances, executed an assignment for the benefit of his creditors, it was held, in an action after his death against the assignee, treating him as executor *de son tort*, that a list of creditors made out about the time of the execution of the assignment, by the direction of the assignor, was evidence as part of the transaction for the purpose of disproving fraud.(2)

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son has possession of a bill, and assigns it in the name of the payee, as his agent; his declarations made at the time of assignment are admissible, while his declarations made subsequently are mere hearsay. Richardson v. Cots, 10 Humph. 138; Garland v. Harrison, 17 Mis. 282. See also Cooley v. Norton, 4 Cush. 93. So also, the declarations of the party in possession of personal property in regard to the title to it, made in the act of bailing it to another for hire, are admissible in evidence in an action by the owner to recover the property, the declarations being to the effect that the property belonged to the plaintiffs. Barnes v. Mobley, 21 Ala. 232. So, where the character of plaintiff's possession is in question, her declarations made in respect to the possession are admissible. Nelson v. Iverson, 24 Ala. 9.)

(1) Phillips v. Eamer, 1 Esp. 357.

(2) Lewis v. Rogers, 1 C., M. & R. 48. For other examples of this principle, see Penn v. Scholey (5 Esp. 243), as to an affidavit to explain an execution on a judgment; Bebb v. Thomas (2 W. Bl. 1043), as to cotemporary declarations, explaining the equivocal act of canceling a will; Collenridge v. Farquarson (1 Stark. R. 259), as to a distinction between an entry in an account book made after the transaction, and a cotemporaneous entry; Prideaux v. Collier (2 Stark. R. 57), as to declarations by a drawee on presentment of a bill; Ryle v. Haggie (1 Jac. & W. 234), for declarations as to property being parted with by way of gift.

(So declarations made on a sale of land, may be proved in an action to recover back the land on account of fraud in the sale, though made by one of the two parties to the fraud in the absence of the other. Jackson v. Summerville, 13 Penn. State R. 359. See Carr v. Gale, 3 W. & M. 38. In general, the declarations of a party, made subsequent to the execution of an instrument, are inadmissible to defeat or to support it. Kittles v. Kittles, 4 Rich. 422; Glen v. Grover, 3 Md. 212; Garland v. Harrison, *supra.*)

NOTE 81.—(The following note may serve to show more at large the application of the rule, admitting hearsay evidence as a part of the *res gestæ*. See rule as laid down by Ch. J. Hosmer in Enos v. Tuttle, 3 Conn. R. 250.)

On a question whether a deputy sheriff acted negligently or unfaithfully in not making an arrest of one S., evidence was received that he inquired at S.'s place of residence, called at his shop, inquired of a man and boy, who told him S. was at his house, where he went and inquired for him of a woman whom he learned was S.'s wife, mentioning to her his business. She told him that her husband was then at work at the shop. The evidence of these answers was objected to as hearsay, and excluded; but a new trial was granted. The court said it was a material point whether the officer made due search and inquiry. It was his duty to inquire at all proper places; and search wherever it was probable S. would be found. To show this, it was necessary he should state the inquiries and the answers made, and that he had made search accordingly. Such answers are a part of the transaction. They are facts, and do not stand on the footing of hearsay evidence. Phelps v. Foot, 1 Conn. Rep. 387, and *vid.* Ponsonby v. Debaillon et al., 6 Mart.

Lou. Rep. 238, 244, 245. Trover for wool, yarn and bocking. The defendant, as deputy sheriff, seized it under an execution against S. as his property. The plaintiff had delivered wool to S. to be manufactured; and, before the seizure, on inquiring of S. at his factory as to his progress, S. showed the plaintiff the wool, yarn and bocking, which he said were the plaintiff's, who then examined them. S. afterwards absconded, and the goods were seized. These declarations of S. were offered in evidence, and held admissible. *Per Cur.* As a mere declaration, this is not evidence; for though S. is out of the country, his sayings should be rejected as hearsay. It is a difficult case of the *res gestæ*. The property was in possession of S., and difficult to be distinguished from other property of the same kind also in his possession. If the saying had been without the parties being engaged in any act, it would have been mere hearsay. But here was an act. It was like labeling the goods with the owner's name. Showing the property to the plaintiff as his wool, on his going and inquiring, in different stages of process, was an act or transaction; and is like an actual separation from the common mass. Pool v. Bridges, 4 Pick. 378. Note. This was moreover a plain case against the defendant, as claiming under S. within the Ivat v. Finch (1 Taunt. 141), and numerous other cases, both in the English and American courts. See note 6, and the text. Although, on the trial of an indictment for manslaughter, malice prepense cannot be shown on the part of the prosecution, yet declarations made by the prisoner, at the commencement of, and during the fatal affray, as well as immediately before and after it, must be received as constituting a part of the *res gestæ;* and this, although they may incidentally tend to show malice. The State v. Powell, 2 Halst. 244. In this case, the parties being shown together quarreling immediately before the fatal blow, a witness was allowed to state that, in the course of the quarrel, the prisoner threatened that he would kill the deceased before he went to sleep. Indeed, malice may be quite material; for should plain murder be made out, the court might, in its discretion, discharge the jury, and order a higher indictment to be preferred. In an action for a libel, what a third person told the defendant as to its truth before the defendant published the libel, was offered in proof to mitigate damages, and seems to have been held receivable. Coleman v. Southwick, 9 John. Rep. 45. See Kennedy v. Gregory, 1 Binn. 85, and Morrison v. Duane, Id. 90, note, S. P. In a settlement cause, on a question whether C., the grandfather, had made a gift of Bess, a slave, to his grand-daughter, it was proved by the defendants, that he requested her to be brought up so as to be useful to his grand-daughter when married, to whom he intended to give Bess, and that F., who married the grand-daughter, came and took Bess, saying that she had been given to his wife by her grandfather. Held admissible, as part of the *res gestæ*. The court said the change of possession was established. The declarations of the parties went to show the intent with which the change was made. This is not within the notion of hearsay evidence. Millford v. Billingham, 16 Mass. Rep. 108. On *scire facias*, to enforce a recognizance against a house on which, with other real estate, it had been charged by K., the cognizor, the defendant, claiming under K., sought to raise an inference of payment from the fact of the *cestui que trust* of the plaintiff having released some of the land charged; and especially a tract sold by K. to Fisher. In reply to this, the plaintiff offered K.'s letter in evidence, requesting such release, on the ground that there was other property out of which satisfaction could be obtained. This was objected to as *res inter alios acta*, but held admissible, as completely repelling the inference of payment, so far as it was derivable from the circumstances of the release. Reigart v. Ellmaker, 10 Serg. & Rawle, 27. Ejectment for land, brought by the heirs of S., on the ground that his administrator had fraudulently sold them for his own benefit, under a decree of the Orphan's Court. They were bid in by one Selin, under whom the defendants claimed. They offered to prove that Selin said at, and just before the sale, that he would not give more than eight dollars per acre. Held, that the declaration should be confined to the time of the sale. But the court received, as evidence for the defendants, his offer after the sale, to take others in as partners in the purchase, at the price he had given. This they held tended to rebut the inference of fraud sought to be made from an under price. Selin v. Snyder, 11 Serg. & Rawle, 319, 323. An act of cancelation by the testator in respect to his will, though slight in itself, may be shown by his declaration at the time to be a revocation. Such declarations are a part of the *res gestæ*. Said in Dan v. Brown, 4 Cowen's Rep. 483, 490, per Woodworth, J. The plaintiff sought, by process of foreign attachment, to charge the defendant as the debtor of T.; and proved that the defendant gave his note to B., since deceased. Then, to show that these notes were assigned by B. to T., the plaintiff was allowed to use a receipt found among the papers of B., by which T.

acknowledged the assignment. Beach v. Swift, 2 Conn. Rep. 269. In an action against a surety on a bond for money, he insisted that he was discharged by the plaintiff's laches. The plaintiff, to show that the surety was indemnified, offered to prove that his principal had delivered a note to a witness, *telling him it was for his surety*, and that it was to secure him; and that the note was delivered to the surety, who collected it. The declarations of the principal were holden admissible in evidence as part of the *res gestæ*. Deardorf v. Hildebrand, 2 Rawle, 226. The prosecutor, on his return from search, declared himself satisfied of the prisoner's innocence, having found his watch in his waistcoat pocket; and directed the driver to turn about. The prisoner being accused and on trial, and the prosecutor absent, his declarations were received for the prisoner as a part of the *res gestæ*. Kelly's Case, 3 C. H. Rec. 153, before Colden, Mayor. And see 3 M'Cord, 232, note. In an action for breach of a marriage promise, the defendant may show by a third person, in order to mitigate damages, that his father declared to him his dislike of the match, on account of the plaintiff's bad character. It appeared that the father was an incompetent witness, having employed the defendant's attorney. Irving v. Greenwood, 1 Carr. & Payne, 350. In a writ of entry against a grantee of S., which grantee had notice of a prior deed from S., under which the demandant claimed, it was alleged that S. had fraudulently obtained and suppressed the first deed; and to show this, it was in proof that he obtained access to the desk of the first grantee, under pretence of searching for other papers. Held, that his declarations, while at the desk, going to identify the deed as one of the papers which he took away, and to show its contents, were admissible in evidence as part of the *res gestæ* against the tenant. Davis v. Spooner, 3 Pick. 284. On a question whether the plaintiff, who exchanged his horse for a horse of A., who purchased of B., an insolvent, to defraud the creditors of the latter, had knowledge of the fraud at the time of the exchange, proof of B.'s declarations, made before he failed and before the sale to A., that B. and A. were anxious to procure the plaintiff's horse, was held admissible for the plaintiff; and that this might be proved, either by B. himself, or any other person who heard it. Rice v. Bancroft, 11 Pick. 469. Case for obstructing a stream running through the defendant's land to an ancient mill of the plaintiff. The plaintiff claimed the mill, and exclusive use of the stream, under W., the defendant claimed a few acres on the stream above, from A., who claimed under the same W. After W. had sold the land to A., and while A. was in possession, W. claimed that all the water of the stream belonged to the mill, and forbid A. to divert any part. This was offered as evidence against the defendant, and held admissible. Strickler v. Todd, 10 Serg. & Rawle, 63, 73, 74. Several returns of *nulla bona*, on *fi. fas.* against one Elliott, were received as evidence of his insolvency, in an action between third persons. Bay v. Freazer, 1 Bay, 66, 69.

The cases cited so far, and indeed all those we shall bring forward in this note, tend to present the various connections in which these declarations are admissible. While still pursuing the same view, it is proper to observe, that in their very nature they must be evidence, though emanating from the party himself who seeks to use them in his own favor. See, also, to the general proposition, Ponsonby v. Debaillon, 6 Mart. Lou. Rep. 238. A constable being indicted for a forcible entry, he having a search warrant, and searching the house, his counsel were allowed to ask a witness what he said at the time. Rex v. Smith, 5 Carr. & Payne, 201. In trover for a fifty dollar bank note, the plaintiff alleged he had lost the note; proved he had it in his possession; and that it was afterwards in possession of the defendant. The plaintiff gave no evidence of the loss except his own declarations; and that the defendant had been seen hunting for it. Verdict for the plaintiff. On motion for a new trial, the following question alone was put to the court: Was it proper to receive the declarations of the plaintiff, connected with other circumstances, to prove the loss? The court thought it was; as if the party was seen with his friends and servants diligently searching the road. They said, here *the circumstances* do not appear; and they considered the question as embracing possible circumstances. They said, in all cases where a person's acts are evidence for him, his declarations in relation to such acts must necessarily be admitted; as in the case of a claim, demand or tender. In the first two cases it is the declaration which constitutes the act; and in the latter they form part of it. Schenck v. Hutcheson, 2 N. Car. Law Repos., 432. In an action by the claimants against the defendant for certain prize property deposited in his hands as the public agent of the United States abroad, held, that his letters written as such agent in respect to the property, it appearing to have been lawfully deposited with him, were a part of the *res gestæ*, and as such evidence for him. He was to remain in possession till Congress

should instruct him how to act. He was a public agent; "and his cotemporaneous correspondence on the subject in that character, with the American government, was certainly proper evidence to show the original nature and complexion of the facts in controversy." Patterson, J., Bingham v. Cabbot, 3 Dall. 19, 39. On trial for a riot, in destroying a threshing machine, the defendant's witness was allowed to state that he and the defendant were compelled to join the mob; but they had before agreed to run away the first chance, which they both did within ten minutes. Rex v. Crutchley, 5 Carr. & Payne, 133, and see note *a* to that case. On a trial for murder, the declaration of the prisoner, made antecedent to the fact, tending to explain and reconcile his conduct, was received in evidence. Particulars are not given by the case, Maryland v. Ridgley, 2 Har. & M'Henry, 120. The defendant gratuitously received of the plaintiff, in Georgetown, District of Columbia, in a letter to S., at Athens (Bradford county, Pennsylvania), $250, in bank bills, to be delivered to S.; but the bills were not delivered. In defence to an action for the loss, a valise which the defendant had borrowed for his journey, then whole, was proved to have been cut while in his possession. On his way to Athens, he stopped at an inn in Philadelphia; and one or two days after he left there, he wrote to his host that he had lost a sum of money; wrote the same thing to S. A., who asked the host about it. The day of receiving the letter, or the next, the defendant came to his host's house, stated that he had been robbed of a sum of money; and that he thought it had been stolen at the host's house, till he reached New York; that he should not feel so unpleasantly if it was his own, but it had been sent by another man. He appeared much concerned at the loss, and was anxious to take all means to trace the money. He was not positive he had lost the money at his host's house; but seemed to be of that opinion. He said he had not opened his baggage from the time he left that house till he arrived in New York. The letter gave an opinion that the money was stolen at the host's house, by servants, on Thursday evening or Friday morning; and stated that before the defendant reached there, the valise was not long enough out of his possession for any one to have stolen the money; and it seemed impossible it should have been done on board the boat, from its place there (stating where and near whom it was). The letter requested a look out, and information. The defendant made immediate and diligent inquiry on board the boat in which he sailed for New York; and a statement of the loss, and his conjecture as to the manner of it, the time when he discovered it, &c. All these acts and declarations, with the letter, were offered in evidence for the defendant, together with what he told S. on his return to Athens, &c. The whole were excluded as inadmissible, and a verdict found for the plaintiff. On error, the Supreme Court held that the evidence was admissible. The court say the action was for negligence. The declaration did not impute embezzlement to the defendant. Being a voluntary bailee, he was liable for gross negligence only, *dolo proximus*. He was bound to that care only which the most inattentive take of their own concerns. He might, therefore, show how he conducted himself on his journey, what care he took of this and his own property. "Evidence is constantly accommodating itself to the state of society and the concerns of the world; and therefore must accommodate itself to the altered mode of traveling by stage coaches and steamboats, instead of on horseback or in private carriages. Travelers are constantly more exposed to secret stealth in a crowded stage or in a steamboat crowded with passengers, where the traveler cannot keep his eye on his own baggage. Inns in our large cities are generally filled with strangers, and with the utmost circumspection he is certainly more exposed to these risks. To preclude a gratuitous bailee from showing how he conducted himself, and what care he took of his own property, would be shutting out all defence. The evidence offered was of a time directly after the receipt of the letter. If he had been silent and remained with his arms folded, this would have been evidence against him. The evidence offered is of acts and circumstances immediately preceding and succeeding the theft; concurrent acts and declarations; not those which are unknown or not commenced until after a lapse of time and suspicion afloat. As all were before any claim made by S., they were evidence of the whole *res gestæ*, the entire conduct, immediate declaration, and hot pursuit of the defendant." Tompkins v. Saltmarsh, 14 Serg. & Rawle, 275. On a question whether a vendor of horses had sold in fraud of his creditors, directions given by the vendee (the plaintiff) to the vendor soon after the sale, and take the horses to an innkeeper to be taken care of at the expense of the plaintiff, who promised the innkeeper to pay, were held admissible for the plaintiff as part of the *res gestæ*. Boyden v. Moore, 11 Pick. Rep. 362. In trover for negroes, the plaintiff proved that he had married the defendant's daughter; and that some time after the marriage, the

defendant had sent the negroes to the plaintiff, who had possessed them two or three years, the neighbors considering them as his. The defendant proved that when the negroes were sent, he called on his son and family to witness that he had sent them as a loan. The judge charged that his declarations should have no weight; and the verdict was for the plaintiff. But the court granted a new trial on this ground; holding that the defendant's declarations made a part of the transaction. Banks ads. Hatton, 1 Nott & M'Cord, 221. On a petition of freedom by the slaves of one who fled from the massacre of St. Domingo, bringing the petitioners along with her, on the ground that she was an importer of slaves, coming to reside in the state, where she had continued sixteen years; held, that her uniform declarations of an intention to return to St. Domingo as soon as circumstances would admit, were receivable in evidence against the petitioners; being, with the fact that she had never been naturalized, a part of the *res gestæ*, and both together conclusive that she was to be regarded merely as a *sojourner;* not a resident. Baptiste et al. v. Volubrun, 5 Har. & John. 86.

In assumpsit against the bank on their certain notes alleged to have been destroyed by fire, with a steamboat where it was alleged they had been placed for transportation, a witness was allowed to testify that in the evening of the 4th September, he was at the plaintiff's store, who showed him a large packet addressed to the cashier of the Plattsburgh Bank; and said it contained $800, which he was about to send in the steamboat, which was afterwards burnt, in the course of the same night. Ross v. The Bank of Burlington, 1 Aik. 43. In a statute proceeding to recover for labor done on the respondent's ship, he insisted that the libelant had been paid by a note of W. & C., former owners. The libelant insisted that the note was not paid, but discounted and renewed; and the money went to W. & C. He proved that W. & C.'s clerk requested him to renew the note, which he did, giving his own clerk a check for the money payable to W. & C., but ordering him not to deliver the check till he saw the note had been discounted at the bank. This was objected to as hearsay, and as a declaration by the libelant in his own favor; but held admissible. The clerk's sayings were a part of his acts as agent for W. & C.; and as to the libelant's directions to his own clerk, these were a part of the same transaction, and so admissible. Ship Portland v. Lewis, 2 Serg. & Rawle, 197, 203. The person in pos. session claiming title, and forbidding a claimant's entry in order to a survey, was recognized as evidence in his own favor of an adverse holding. Per Jones, Chancellor, in La Frombois v. Jackson ex dem. Smith, 8 Cowen's Rep. 589. To prove that the defendant had paid the plaintiff's intestate a debt, he showed that the intestate was seen coming in a direction from his (the defendant's) store by the witness, who lived within 30 or 40 yards of the store; that the intestate paid the witness money, and the witness immediately paid the same money to the defendant, who said, "you got that money from Darby," (the intestate.) Held admissible as one circumstance to show the payment; viz: to infer from his knowledge of the bills that he had just paid them to the intestate. The court say his declarations were admissible to show that he knew the bank bills and that they had been in Darby's possession. Certain facts can only be proved by the declarations of a party; *e. g.* to prove a man knows the multiplication table, his repeating it is the only evidence. Darby's Adm'r and Adm'x v. Rice, 2 Nott & McCord, 596, 597. In ejectment, the plaintiff claimed that the defendant's mortgage was taken from his father to defraud creditors, and (*inter alia*) that the defendant, when he took the mortgage, had not given the mortgagor certain credits. To repel this allegation, the defendant offered his account book, wherein the credits were contained in an account purporting to be stated and signed by the parties, mortgagor and mortgagee. The court held the book admissible. Cook v. Swan, 5 Conn. Rep. 141. In an action on a bond given on suing out an attachment against an absconding debtor, for damages, grounded partly on malice, the inquiries by the defendants after the plaintiff, and the answers of third persons as to the plaintiff's absence and its cause, are admissible for the defendants without producing those persons. Ponsonby v. Debaillon et al., 6 Mart. Lou. Rep. (N. S.) 238, 246, 247. A prisoner's declarations at the time he passes counterfeit money, are admissible in his favor as a part of the *res gestæ;* otherwise if made afterwards. Robetailles' Cases, 5 C. H. Rec. 171, 173. A creditor's entry in his book of credit, is evidence of an appropriation of payment. Cole v. Trull, 9 Pickering's Reports, 225, 227. Indeed, such an entry is the *res gestæ* itself. See Vol. II, and 9 Cowen's Reports, 773, *et seq.* note. That his indorsement or a credit given, is sometimes evidence to take his debt out of the Statute of Limitations or rebut the presumption of payment arising from lapse of time, see the subsequent notes. But see Whitney v. Bigelow, 4 Pick.

110, that such an indorsement is, in no case, *per se*, evidence for the party who made it. On trial of an indictment for counterfeiting notes, found in the room where the prisoner was, his denial at the time that he had been there before, was received for him, to repel any unfavorable presumption which might otherwise have arisen from his silence; also his statement, on his way, that he was going there to get bail for his brother-in-law. United States v. Craig, 4 Wash. C. C. Rep. 729, 730, 732. But the force of such declarations depends upon their truth as appearing from other parts of the case. Id. That one has, within twenty years from the commencement of the user, plowed up a way claimed through his land by another, on the ground of user for more than twenty years, declaring that the other had no right, is admissible in evidence against the other, though he was not present, in order to rebut the allegation of acquiescence. Barker v. Clark, 4 N. H. Rep, 380. *Semb.* that one partner giving notice to a witness that the partnership had ceased, might be admissible evidence for the defendant. It was offered where it might be material to ascertain whether the defendant, though he had dissolved the partnership, might not still have been suffering his name to go out to the world as belonging to the old firm. Dolman v. Orchard, 2 Carr. & Payne, 104. It was denied, however, that his merely stating the fact of the dissolution in conversation, without the view of giving notice, would he admissible. Id. In case for a false representation of the solvency of A. B., whereby the plaintiffs trusted him with goods, their declarations at the time of delivering the goods, more than four months after the representation, that they trusted him in consequence of the representation, were held admissible in evidence in their own favor. Fellows v. Williamson, 1 Mood. & Malk. 306. The prosecutor advertised two lost watches, offering a reward; and the prisoner came with them, upon which he was prosecuted as the thief. Under the circumstances, it was held that what the prisoner said, on bringing the watches, should be received in his favor as a part of the *res gestæ*. Atwood's Case, 4 C. H. Rec. 91. But see State v. Slack, 1 Bail. Rep. 330, 332. On trial of an indictment for a libel by the defendant for the act of adding ass's ears to the prosecutor's portrait, the defendant was allowed to prove his own declaration at the very time of the act, that it was his intention to transform the picture into a Midas, this being considered as part of the *res gestæ;* and being a circumstance to show a want of malice. Mezzara's Case, before Radcliff, Mayor, 2 C. H. Rec. 113. On trial of an indictment against W. & B. for conspiring to defraud C. by misrepresenting the value of certain estates of B., W. offered in evidence certain letters between himself and B., to prove that he had been deceived himself by B., and was thus led into his share in the misrepresentation; and these were received as part of the *res gestæ*. Rex v. Whitehead, 1 Carr. & Payne, 316. "The declarations and conduct of a party to explain his acts, are often extremely material in cases of mutiny on board ships, as it frequently happens that when the mutineers have deposed their captain, they find that none of them are able to navigate the ship, and they then force one of the officers to assume the command of her; and he is, in many cases, brought to trial because he appeared to be acting with and directing the mutineers." Note *a* to Rex v. Crutchley, 5 Carr. & Payne, 133. In assumpsit, by A. against D., for money paid to G. by A., as the guarantor of the price of goods purchased by D. of G., D. contended that A. and his partner, W., paid the money jointly, so that A. could not sue alone. And G., who proved the purchase of the goods, and that A., for himself, or for A. & W., guarantied the payment for D., and that A. paid the money to G., was also allowed to state that A., at the time of payment, declared that he alone was the guarantor, and that W., his partner, had nothing to do with it. Allen v. Duncan, 11 Pick. 308, 309, 310. What A. said as to a joint engagement when he guarantied the payment, was obviously admissible. Per Shaw, C. J., Id. 310.

When, and how far the return and cotemporaneous conduct of an officer shall be evidence in his own favor, we shall see in the subsequent notes in this chapter.

In one case (trover), the defendant, who claimed the goods under N., offered to show that while N. was in possession, she claimed them as her own. This was overruled, and on error held well, the declaration being in favor of her interest. Waring v. Warren, 1 John. Rep. 340. The argument does not appear to have been well considered, if, as we shall now proceed to show, the declaration was a part of the *res gestæ*.

It is not necessary, in order to warrant such evidence, that the act done (*res gestæ*), with which the declaration is connected, should be a single effort or a positive transaction in the common sense of the term. It may be continuous for a series of years, and of a passive or negative character. Thus possession of real estate for a long time, may be qualified and explained

by the declaration of the possessor, the apparent owner in fee being thus cut down to the mere *squatter*, or the apparent *squatter* elevated to the owner in fee, as is done every day in our courts. Doe ex dem. Human v. Pettett, 5 Barnw. & Ald. 223. In the same way, the apparent general owner of personal property, may be turned into a bailee or trespasser, and *e converso*. And see the subsequent notes. Long forbearance may, in like manner, be shown to signify absolute title, or temporary tenancy in another; and an apparent legal resident or citizen reduced to the temporary sojourner. And it makes no difference whether the declarant be alive, and a competent attainable witness, or be dead. The declaration is identical with the act, and may be proved in the same manner as might the hand and seal of the declarant, either by himself, or any person who saw him sign and seal.

In case of declarations brought forward to qualify, either temporary or continuous acts of possession, we are first to be satisfied, *prima facie*, at least, that there is a possession. This may appear by actual occupancy, inclosures, partial occupancy under a deed or contract, which carries out a constructive possession commensurate with its terms of local description, acts of ownership, &c., &c., all which will be more fully considered under our future titles of ejectment and trespass in the second volume. In a recent case at the English Nisi Prius, an act, which would be deemed a very slight indication of possession and consequent ownership, especially in the unsettled parts of this country, was held to let in proof of declarations. The lessor of the plaintiff, to show seizin of a wood lot in his ancestor, proposed to prove that one Brown cut timber there by the ancestor's permission. Having proved, simply, that Brown was seen in the wood cutting timber, he then proposed to ask what Brown had said as to who was the owner of the wood. Maule, for the defendant, objected. Mr. Justice J. Parke: "He exercised an act of ownership, and he is, therefore, *prima facie* owner. And what he says as to any one else being the owner, is a declaration to cut down his own title." Maule. "He was a mere workman." Parke, J., "I do not know that he was only a workman, except from what he may have said." Richards. "Your Lordship will only hear what he said at the time." Parke, J., "Yes, what he said at any time." The latter must have been on the ground, that the act of cutting wood being *prima facie* evidence of a continuing ownership and possession, both before and after the act, would thus constructively extend each way, and connect itself as a possession with any declaration made before or after. See the case of Doe ex dem. Stansbury v. Arkwright, 5 Carr. & Payne, 575. See Thompson v. Stewart, *infra*.

The case of Doe v. Arkwright goes to the utmost latitude of constructive possession, as the foundation for letting in proof of the occupant's declarations. And in allowing the tenant to connect himself in this way with the party as owner, by setting up a contract, it goes farther than some of the American courts have been willing to go. In a late case, the defendants, as heirs of Price, claimed to extend their ancestor's adverse possession over the lines of his grant into lands granted to one Greenup previous to 1804, which lands Greenup conveyed to the lessor of the plaintiff in 1815. To make out the defence, it was proved, among other things, that in February or March, 1804, Price demised the land contained in his grant to one Haydon, who entered, claiming under one Price. And a witness was allowed to state, that about the time Haydon entered, he told the witness that he was to clear ten acres of land for rent, according to the contract with Price; and some time afterwards, Haydon showed the witness, demarked by blazes on the trees, the ten acres which he stated he was to clear, which ran across the division line between the parties, as pointed out by their grants, and comprehended land lying within Greenup's boundaries. Haydon cleared a turnip patch lying within the ten acres in the season of 1804, and got firewood there. A part of the turnip patch extended across the line; and in the winter following, the patch was enlarged by a farther clearing, making in the whole two acres cleared within the plaintiff's boundaries, which had been fenced and cultivated by Price and his heirs ever since. The demarkation of trees extended still farther within the plaintiff's boundaries.

The testimony as to Haydon's declarations having been objected to, but admitted, now came on exception taken, before the Court of Appeals on a writ of errors. Underwood, J., delivering the opinion, remarked, that "to legitimate the statements made by Haydon to the witness, and to rid them of the character of mere hearsay, they must be considered as part of the *res gestæ*; and if they cannot be so considered, they ought to have been rejected. Conversations or declarations, made by the actor or party concerned, at the time an act is done, and which explain the *quo animo*

and design of the performance, may, whenever the nature of the act is called in question, be given in evidence as part of the *res gestæ*. Without tolerating this explanation of the acts of men, by receiving their accompanying declarations, we should be often misled as to their true nature and character, and consequently liable to fall into errors in respect to them. The rule requiring *res gestæ* declarations to be received as evidence, is a necessary and very useful one; but, in the present case, we think it will not sanction the reception of the testimony objected to. Haydon, as an occupant or tenant of the land, might, during his actual occupancy, make declarations which ought to be received whenever offered in evidence, to show the nature and character of his tenancy, whether as claimant in his own right, or right of another, whether as tenant of the freehold, or for years, whether adversely to a particular claim, or not, &c. In cases like these, the occupancy or tenancy is the act; the declarations to explain its nature and extent, made by the tenant while in possession, are the *res gestæ*. Haydon's declarations, while occupying the land, were very proper to show that he held under Price, and that his possession was as tenant to Price; but Haydon's statements were not confined to this. They have been unwarrantably extended. His mere declaration to the witness was received as evidence of what the contract was between him and Price. By showing the blazes on the trees to the witness, and by declaring that they included the ten acres, he, Haydon, was to clear, his statement without oath established a contract between him and Price in relation to these identical ten acres; and thereby Price, by his tenant, Haydon, is made the adverse possessor by construction, of another's land, to the extent of the blazed demarkation. The contract between Haydon and Price is one thing, the occupancy of the land by Haydon is another; and the declarations of Haydon in relation to the nature of his possession, as *res gestæ*, still another. It was as improper to admit proof of the first under the idea of *res gestæ*, by receiving as evidence what Haydon has been heard to say, as it would have been to have received the hearsay of Haydon to prove that Greenup, in 1804, had actually conveyed the land in controversy to Price.

The judge then goes on to show that, however plain a tenant's possession may be, it does not follow that he can, by his declarations, connect himself with another in a distinct and independent contract, as in this case, the contract for clearing the land; and that the effect must be merely to qualify the possession in respect to himself. He would not allow that Price could come in and adopt the adverse possession for himself which Haydon had assumed for him, as it seems to have been intimated Stansbury might have done, in the above English case. West v. Price's Heirs, 2 J. J. Marsh. 380, 383, *et seq.* And see per Ruffin, J., in Den ex dem. Pickett v. Pickett, 3 Dev. 6, 7.

Under the general doctrine above recognized by Underwood, J., it has been held, that the declarations made by the warrantor in a deed, while in possession, going to show in what character and with what intent he entered and continued his possession, are admissible in favor of the title derived from him. Jackson ex dem. Youngs v. Vredenburgh, 1 John Rep. 158. And on a question of settlement, one party having given in evidence long adverse possession of land by the father of the paupers, to make out that he had a settlement as a freeholder, held, that the other party might show the father's declarations that he held merely under a contract for a deed, and had no title. West Cambridge v. Lexington, 2 Pick. 536.

In this class of cases, it has been made a question, whether, after a *prima facie* right had been established by proof of an apparent adverse possession for a sufficient length of time to confer title, evidence of the possessor's declarations going to cut down such title, were not inadmissible as coming within the Statute of Frauds. Thus, in trespass, q. c. f., it appeared that the parties owned adjoining lots, and the defendant gave evidence of a possession for thirty years, according to a crooked fence between them. The plaintiff straightened the fence, but the defendant tore the straight fence down. The plaintiff offered to prove acts and declarations of the defendant since the expiration of the thirty years, showing that the old fence was built for mutual accommodation, without any view to title, and that the occupation was not adverse. *Per Curiam.* "It is urged that a complete possessory title was obtained up to the line of the old fence; and that all evidence of acts or declarations, which took place afterward, are irrelevant and inadmissible to prove the character of the previous possession. If the premises are well founded, the argument is sound, and the conclusion logical. But the very question was as to the nature and character of that antecedent possession; and the acts and declarations of the parties owning the estates, made after thirty years, which had a tendency to show their motives and

views during the thirty years, were proper to show the nature of the occupancy, and rebut the inference which would otherwise follow from the act of possession. Surely, if a written agreement had been produced, showing that the defendant was allowed to maintain a crooked fence until the plaintiff should choose to have one back upon the true divisional line, it would defeat all claim to the land in dispute on account of the thirty years' possession. Confessions of the party in possession, claiming under that title, his acts and declarations having a tendency to show such arrangement and understanding, are equally competent evidence." Church v. Burghardt, 8 Pick. 327, 328. See Doe ex dem. Human v. Pettett, 5 Barnw. & Ald. 223. In a precisely similar case, in the state of New York, where the possession exceeded twenty-five years, and appeared to have been adverse, the mere declaration of the defendant that the line should have been a straight one, without any express admission showing that his possession had not been adverse, was not admissible, or rather, not sufficient, to entitle the plaintiff to the straight fence which they had built between the two extremities where the defendant said the fence should have run. Stuyvesant v. Tompkins & Dunham, 9 John. Rep. 61. *Quere.*

But to proceed with our direct illustrations. The plaintiff in ejectment claimed under H., on the ground that he (H.) acquired a right by improvement, under the Pennsylvania law; and offered to show that H., when he entered, said he was settling on the land in dispute as vacant land, and to take it up by improvement. Held admissible. Bennett v. Hethington, 16 Serg. & Rawle, 193, 195. On a traverse of an indictment for a forcible entry and detainer, the defence was that the prosecutor had removed away from the *locus in quo*, leaving it vacant. He was allowed to give in evidence his declarations of an intention to return and hold possession, made after he had left. A person may be in fact possessed of land, without being in fact upon the land. This must depend on intention, which can only be shown by the party's declaration. Thompson v. Stewart, 5 Litt. 5, 6. In trespass, the plaintiff claimed solely on the ground that he had possessed the *locus in quo* adversely for fifteen years (the Connecticut limitation). The defendant showed title from Williams, who had the paper title, and was permitted to prove that, during the fifteen years, one Cotton being in personal occupation of the land, and actually taking off the crops, said he held under Williams, and was to give him a part of the produce. This was on the ground that the declarations were a part of the *res gestæ*. Williams v. Ensign, 4 Conn. Rep. 456. On a trial for a forcible entry and detainer, the question being upon the relator's entry, and the extent and nature of his possession, he having proved that he was in possession, was allowed to show his own declarations as to its extent, and the person under whom he held. Smith v. Morrow, 7 Monroe, 234, 236.

It was a strong case which allowed the tenant's declarations in his own favor, after he had signed a written acknowledgment that he held under the lessor of the plaintiff. Yet these were allowed as to the manner in which he was operated upon to sign, as that he was assured that he might long continue in possession, &c. This was allowed, he being in possession, in favor of the defendant, who claimed under him. Turpin v. Brannon, 3 M'Cord, 261. Of the right to use such declarations in favor of one claiming under the party, and even the party himself, there is indeed no doubt where they are admissible as relating to the nature of the possession. This was directly held in Martin v. Simpson (4 M'Cord, 262). There, one Nance, who conveyed to the defendant, had, while in possession, cut logs and asserted a claim to a certain line; and such assertions of right were received in favor of his own grantee. Yet, if such declarations be admissible to impeach a distinct previous act, as taking a lease or giving a written acknowledgment by the tenant, their force can rise but little above nihility. Indeed, the effect of a long series of adverse acts and claims, for twenty-five years and more, under the Statute of Limitations, may be swept away by a single intermediate conflicting acknowledgment, as we often see at the circuit. Doe ex dem. Human v. Pettett, 5 Barn. & Ald. 223.

The general doctrine that the declarations of a tenant in possession of land are admissible as a part of the *res gestæ*, for the purposes explained by Underwood, J., *supra*, has seldom been denied. A few cases have, apparently through inadvertence, gone the other way; but they have generally been afterwards given up by the very courts in which they were decided. In one case, the defendant in ejectment, claiming that certain tenants in possession held under him, offered to show their acknowledgments to that effect, which was denied as hearsay, without apparently adverting to the question whether these acknowledgments might not be considered a part of the *res gestæ*. Calvert v. Fitzgerald, Litt. Sel. Cas, 388, 389. That they might was afterwards con-

ceded by the same court in another case, where the usual distinction between being in and out of possession is taken. May v. Jones, 4 Litt. Rep. 21, 23, 24. In a subsequent case still, the court denied that the declarations of a possessor were a part of the *res gestæ*, but only what he said at the time of his entry. Brubaker v. Poage, 1 Monroe, 125, 126. But we have seen, by West v. Price, *ut supra*, that they have given up that distinction.

It is well settled, however, that the tenant's declarations can in no case be received to shake a clear documental title derived to himself from the owner (Reading v. Weston, 7 Conn. Rep. 143, 147); or, if by parol, to show title in another which could only arise documentally. Either would be a plain violation of the Statute of Frauds. Jackson ex dem. Burr v. Shearman, 6 John. Rep. 19, 20, 21. And see Kimball v. Morrell, 4 Greenl. 368. But a distinction should always be made between a possessory and documental title. A deceased widow's admission that she claimed for life only, was received to debut an adverse possession, indicating that she had claimed in fee. Doe ex dem. Human v. Pettett, 5 Barn. & Ald. 223.

Indeed, it is hardly necessary to observe, that hearsay making a part of the *res gestæ*, as well as all other declarations, in order to their being competent, must not only relate to such facts as are susceptible of oral proof, but must also, like other evidence, be relevant to the matter in hand, must bear upon the point of inquiry, and come under subordination to other general rules which govern in the admission of testimony. All questions of evidence must be considered in reference to the particular circumstances under which it is offered. Per Abbott, C. J., in Doe ex dem. Human v. Pettett, *supra*.

In like manner, and under similar qualifications, the declarations of persons accompanying their acts of forbearance to take possession, may be given in evidence. The plaintiff claimed a right to the exclusive felling and converting of trees in a certain belt of wood surrounded by tenants, he founding the right on long usage, and sought from this to have a grant or reservation presumed by the jury; and he was allowed to give in evidence the declarations that such was his right, made by the surrounding tenants. It was objected that this was hearsay, but answered that it was a part of the *res gestæ;* for it was accompanied with forbearance by the various tenants who made the declarations, and their landlords, to exercise the right themselves, and leaving the whole to the plaintiff. Stanley v. White, 14 East, 332, 335, 339, per Bayley, J.; 340, by the court, and 341, per Ld. Ellenborough, C. J.; and see *post*, in the text. In a writ of entry the demandant claimed the premises as part of a mill privilege granted to Ham; and to show that it was within the grant, proved grants from Ham to several persons, of land which they took possession of as the mill privilege, and built a mill. The defendant claimed that the premises in question did not come within the grant to Ham, and was allowed to prove that when the mill built by the grantees of Ham, was to be rebuilt, some of the grantees refused to join in re-building, saying it stood on Allen's land, under whom the defendant now claimed. The court say their declarations were admissible as a part of the *res gestæ*. The mere act of abandoning was equivocal as to the motive. The declarations removed the doubt, and were admissible to qualify the act, and in that sense made a part of it. Downs v. Lyman, 3 N. Hamp. Rep. 486.

The same rule prevails, in its utmost extent, as to personal property. Thus, on appeal between two towns, contesting the settlement of a negro, it seems, that the declarations of a person, made in respect to his title to the negro, while in possession of the negro as a slave, are receivable in evidence. Overseers of Germantown v. Overseers of Livingston, 2 Cain. Rep. 106, 107. On the same principle, a will and inventory of a negro are evidence that the testator claimed the negro as his slave, and that he was inventoried as such. Walkup v. Pratt, 5 Har. & John. 51, 57. See also Pool v. Bridges, *supra*. (*Contra*, Woodruff v. Cook, 25 Barb. (N. Y.) 205.)

A majority of the cases are peculiarly clear and strong, that declarations of a debtor who continues in possession of property after a sale or transfer in any way by him to another, showing fraud in the transfer, are evidence against the vendee or transferee, in a contest between him and the creditors. In one case it was denied that such declarations (*e. g.* an offer by the debtor to sell) could be used in this way, unless shown to have been with the consent or permission of the vendee. Talcott v. Wilcox, 9 Conn. Rep. 134, 139. But in that case the possession of the vendor, at the time of the declaration, was put in doubt by the evidence; and the court consider the jury as having found against it. Id. p. 140. And in trover for stock on a farm and household furniture, the plaintiff claimed under a bill of sale from Pusey, whose creditors had sold the property through the defendant as sheriff, and now set up that the sale was fraudulent. The vendor

professedly ceased to control the property on selling it to the plaintiff, who hired Peter, a former servant of Pusey, to take charge of it, which he did till the time of the sheriff's sale; the property still, however, continuing on Pusey's premises. Various testimony being given on the question of fraud, including some acts of ownership which Pusey had exercised, the defendant insisted on asking a witness as to conversations between Pusey and Peter in the absence of the plaintiff, but while Peter so apparently had charge of the property for the plaintiff, in order to determine from those conversations whether he was hired by the plaintiff, or whether her hiring was not colorable, he in truth being still in the employ of Pusey. Peter had left the county. This was objected to and overruled, but on error was held admissible. The court say it was important for the plaintiff in the first instance to prove her possession by the servant Peter. It then became undoubted and very important evidence for the defendant, to show how the matter really was; to prove that while Peter was employed, he and Pusey both declared that he was the hireling of Pusey. This was not merely hearsay evidence. It was the best evidence the nature of the thing was capable of—the declaration of the master and the servant at the time they were employed about the property. It was not to charge the plaintiff, nor to destroy a contract by a conversation between others; but the declaration of persons in possession, showing in what character they were in possession. It was the *res gestæ* itself. It was very proof of actual possession in Pusey. It destroyed the colorable possession of the plaintiff by means of Peter, and showed the reality of the possession to be *Pusey's*. Peter had before been in the employment of Pusey in the same way. He continued to act under his orders, at the very time the witness spoke of. It was much stronger evidence to show the unaltered course of possession in Pusey, than the evidence of a hiring of the plaintiff was to show the contrary.

The declaration of a tenant in possession is constantly received as to whom he held under; not as evidence of title, but as evidence of possession, and the character of the possession. Babb v. Clemson, 10 Serg. & Rawle, 419, 426, 427, compared with S. C. in 12 Id. 328, 330. The same doctrine is held in England. In trover, it was proved that on the 13th July, 1827, the plaintiff sued out a *fi. fa.* against J. Willies; and the defendant, as sheriff, sold the goods under the *fi. fa.* to the plaintiff, on the 16th July. On the 9th of the next September, the defendant seized the same goods under another *fi. fa.* against J. Willies, at the suit of Homfray. J. Willies continued in possession till the second *fi. fa.* came; and the defence was, that the first execution was fraudulent. To show this, the defendant's counsel proposed to ask the sheriff's officer what Willies said when Homfray's execution came against the goods. "Curwood, for the plaintiff, objected that what J. Willies said as to the property of the goods was not evidence, as he might be called." Vaughan, Baron: "What J. Willies said as to whose the goods were, he being then in possession of the goods, is evidence." This evidence was received; and the officer also proved that the plaintiff had said to him that he had sued out the first execution to protect the goods from Homfray. Nonsuit. Willies v. Farley, 3 Carr. & Payne, 395. Such testimony has been held admissible on more grounds than one. The possession is there considered as adequate evidence of a conspiracy between the vendor and vendee to defraud the creditors, and the admission of the debtor let in as that of a co-conspirator. True, there is little need of the latter ground, because, when the conspiracy is made out far enough to let in the declaration, the case may stop as a safe one for the creditors. In Louisiana, the declarations of the debtor are always received to show fraud as far as he was concerned, though it is admitted that, unless he be in possession, his vendee cannot be further affected. Guidry v. Grivot, 2 Mart. Rep. (N. S.) 13, 15; Martin v. Reeves, 3 Id. 22. And see Highlander v. Fluke, 5 Mart. Rep. (1st series), 442, 449.

So as to residence. On a question of settlement it became material to ascertain whether the pauper was domiciled in the town of Canton. He resided there with H. about seven years, being off on excursions and journeys about one-third of the time. He being dead, his declarations of an intention to remove, on going out upon excursions and journeys, were received in evidence as part of the *res gestæ*. Gorham v. Canton, 5 Greenl. 266. See also Baptiste v. Volubrun, *supra*, S. P. The party's own declarations, to show him a sojourner, were received after sixteen years' residence. And, on a question whether one was a citizen of England or the United States, the court allowed his declaration: that, in going to England, his object was to claim compensation as a loyalist. Doe ex dem. Stansbury v. Arkwright, 5 Carr. & Payne, 575. The court went very far when they held that an ancient deed and will of the pauper's deceased grandfather, describing himself as of O., was receivable, as being in the nature of an act to show

that his settlement was there. Ward v. Oxford, 8 Pick. 476. But in an action of slander, for accusing the plaintiff of perjury in respect to A.'s place of residence, A.'s declarations as to his residence are not admissible against a party not present; though, on a mere abstract question as to residence, it depends so much on intent, that declarations explanatory of his bodily presence are admissible as part of the *res gestæ*. Cherry v. Slade, 2 Hawks, 400.

The state of feeling, of sentiment or sanity, may—nay, must—in general be indicated by the declarations of the individual in respect to whom these things are predicated. That this is so in a question of competency for defect of a witness's religious belief, we saw *ante*, note 11, And where it was sworn by a witness that a testator made confidential communications to him, the testator's declarations, by which he showed suspicion of the witness's honesty, were admitted in reply. These, says Tilghman, C. J., were acts, not merely hearsay. They showed a want of confidence, and the improbability that family concerns of a delicate nature would have been committed to the witness. Lightner v. Wike, 4 Serg. & Rawle, 203, 206, 207. The defence was that the master of a ship was insane, on trial of an indictment for confining him at sea. A journal kept by the master was received in evidence for the prosecution, to show, by the manner of its being kept, that he was not insane; but held not evidence for any other purpose. United States v. Sharp et al., 1 Peters' C. C. Rep. 118. See Darby's Adm'r and Adm'x v. Rice, *supra*. But such acts or declarations, even to show insanity, in a criminal defence, must be strictly *part* of the *res gestæ*. In a case of homicide, by stabbing, the counsel offered in evidence the prisoner's declarations, in connection with his conduct, the morning after the homicide, from which to infer his insanity; but held not admissible. State v. Scott, 1 Hawks, 24. See *ante*, note 79, Where a prisoner, on trial for murder, produced evidence of declarations by the deceased that he would destroy himself, with a view to raise the presumption that the deceased came to his death by suicide, it was held competent for the state to give evidence of the reasons assigned by the deceased for his declarations. State v. Crane, 2 Bail. Rep. 66.

It is also proper to notice again here, that the declarations of an agent against his principal, in order to be available, must be a part of the *res gestæ*—a matter fully illustrated in the subsequent notes to this chapter. The principle has been followed out by a recent decision that the admission of an attorney, who afterwards appears in the cause as the attorney on record, cannot be received without further proof that he was attorney when he made the admission. Wagstaff v. Wilson, 4 Barnw. & Adolph. 339. But not only what the actual attorney on record for the party admits at any time, in court or out, while the cause is going on, is evidence against his client, if the admission be made in the regular transaction of business in respect to the cause; but the admission of the attorney's clerk, if intrusted with the management of the cause, shall have the same effect. Accordingly, Denman, C. J., allowed proof that the managing clerk of the defendant's attorney had offered the plaintiff's attorney to pay down £30, with the costs, and secure the residue by a warrant of attorney. Standage v. Creighton, 5 Carr. & Payne, 406. The admission of a servant must, to make it receivable against the master, be strictly within the line of his master's business. Thus, statements made by the shopman of a pawnbroker, who is left in the shop to answer in his master's absence, can only be received against the master when they relate to transactions which are strictly within the business of a pawnbroker; and are not receivable, if they relate to an advance of money not within the Pawnbroker's Act. Grath v. Howard, 5 Carr. & Payne, 346. The sale of a libel by a printer's common clerk is evidence to charge the printer, and, through him, his sureties to keep the peace. Respublica v. Davis, 3 Yeates, 128.

The declarations of one of several wrongdoers, made long after the injury has been committed, in pursuit of the common object, are received to affect the others on a different ground. It seems to rest on a principle of policy and necessity. And so where the party has been previously indemnified by another, against the commission of a particular wrong. In such case he shall be taken as fully accrediting and authorizing his indemnitor to act as his regular agent or attorney in managing the matter—all his admissions in respect to which may, therefore, come in against the guarantee. Indeed, two are joint wrongdoers. But the courts do not agree as to the ground of receiving such declarations, as we shall see hereafter, in respect to indemnities by deputy sheriffs, a majority rather inclining to confine the admissions, like those of an agent, to the *res gestæ*. In one shape or the other, however, the notion has been long prevalent. It was strongly acted upon in the time of Lord Mansfield. The King's Bench then held that a sheriff

who levied and paid over the money to one party, where the goods were claimed by another, should be presumed to be indemnified by the party to whom he had paid; and the declarations of the party receiving were therefore held admissible against the sheriff, in an action against him by the other party. Aldridge v. Ireland, 3 Dougl. 397.

Various other hearsay matters will suggest themselves, in the course of these volumes, as coming within the doctrines of the *res gestæ*. We have reserved a large number of cases for our projected note to the case of Ivat v. Finch (in the text), where they are brought together with a view to see how privies, or persons coming in under the declarant, shall be affected by the language of their predecessors.

Among others, the case of Dolman v. Orchard (2 Carr. & Payne, 104; S. C., *supra*), which inclines to allow oral notice of the dissolution of a partnership, given to a single individual, as evidence in favor of the partner giving the notice, suggests all that class of cases where newspaper advertisements and other notices of dissolution are admissible; not to prove the fact of dissolution, but to put the public on their guard, and avoid the claims of individuals on the ground that, although there was a secret dissolution, yet it was unknown to them, the old firm being still held out as a subsisting one, and they, therefore, having a right to take it as continuing, and to insist that it shall still be bound by the credit which they gave. See *post*, Vol. II, and the notes. See per Savage, C. J., as to proof of a partnership by public reputation. M'Pherson v. Rathbone, 11 Wendell, 98. But *quere*, as to the accuracy of that dictum in its broadest extent.

The same thing will occur as to the foundation upon which we allow proof of the usages of trade or business, which are agreed to enter into and make a part of contracts between men. See the title *Usage*, in the index. These are proved by general hearsay; in other words, the general opinion and understanding of persons concerned in the trade to which the contract relates, though the witnesses may not know of any particular instance in fact upon which the opinion is founded. Camden v. Cowley, 1 Bl. Rep. 417.

It is obvious that the every-day practice of fixing the price or value of various articles must depend, in a great measure, on the opinion of the witnesses as derived from generally reputed prices in the place with reference to which they speak. Parties generally contract in reference to such reputed usages. They are governed, in a great measure, by hearsay, when they contract or deal in any way with, or do any act in relation to articles of value; and hence, hearsay may truly be said to form a part of the *res gestæ*. We should not be left to infer, however, that the price of an article in market is provable by the hearsay of a single fact of purchase.

Accordingly, in an action for the non-delivery of flour, the plaintiff offering to prove by a witness certain purchases of flour in market, at certain prices, by the witness's partner, *as his partner informed him*, this was held inadmissible. Williamson v. Dillon, 1 Har. & Gill, 444, 451, 466, 467. But, in a New York case, to prove the price of wheat at a certain day and place, proof was received that the witness inquired of large dealers in wheat at the place, and derived his knowledge from their books, knowing nothing of the price himself. Lush v. Druse, 4 Wendell, 313. Such credits were a part of the transactions of such dealers, and as well calculated to exhibit true prices as instances of sales made or seen by the witness himself.

See *post*, as to cohabitation, declarations, &c., in proof of marriage being a part of the *res gestæ*.

The receiving of the opinions of witnesses in any art or science depends, in some measure, upon the same principles. These will be considered when we come to treat of their examination. *Post* of the text, and the notes. They speak not only from their own experience, but also from what they have read and heard; and the acts of the party whom these opinions are called in to affect, in a degree take their character from, and are influenced by, results thus formed and thus delivered by the experts who are examined.

Nor is it refining too much to say that the moral characters of parties and witnesses, where they form a proper subject of inquiry, are provable upon the same principles. These characters depend upon the general estimates of their neighborhood. What society have said in making them up is but another name for what they have done. Their individual sayings have contributed to the good or bad character, the thing formed, the act done, the *res gestæ*. See *post* of the text on the examination of witnesses, with the notes, and Vol. II, title *Slander*, &c. Indeed,

the moral merit and demerit of some actions are formed exclusively by public opinion. Locke's Essay on the Human Understanding.

(Mitchum v. The State, 11 Geo. 615. In regard to what are the *res gestæ*, the court say in this case: "The idea of the *res gestæ* presupposes a main fact. With this preliminary remark, I answer, that the *res gestæ* mean the circumstances, facts and declarations which grow out of the main fact, are cotemporaneous with it, and serve to illustrate its character." See also to the same effect, Handy & Tull v. Johnson, 5 Md. 450. "The rule applicable to the *res gestæ* does not require the circumstance proposed to be given in evidence should have occurred at the precise time when the principal fact happened; if it arose either at the time or so soon thereafter as to constitute a part of the transaction, then it seems to give color and definiteness to it." Sample v. Robb, 16 Penn. State R. 305; the declarations of a former owner or improver of land, accompanied by acts of ownership, are evidence that he claimed title to same and did not hold under another. So in relation to personal property (Maxwell v. Harrison, 8 Geo. 61); the declarations of a former owner as to the title, while in possession of the property, are admissible against a person deriving title from him. But declarations of a vendor, made after he has parted with the possession, are not admissible. Little v. Allison and others, Id. 201. And so declarations made by a purchaser some two years before the conveyance to him, and not connected with it, are inadmissible to prove fraud in the conveyance. Littlefield v. Getchell, 32 Maine R. 390.

The declarations or admissions of one in possession of property explanatory of his possession, as that he held in his own right, or as a tenant or a trustee of another, are admissible evidence, because it explains the character of his possession; but his declarations in regard to the contract by which he came into possession cannot be received in his favor. McBride v. Thompson, 8 Ala. 650; Cox v. Eastly, 11 Id. 362; 17 Id. 392; Mems v. Sturdevant and wife, 23 Ala. (N. S.) 664. Declarations made by a third person, as in the delivery of a chattel showing the purpose for which the delivery was made or the terms of it, are admissible in connection with proof of the delivery. Stewart v. Hanson, 35 Maine, 506. The declarations of a person in possession of land that he occupies as tenant of another person, are admissible to prove possession in that other person in an action between him a third person; Marcy v. Stone, 8 Cush. 4. Noyes v. Ward, 19 Conn. 250; a party removes an ancient fence, and places a stone in a post-hole, and the next day declares that he put it there as his boundary; and the court excluded his declaration, because it did not accompany the act and qualify it. Bailey v. Clayton, 20 Penn. R. 295; the declarations of the obligee in a bond made after the assignment, are not admissible; otherwise, if made by holder, as held in Murray v. Oliver, 18 Miss. 405. Neither are the declarations of the payee of a note, made while he was the owner of the note, admissible in this state against a subsequent holder for value. Smith v. Schenck, 18 Barb. New York Sup. Ct. Rep. 344. Neither are the declarations or admissions of the assignor of an account stated, made after an assignment of it, admissible to prove it erroneous. State v. Jennings, use Bettison, 5 Eng (Ark.) Rep. 428. The same rule applies in the case of a sale of lands. Beal v. Barclay et al., 10 B. Mon. 261. A written declaration to a purchaser made at the time of a sale of lands, made by the owner of a ground rent thereon, is admissible as a part of the *res gestæ*, and may be proved after his death in an action between that and a prior purchaser. Sergeant v. Ingersoll, 15 Penn. State R. 343. See also Murphy v. Hubert, 16 Id. 50.

In Sharp v. Smith, 7 Rich, (S. C.) 3, the declarations of the payee of a note, the day after it bore date, he being then in possession of it, that it was given for a gaming consideration and that he had sold it, were held admissible in an action by bearer against maker. The statement that he had sold the note, was treated as a mere pretence.

So in regard to chattels, the declarations of the party in possession disparaging his title, or showing that he did not hold in his own right, are admissible against a person deriving title from him. Jennings v. Blocker's Adm'r, 25 Ala. (N. S.) 415. Byers et al. v. Fowler, 14 Ark. 86; to render the declarations of an agent admissible against his principal, they must accompany and form a part of the act authorized; they must be in the nature of a verbal act. 4 Wend. 397. For instance, the declarations of a party paying money are admissible as a part of the *res gestæ*, because they make the act operate as an application of the payment. Bank of Woodstock v. Clark et al., 25 Vt. Rep. 308. The declarations of a third person in the hearing of a party, which do not naturally call for a reply, are not admissible against him; as where declarations are made in a judicial proceeding not specially addressed to him. Brainard v. Buck et al., Id. 571.

Declarations evidence on questions of bankruptcy.

Upon questions of bankruptcy, where the intentions of the alleged bankrupt are often material to be inquired into, it is usual to give evidence of declarations, as furnishing an explanation of transactions in their nature equivocal.(1) Thus, it has been held, that a declaration accompanying a purchase of goods is admissible evidence, to show whether a person sought his living by buying and selling.(2) Similar evidence has been received to explain a bankrupt's motives, where a payment made by him is sought to be invalidated as a fraudulent preference. Upon such a question, it is competent to inquire into the bankrupt's declarations as to the state of his affairs, made about the time of the transaction in question, though not accompanying or connected with that transaction.(3) Such declarations are

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Where a party seeks to prove the declarations of an agent, the agency must be first proved; as where one present paid money for another, and it was sought to show his declarations at the time. Williams v. Kelsey & Halsted, 6 Geo. 365. The proof of the agency is to be passed upon by the court; that proved, the declarations are to be received and submitted to the jury as a part of the transaction. Munroe v. Stutts, 9 Ired. 49. The moderator of a town meeting is not an agent whose declarations bind the town, where the declarations are made at a general meeting. Morrell v. Dixfield, 30 Maine, 157. Coit v. Howd, 1 Gray (Mass.) 547; two persons met and negotiated for the purchase and sale of a pair of cattle; witness heard vendor offer them for $100, and the other offer for them $95; witness then left, and some time afterwards met the owner or vendor and heard him say that he had sold the cattle at the time of the previous negotiation, requesting witness to keep the oxen for him; and the court refused to permit this subsequent conversation to be proved against the alleged vendor, who was still living and a competent witness. Wakefield v. Crossman & Trister, 25 Vt. 298; a party is not bound or estopped by an admission or statement, when made in good faith, or under a mistaken impression of its nature or extent in fact. Whittaker v. Williams, 20 Conn. 98. It is not enough that another acts upon the admission or declaration; it must be made with a design to have it acted upon. McLellan v. Cox, 36 Maine (6 Red.) 95; the defendants were general owners, that is, several owners of distinct fractional portions of a vessel, holding the same as tenants in common; and the evidence tended to show that the vessel had been hired by Hoyt, the master, on shares; and this action was sought to be maintained against the defendants for supplies on the admission of one of them, but the court held that the admissions of one of them did not bind the others.)

(1) Questions on this subject are to be distinguished from numerous questions respecting the reception of admissions of bankrupts concerning their trading, or the petitioning creditors' debt, and which are not explanatory of any co-existing motives. See Parker v. Barker, 1 B. & B. 9; Bromley v. King, R. & M. 228. Respecting admissions of trading made before bankruptcy, see Smallcombe v. Bruges, M'Clel. 45; and respecting admissions of petitioning creditor's debt, see Sanderson v. Laforest, 1 C. & P. 46.

(2) Gale v. Halfknight, 3 Stark. R. 58.

(3) Vacher v. Cocks, M. & M. 353; Herbert v. Wilcocks, Id. 355, n. See, also, Belcher v. Brake, 2 C. & K. 658.

NOTE 82.—The declaration of a bankrupt as to the state of his affairs, and letters received from his correspondents refusing to loan him money, are receivable in evidence, in an action between third persons, to show the state of his affairs at the time. Vacher v. Cocks, 1 Mood. & Malk. 353. Where A. & B., who were partners in trade, became embarrassed about the 17th March, and on the 27th, applied for a discharge under the insolvent law; and where, as between the permanent trustee of the insolvents and the defendant, the inquiry was, whether a certain transfer of property, made by the insolvents on the 19th, to the defendant, then a creditor, was made with a view or under an expectation of being or becoming insolvent debtors; *it was held* that, for the purpose of enabling the jury to find when the intent to seek relief under the insolvent laws origi-

not admissible as proof of the fact of his insolvency; and before they are received in evidence as proof of *his knowledge* of the fact, the most correct practice would be to prove *aliunde*, in the first instance, the *fact* of his insolvency.(1) It is very common to give evidence of conversations and letters, in order to explain acts, which, according to the intentions of the party at the time, may or may not amount to acts of bankruptcy.(2) In an action of trover brought against the assignees of a bankrupt, where it appeared that the plaintiff at the recommendation of the bankrupt had sent some goods to a dyer, and had told him that the bankrupt would call and give directions about them, it was held, that these directions were admissible in evidence for the defendants, as showing who was dealing with the goods.(3)

Time of making the declaration, material.

Much discussion has arisen with respect to the limits of time (with reference to the date of transactions insisted upon as an act of bankruptcy) within which the declarations of the alleged bankrupt ought to be proved to have been made, to render them admissible in evidence. It is a question for the court, in each case, to consider whether the declaration proposed to be received does or does not come within a reasonable time of the disputed act: and, for this purpose, the court will inquire into the existence of any connecting circumstances between the declaration and the act of bankruptcy.(4) The rule is not confined to the precise time of the act in question.(5) For, as was remarked by Lord Denman, C. J., in

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nated, declarations of one of the insolvent partners, made a few days before the 20th, that if certain creditors came on them, they must stop payment, or petition; that bills of sale of household furniture, executed by them on the 21st, and declarations of one of the insolvents, made at the same time, that the grantee therein (who was not the defendant) had advanced money to the partners, and they wished to secure him in consequence of the situation they were placed in; and entries in the day-book of the insolvents, dated the 19th, 20th, 21st, and 23d, showing a delivery of goods and notes to various persons, and among others to the defendants; were all competent evidence for that object, as surrounding circumstances of the transaction and a part of the *res gestæ*. Kolb v. Whitley, 3 Gill & John. 188, 195 to 199.

(Under our Bankrupt Act of 1841, securities given "in contemplation of bankruptcy" were rendered void, where it appeared that the debtor contemplated an act of bankruptcy, or a decree of court declaring him a bankrupt, at the time of giving the security. Buckingham v. McLean, 13 How. U. S. 151.)

(1) Thomas v. Connell, 4 M. & W. 269. See, also, Craven v. Halliley, cit. Id. 270, by Parke, B.; Vacher v. Cocks, M. & M. 353.

(2) B. N. P. 40; Robson v. Rolls, 9 Bing. 349; Jayer v. Garner, 7 Bing. 103.

(3) Sharp v. Newsholme, 5 N. C. 719.

(4) See the observations of the court in Ridley v. Gyde, 9 Bing. 349, and in Rawson v. Haigh, 2 Bing. 99.

(5) See the last note; and the observations of the court in Ridley v. Gyde, 9 Bing. 349, and in Thomas v. Connell, 4 M. & W. 267. The language of Lord Ellenborough, C. J., in Robson v. Kemp (4 Esp. 233), confining the inference of intention to previous or cotemporary declarations, may perhaps be considered as no longer adhered to by the courts. The rule seems to have been

giving the judgment of the court, in the case of Rouch v. The Great Western Railway Company,(1) "the nature and strength of the connection (of the declaration) with the act are the material things to be looked at; and, although concurrence of time cannot but be always material evidence to show the connection, yet it is by no means essential."

In that case, which was an action by the assignees of a bankrupt to recover property belonging to him, it was held that a letter written by him during his absence from home, stating that he was absent to avoid two writs that were out against him, was admissible evidence for the plaintiffs to show an act of bankruptcy. But, being written during the bankrupt's absenting himself from home, they were in fact cotemporaneous with the act.

In a leading case upon this subject, Bateman v. Bailey,(2) a conversation with the bankrupt, which had passed on his return home at night, after having been absent nearly two days, was permitted to be given in evidence. And this case has been recognized, and followed by subsequent authorities to the like effect.(3) In one of the latest cases,(4) the trader absented himself on the 16th of February till the 9th of March; and two letters written by him on the 16th of January preceding, asking for time on two bills of exchange payable in February, were received, as showing that the bankrupt was a needy man, and to give a color to his absence.

In cases where the act of bankruptcy insisted on is a fraudulent transfer, which is not capable of being proved by any single incident, but depends on the situation of the bankrupt, or his conduct and language with reference to the whole transaction—a considerable interval may frequently elapse between the date of a disputed act of bankruptcy, and that of the declarations calculated to explain it. In the case of Ridley v. Gyde,(5) a conversation with the bankrupt was, under the peculiar circumstances of the case, allowed to be given in evidence, which had passed twenty-six days after the disputed act of bankruptcy, which was a fraudulent transfer. And in cases of continuing acts of bankruptcy, as departing the realm, or remaining abroad with intent to defeat or delay creditors,

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formerly confined to cotemporaneous declarations. See Ambrose v. Clendon, Ca. temp. Hardw. 267.

(1) 1 Q. B. 51, 61.

(2) 5 T. R. 512. The language of the court is not quite so strong as the effect of the decision. See observations on this case, Eden's Bankrupt Law, 3d edit. p. 360; Evans' Pothier, Vol. 2, p. 285.

(3) Newman v. Stretch, M. & M. 338; Rawson v. Haigh, 2 Bing. 99; Ridley v. Gyde, 9 Bing. 349; Rouch v. The Great Western Railway Co., 1 Q. B. 51. There is also a prior case, Maler v. Eyloe, 2 Stark. R. 809.

(4) Smith v. Cramer, 1 N. C. 585.

(5) 9 Bing. 349. Park, J., relied much on an intervening circumstance of a fraudulent transfer between the declaration and the act of which the bankrupt, at the time of the declaration, falsely professed a total ignorance.

letters or declarations may be received during the continuance of the act of bankruptcy, and long after the commencement of it. Thus, in Rawson v. Haigh,(1) where the alleged act of bankruptcy consisted in departing the realm with intent to delay creditors, two letters were received—one sent from Calais, and the other from Paris—the latter having been written upwards of a month after the time of the bankrupt quitting England.

In an action by the assignees of a bankrupt, to recover money paid by the bankrupt to the defendant in fraudulent preference, declarations by the bankrupt, made two months before the *fiat* in bankruptcy, were admitted, for the purpose of showing his knowledge of his own insolvency at the time of his making them.(2)

The declarations or letters must be connected with the state of the party's mind at the time of doing the act;(3) and in a case where there was no evidence as to the time when declarations explanatory of an act of bankruptcy were made, they were rejected.(4)

Declarations of conspirators, when evidence against co-conspirators.

Another well known example of evidence admissible as part of the *res gestæ* is supplied in the instance of prosecutions which involve a charge of conspiracy. It is an established rule, that where several persons are proved to have combined together for the same illegal purpose, any act done by one of the party in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of the law, the act of the whole party:(5) it follows, therefore, that any writings or verbal expressions, being acts in themselves, or accompanying and explaining other acts, and so being part of the *res gestæ*, and which are brought home to one conspirator, are evidence against the other conspirators, provided it sufficiently appear that they were used in the furtherance of a common design.(6)

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(1) 2 Bing. 99.

(2) Thomas v. Connell, 4 M. & W. 267.

(3) See observations of the court in Rawson v. Haigh, 2 Bing. 99.

(4) Marsh v. Meager, 1 Stark. R. 353. And see Robson v. Kemp, 4 Esp. 233. In Lees v. Marston (1 Mo. & R. 210), Park, J., held that a statement of a bankrupt could not be received, unless it could be proved to have been made whilst he was absenting himself, or immediately on his return. This authority was cited in Smith v. Cramer, 1 N. C. 585.

(5) Charge of Bayley, J., in Watson's Case, 32 How. St. Tr. 7. See, also, Brandreth's Case, 32 How. St. Tr. 854, 857; R. v. Salter 5 Esp. 125; R. v. Cope, 1 Stark. R. 144.

(6) Hardy's Case, 24 How. St. Tr. 704. What the effect of such evidence will be, must depend on a variety of circumstances; as, whether the prisoner was attending to the conversation; whether he approved or disapproved. By Eyre, C. J., Ib.

NOTE 83.—(The common design must be first shown before the statements or declarations made by one of them, in the absence of the others, can be given in evidence against the others. The People v. Parish, 4 Denio, 153; Williamson v. The Commonwealth, 4 Gratt. 547. Proof of the plot or combination must precede proof of declarations made by either of the alleged conspirators, though the conduct, acts and declarations of the separate parties in the planning or execution of the scheme may be shown as evidence of the common design. The State v. Simons

In Stone's Case,(1) the prisoner was indicted for treason, and was charged with conspiring, together with a person of the name of Jackson, to collect and communicate intelligence to the French government. After evidence had been given of a conspiracy for this purpose, a letter written by Jackson, containing treasonable information, and which had been intercepted, was received in evidence against the prisoner.

Upon the same principle, in Hardy's Case,(2) a letter written by the chairman of a meeting in London to a delegate sent by that meeting into Scotland, was received in evidence; the letter containing encouragement to that delegate to proceed in the cause in which he had been engaged by the direction of the meeting in London; and that meeting being composed, amongst others, of the prisoner, the writer of the letter, and the person to whom it was addressed. In the same case,(3) evidence was admitted to prove that Thelwall (who was a member of the Corresponding Society with the prisoner) had brought a paper with him to a printer, and desired him to print it; the paper being considered as evidence to prove a circumstance in the conspiracy.

On the same trial numerous letters were read which had been written

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4 Strobh. 266; Regina v. Mears, 1 Eng. Law and Eq. 581; State v. Ripley, 31 Maine, 386. And the common design having been proved, the declarations of one of the parties may be shown in evidence against them all. Glory v. The State, 8 Eng. (13 Ark.) 236.) It makes no difference that the person who utters the declaration is not a party to the suit which draws the conspiracy in question. Claylor v. Anthony, 6 Rand. 285. On an information in nature of a *quo warranto*, to avoid the election of usurping vestrymen in a religious corporation, whose election was objected to as being procured by preconcerted tumult and violence, various conversations in respect to the election among the corporators, at their meeting, and at meetings of certain members of the congregation, and at meetings of certain voluntary societies, were received in evidence in behalf of the commonwealth. And held, that it was properly put to the jury whether what they had heard was relevant, and ought to have any influence as being connected with the election. Commonwealth v. Woolser et al., 3 Serg. & Rawle, 29, 31. In case of a fraudulent combination to extort money by C., T., H. and others, which probably continued on foot down to the time of the trial, held that the declarations of one, being part of the *res gestæ*, were admissible to affect the others. Apthorpe v. Comstock, 2 Paige, 482, 488. The plaintiff, C., holding a bill of sale of personal property, subject to the levy of an execution, the debtors in the execution, who had given the bill of sale to the plaintiff, conspired with M. to procure a sheriff's sale, in the plaintiff's absence, so as to prevent his redeeming the property; and it was sold at auction to M. In trover by C. against certain persons who claimed title through M., the declarations of one of the debtors and M., made about the time of the auction, were held admissible against the defendants, as part of the *res gestæ*. Crary v. Sprague, 12 Wend. 41. See Babb v. Clemson, and Willies v. Farley, 3 Carr. & Payne, 395, where a vendor in possession after sale may, by his declarations, affect his vendee, on the ground of the *res gestæ*.

The declarations of joint wrongdoers, when received to affect others, are not always confined to the narrow ground of the *res gestæ*. In most instances, the common object being first proved, and the wrong done, admissions by one made long after the injury is complete, may be received to affect the others.

(1) R. v. Stone, 6 T. R. 527; S. C., 1 East, 97; 25 How. St. Tr. 1266.

(2) 24 How. St. Tr. 704. The scruple of Eyre, C. J., in consequence of the letter never having reached its destination, does not appear to have any weight.

(3) 24 How. St. Tr. 199.

by co-conspirators in furtherance of the common object, and tracts and other writings distributed by them were received in evidence; being in the nature of verbal acts, for which the prisoner, though not personally present when they were spoken, written or published, was nevertheless responsible.

In like manner, consultations in furtherance of a conspiracy are receivable in evidence,(1) as also letters or drafts of answers to letters, and other papers found in the possession of co-conspirators, and which the jury may not unreasonably conclude were written in prosecution of a common purpose to which the prisoner was a party. In Horne Tooke's Case,(2) the draft of a letter intended to have been sent by Hardy, as secretary to the Corresponding Society, in answer to another letter, and which was found in Hardy's possession, was admitted. And in the same trial, another letter was admitted, which was written by the secretary of a society at Sheffield, and was addressed to the prisoner, but was found in Thelwall's possession.

For the same reason, declarations or writings explanatory of the nature of a common object, in which the prisoner is engaged, together with others, are receivable in evidence; provided they accompany acts done in the prosecution of such an object, arising naturally out of these acts, and not being in the nature of a subsequent statement or confession of them. Upon this principle the expressions of the mob in the Sacheverell riots, that they designed to pull down the meeting-houses, were admitted in evidence.(3) The same kind of evidence was received in Lord George Gordon's Case;(4) and on the same principle, in other cases, the hissing of a mob, their declarations, and inscriptions upon banners, have been held to be admissible, as showing the disposition and character of the mob, in proceedings wherein the prisoner was concerned.(5)

Upon the same principle, in Vincent's Case,(6) on an indictment for a conspiracy to induce illegal meetings for the purpose of exciting alarm in the minds of her Majesty's subjects, evidence having been given of several such meetings at which the defendants were present, it was ruled that a witness, who was a superintendent of police, might be asked, whether per-

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(1) Lord Russell's Case, 9 How. St. Tr. 578; cited in Hardy's Case.

(2) 25 How. St. Tr. 220. And see the point respecting letters found in the possession of co-conspirators in Watson's Case, *infra*.

(3) 15 How. St. Tr. 552.

(4) 21 How. St. Tr. 542.

(5) R. v. Hunt, 3 B. & A. 566; Redford v. Birley, 3 Stark. R. 76. A point was raised in R. v. Hunt, whether the evidence of inscriptions on banners was the *best* evidence; as to which, see *infra, On Secondary Evidence.* A point occurring in the same trial, as to the admissibility of resolutions at a former meeting, seems to depend rather upon the doctrine of admissions, and properly to belong to that part of the present work which treats of the relevancy of proofs. See further, Burdett v. Colman, 14 East, 183.

(6) R. v. Vincent, 9 C. & P. 275.

sons had complained to him of being alarmed by these meetings, and that it was not necessary to call such persons themselves.

Statements of conspirators when not part of the *res gestæ*.

But where words or writings are not acts in themselves, nor part of the *res gestæ*, but a mere relation or narrative of some part of the transaction, or as to the share which other persons have had in the execution of a common design, the evidence is not within the principle above mentioned: it altogether depends on the credit of the narrator, who is not before the court, and therefore it cannot be received.

Thus, on the trial of Hardy for high treason,(1) a question arose as to the admissibility of a letter written by Thelwall, and sent to a third person not connected with the conspiracy, containing seditious songs, which the letter stated to have been composed and sung at the anniversary meeting of the London Corresponding Society, of which society the prisoner and the writer of the letter were proved to be members. The argument in favor of the admission of the evidence was, that the letter was an act done in furtherance of the conspiracy; that the letter contained language of incitement, not merely a narrative or confession by a stranger, and that in such case "*scribere est agere.*" The objection was, that the letter contained merely a relation by the writer, that certain songs had been sung, which could not be evidence against the prisoner. The majority of the court decided against the admissibility of the letter. Eyre, C. J., Macdonald, C. B., and Hotham, B., were of opinion, that the letter could not be received. Buller, J. (with whom Grose, J., agreed, in thinking it admissible), said, the letter ought to be received in evidence, for the purpose of showing what was the nature and extent of the conspiracy; that in Damaree's and Purchase's Cases, evidence was received of what some of the parties had done, when the prisoner was not there; that, on the trial of Lord Southampton, something said by Lord Essex, previous to the prisoner's being there, was admitted as evidence: and that, in Lord George Gordon's Case, evidence of what different persons of the mob had said, though he was not there, had been admitted. But Eyre, C. J., and the other judges, considered the letter, not as an act done in prosecution of the plot, but as a mere narrative of what had passed. "Correspondence," said the chief justice, "very often makes a part of the transaction, and in that case the correspondence of one who is a party in a conspiracy would undoubtedly be evidence, that is, a correspondence in furtherance of the plot; but a correspondence of a private nature, a mere relation of what had been done, appears a different thing." And with respect to the cases alluded to by Buller, J., the chief justice observed: "In the cases of Damaree and Lord George Gordon, the cry of the mob at the time made a part

(1) 24 How. St. Tr. 452, 475. See 32 How. St. Tr. 351.

of the fact, part of the transaction, and therefore such evidence might properly be received."

Writings in possession of conspirators, before or after apprehension.

It is in consequence of the distinction between writings or declarations which are a part of the transaction, and such as are in the nature of subsequent statements, but not part of the *res gestæ*, that the admissibility of writings often depends on the time when they are proved to have been in the possession of co-conspirators; whether it was before or after the time of the prisoner's apprehension. Thus, on the trial of Watson,(1) some papers, containing a variety of plans and lists of names, which had been found in the house of a co-conspirator, and which had a reference to the design of the conspiracy, and in furtherance of the alleged plot, were held to be admissible evidence against the prisoner. All the judges were of opinion that these papers ought to be received; inasmuch as there was in the case strong presumptive evidence that they were in the house of the co-conspirator, *before* the prisoner's apprehension: for the room in which the papers were found had been locked up by one of the conspirators. And the judges distinguished the point in this case from a point cited from Hardy's Case, where the papers were found, *after* the prisoner's apprehension, in the possession of persons who, possibly, might not have obtained the papers till afterwards.

Declarations of rioters.

The principal decisions respecting writings and declarations of conspirators have been pronounced on the occasion of trials for high treason; but similar evidence has been frequently given upon prosecutions for simple conspiracy, or for riot, and, generally, for offences perpetrated by confederates.(2) Thus where a defendant was indicted for having conspired with one Jones and others to raise an insurrection,(3) and it was proved that the defendant and Jones were both members of a Chartist lodge, and that they were both at the house of the latter on a certain day, on the evening of which the defendant directed certain persons, there assembled,

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(1) 32 How. St. Tr. 348, 350; S. C., 2 Stark. R. 140.

(2) Such evidence was repeatedly given upon the trials under the Nottingham Special Commission, A. D. 1832, on prosecutions for demolishing a mill, and for arson, the offences having been committed by a riotous mob. Also, in actions against the hundred, arising out of the same disturbances. The like evidence is often given in cases of confederacies for uttering counterfeit coin; and on trials for felonies of various kinds, involving a charge of conspiracy. See 6 T. R. 528. See also the cases cited 2 Russ. C. & M. by Greaves, 773, and R. v. O'Connell, Armstrong & Trevor's R. (Ir.), 1844.

(Several persons, acting in concert in the perpetration of an offence, such as going to the prosecutor's stable and shaving his horse's tail, creating a noise and disturance, are guilty of a riot. The State v. Alexander, 7 Rich. (S. C.) 5. The parties present aiding and abetting the violence and illegal act, are guilty. The State v. Straw, 33 Maine, 554.)

(3) R. v. Shellard, 9 C. & P. 277.

to a race course in the neighborhood, whither Jones had gone before with others; evidence was admitted that Jones, at an earlier part of the same day, had directed other persons to go to the race course; and it being proved that Jones with an armed party went from the race course to another place, evidence was also received of what Jones had said at this place, it being considered as all one transaction.

The case of The Queen agt. Blake(1) further illustrates the distinction which has been above pointed out, between declarations made or acts done in furtherance of the common design, and subsequent statements or mere relations of acts stated to have been done. That was an information against two defendants, Blake and Tye, for conspiring to defraud her Majesty by importing certain goods without paying the proper duties; the former pleaded not guilty, but the latter did not appear. At the trial it was proved that Tye was agent for the importer of the goods in question, and that Blake was a landing waiter at the custom-house; that it was Tye's duty (under the 3 & 4 Wm. IV, c. 52, § 24) to make an entry describing the quantity, &c., of the goods; that a copy of such entry was delivered to Blake, whose duty it was to compare it with the goods, and, if they corresponded, to write "correct" on Tye's entry, whereupon the latter would receive the goods on payment of the duty according to his entry. It was further proved that Tye's entry was marked "correct" by Blake, and corresponded with the copy of the latter; that payment was made according to the quantity there described, and that the goods were delivered to Tye. Evidence was then offered of an entry by Tye in his day-book of the charge made by him on the importer, showing that the charge was for duty paid on a larger quantity than appeared by the official entry and copy; and it was held that this was admissible against Blake, as evidence of something done in the course of the transaction, and a step in the proof of the conspiracy. On the other hand, it having been shown that Blake received the proceeds of a check drawn by Tye after the goods were passed, the counterfoil of this check was offered in evidence, on which an account was written by Tye showing, as was suggested, that the check was drawn for half the aggregate proceeds of several transactions, one of which corresponded in amount with the difference between the duty paid and the duty really due on the above goods; and it was held, that this was not evidence against Blake, upon the principle that a mere statement made by one conspirator to a third party, or any act of such conspirator not done in pursuance of the conspiracy, is not evidence for or against another conspirator.

The principles upon which evidence of the description above mentioned is admitted, are equally applicable to the trial of civil injuries, in

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(1) 6 Q. B. 126.

the commission of which different defendants have concurred.(1) But evidence of this description is inadmissible in actions where no common motives or object can be imputed, as in actions for negligence;(2) at least it ought not to affect co-defendants where such a consequence can be avoided. And it would seem that the principle upon which the declarations of associates are admitted (in civil actions not less than in proceedings upon criminal charges) only applies where such declarations are strictly part of the transaction in question. In The King agt. Hardwicke,(3) the rule is incidentally laid down by Lord Ellenborough, C. J., but apparently without proper limitations. He says:—"Although an admission by one of several defendants in trespass will not establish others to be co-trespassers; yet, if that is proved by other competent evidence, the declaration of one, as to the motives and circumstances of the trespass, will be evidence against all who are proved to have combined together for the common object." In one case,(4) Garrow, B., admitted the declaration of a co-trespasser as to common motives, in an action for false imprisonment made five weeks after the injury complained of; he was a defendant on the record, and had not suffered judgment by default. But it is probable this case would not now be acted upon.

SECTION II.

Of the Rule respecting the Exclusion of Hearsay Evidence.

The technical meaning of the term *hearsay evidence* having been explained in the preceding section, it remains now to consider the rule by which such evidence is generally excluded.

Principle of the rule.

The principle of the rule, according to which evidence is rejected as being *hearsay*, is, that such evidence requires credit to be given to the statements of a person who is not subjected to the ordinary tests required by law for ascertaining the truth of testimony—the author of the statement not being subject to cross-examination in the presence of a court of justice, and not speaking under the religious and penal sanctions of an oath—his character and motives not being investigated, and his deportment not observed. It may be further remarked, that other objections apply to this species of evidence, which are equally applicable to evidence

(1) By Lord Ellenborough, C. J., in R. v. Hardwicke, 11 East, 585. See also Powell v. Hodgetts, 2 C. & P. 432; North v. Miles, 1 Campb. 389; Bowsher v. Cally, 1 Campb. 391.

(2) Daniels v. Potter, M. & M. 501.

(3) 11 East, 585.

(4) Wright v. Court, 2 C. & P. 232.

of oral matters in general, and which seem to render the application of the tests referred to peculiarly necessary. Such evidence is very liable to be fallacious, from the facility by which it may have been imperfectly heard, or from having been misunderstood or inaccurately remembered, or perhaps perverted, or possibly altogether fabricated. It is to be observed, also, that persons communicating such evidence are not subject to the danger of a prosecution for perjury (in which a contradiction by two witnesses is requisite); for, where the hearsay statement is said to have been made when no third person was present, or purports to be that of a deceased person, the witness has no cause to be apprehensive of punishment, even though he has entirely fabricated the statement.

With reference to the necessity of an oath or affirmation, "no evidence," says Buller, J., "is to be admitted but what is upon oath: and if the first speech was without oath, another oath that there was such a speech makes it no more than a bare speaking, and so of no value in a court of justice."(1) The misconstructions to which evidence of oral matters is subject, from the ignorance or inattention of hearers, or from criminal motives, are powerfully adverted to by Mr. Justice Foster, in his Treatise on the Laws of Treason.(2)

History of the rule.

The rule under consideration is not of great antiquity.(3) So late as the year 1790, it does not appear to have been settled with regard to depositions taken before magistrates (whether upon criminal charges or upon other occasions); and, as will appear from the following pages, several of the exceptions to this rule have been much narrowed within very modern times.

Throughout the state trials before the time of the commonwealth, the worst species of hearsay was constantly received; such as the examina-

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(1) B. N. P. 294. And see by Bayley, J., and Littledale, J., in Spargo v. Brown, 9 B. & C. 938; and by Lord Tenterden, C. J., in Doe d. Sutton v. Ridgway, 4 B. & A. 55.

NOTE 84.—The law requires the sanction of an oath to all parol testimony. It never gives credit to the bare assertion of any one, however high his rank or pure his morals. *Per Curiam*, in Gray v. Goodrich, 7 John. Rep. 96. See also, Davis v. Whitesides, 4 J. J. Marsh. 116. All translations from foreign languages, to be evidence, must be on oath, otherwise they are not receivable, though made by a consul. Vandervoort v. Smith, 2 Cain. Rep. 155.

(The form of the oath is not essential. And any person who has conscientious scruples against taking an oath, or swearing in any form, may in this and most of the states, give testimony on his solemn declaration or affirmation. 2 R. S. 505 (3d ed.) Under a late statute (17 & 18 Vict., c. 125), passed in 1854, the English rule is the same. There are also cases specially provided for by statute, in which certificates have the force of positive testimony under oath, such as apothecaries' certificates, certificates by the clerk of a court of a conviction of crime, certified copies of documents and the like. See 14 & 15 Vict. c. 99.)

(2) Foster on Treason, 200.

(3) One of the earliest cases in which the rule was acted upon is Sampson v. Yardley, Pasch. 19 Car. II, Keb. 223, pl. 74.

tions of persons who might have been produced as witnesses, or who had been convicted of capital offences, or who had signed confessions in the presence only of the officers of government, and under the torture of the rack.

On the trial of Sir Walter Raleigh, for example, the only piece of evidence directly affecting him was a paper purporting to be a statement by a third person of the effect and result of Lord Cobham's examination, which that person had signed under threats from the chief justice. This was admitted, as the chief justice observed, lest there should be "a gap opened for the destruction of the king;" though Sir W. Raleigh urged "that he might see his accuser face to face," adding that "if, being charged on his soul, Lord Cobham affirmed the matter of the examination, he consented to be taken to be guilty." And on the trial of Sir R. Throgmorton, the principal deposition had been taken from a man who had been convicted of treason, but whose execution had been respited from time to time, in order to induce him to accuse the prisoner.

Even during the reign of Charles the Second, though the practice of reading the depositions of persons who might have been produced as witnesses was discontinued, yet hearsay evidence was allowed in many cases in which it would now be rejected. On the trials for the Popish Plot, the evidence consisted principally of a narrative of the transactions of the supposed conspirators in various countries, collected during a long period of time from a multitude of letters, the contents of which were given from recollection; the witnesses not having taken a note of any part of the letters at the time of reading, not having read them for a great number of years, nor having been required in reading to notice their contents, and not producing one of the letters, or a copy, or even an extract.(1)

Extent of the rule.

The rule under discussion applies, although the account has been given upon oath, and in the course of a judicial proceeding; as, where a pauper has been examined upon oath (unless under particular statutes) by magistrates, respecting his parochial settlement;(2) or where a deposition has been taken by magistrates upon a criminal charge in the absence of a prisoner.(3)

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(1) The reader is referred to Mr. Phillips's Review of the Earlier State Trials: in particular to the trial of Lord Stafford, Vol. 1, p. 443, and that of Algernon Sydney, Vol. 2, p. 105.

(2) R. v. Nuneham Courtney, 1 East, 373; R. v. Ferry Frystone, 2 East, 54; R. v. Abergwilly, Id. 63. See R. v. Eriswell, 3 T. R. 725.

(3) See R. v. Crowther, 1 T. R. 125; R. v. Smith, 2 Stark. R. 208; Holt, 614; R. & R, C. C. 339.

NOTE 85.—On certiorari, it appeared that after the jury had retired to deliberate, they returned into court, and were permitted to re-examine a witness in the absence of the parties. *Per Curiam;* "This is error. No man can be condemned in our law without hearing the witnesses against

The rule applies also, notwithstanding that no better evidence is to be found, and though it be certain that, if the account is rejected, no other can possibly be obtained: as, where the evidence purports to be the narrative of an eye-witness of a transaction, and that witness was the only one, and he is since dead.(1) And, as has already been seen, where a party is indicted for ravishing a child, who is too young to understand the nature of an oath, a statement made by her is not admissible.(2)

Doubts were formerly entertained, whether declarations by an attesting witness to a will or other instrument might not be given in evidence after his death, to show that he had forged or fraudulently altered the instrument.(3) It was suggested, that as the one party used the declaration of the subscribing witness, as evidenced by his signature, to prove the ex-

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him, or having an opportunity to hear them, and to cross-examine them." Judgment reversed. Perine v. Van Note, 1 South. 146.

Where arbitrators, after the parties had closed their proofs, and left the arbitrators to deliberate, re-examined a witness without the parties being present, and without their knowledge or consent, upon a material point of testimony upon which they differed, the plaintiff (a party) prayed an injunction against a suit on the arbitration bond against him. Chancellor Kent denied it, saying there was no misconduct; no new testimony appeared to have been given, nor that the witness deposed differently from what he did on his first examination. It was a mere explanation of his testimony. Herrick v. Blair, 1 John. Ch. Rep. 101. Yet, if it clearly appear that any of the party's witnesses were not examined, and in his presence, it will be ground for setting the award aside. Bedington v. Southall, 4 Price, 232.

(1) In the Berkeley Peerage Case (4 Camp. 515), Mansfield, C. J., remarked: "In Scotland, and most of the continental states, the judges determine upon the facts in dispute as well as upon the law, and they think there is no danger in their listening to evidence of hearsay, because when they come to consider of their judgment on the merits of the case, they can trust themselves entirely to disregard the hearsay evidence, or to give it any little weight which it may seem to deserve."

In like manner, as the reporter remarks, according so the practice of the English courts, in affidavits which are submitted to the judges only, hearsay evidence is constantly admitted and acted upon.

In Scotland the rule is, that evidence on the relation of another person is admitted, where the relator is since dead, and would, if dead, have been a competent witness. And this doctrine is carried to such an extent, that if the relation has been transmitted to the witness through several successive relators, it is still admissible, if the original and intermediate relators are all dead, and would, if living, have been competent witnesses. Tait Ev. pp. 430, 431.

(The declarations of a deceased person cannot be proved to show the loss of a paper, so as to let in secondary evidence. Harper v. Scott, 12 Geo. 125. Nor can a person's death or absence from the state be shown by hearsay or by general reputation. Smothers v. Mudd, 9 B. Mon. 490; State Bank v. Seawell, 18 Ala. 616. And where a person is proved to have been absent, and not heard from for seven years, the presumption arising therefrom cannot be rebutted by hearsay evidence that he has been since seen in his own state—the person who saw him must be produced. Smothers v. Mudd, *supra*. In ordinary cases, however, hearsay evidence may be given of the death of a person (Jackson v. Boneham, 15 John. R. 226); but not to prove his death in a particular manner. Jackson v. Etz, 5 Cowen, 314.)

(2) R. v. Brasier, 1 Leach, 199; S. C., 1 East, 443; R. v. Nicholas, 2 C. & K. 246; *Supra*, pp. 12, 13.

(3) See Wright v. Littler, 3 Burr. 1244; S. C., 1 W. Bl. 346; Aveson v. Lord Kinnaird, 6 East, 193.

ecution, the defendant might use any declaration of the same witness to disprove it: and further, that the declaration was a substitute for the loss of the benefit of cross-examination, which might have been had if the witness had been alive and examined. But in the case of Stobart v. Dryden,(1) it was held, that such declarations were inadmissible in evi-

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(1) 1 M. & W. 623. See *infra, Dying Declarations.*

Though a witness keep out of the way to avoid a subpœna, his declarations cannot be given in evidence. Woodward v. Paine, 15 John. R. 493. The rule allowing the testimony of a witness given on a former trial to be shown in evidence *after his death*, shows with how much strictness the courts adhere to the rule excluding mere hearsay evidence. In this state, however, it has been held that where the subscribing witness to an instrument is dead, and the same is read in evidence on proof of his handwriting, it is competent for the opposite party to prove that the character of the subscribing witness at the date of the instrument for truth and veracity, was bad. Losee v. Losee, 2 Hill R. 609. On the presumption that his character for veracity was good, proof of his signature, after his death, comes in by way of substitute for his oath. Crouse v. Miller, 10 Serg. & Rawle, 155, 158, per Gibson, J. So that proof of his bad character destroys the evidence resulting from proof of his signature: for the same reason, his declarations have been received in evidence to prove that the instrument was a forgery. See note to Losee v. Losee, 2 Hill, 612.

NOTE 85 *a*.—2 Wash. C. C. Rep. 135; Vassee v. Mifflin, 4 Wash. C. C. Rep. 519. In noticing hearsay as evidence we have, so far, forborne to classify the authorities as they relate either to oral or written declarations; treating letters, memoranda, entries, recitals, &c., as standing on the same footing with what a witness hears in conversation. That they do so in general, will be seen by the instances which we have given in note 78, *ante*, where the kind of declaration offered is noted in each case, as well as in the instances which will be hereafter presented in the text and notes. If there be cases in which the mere writing of a declaration renders it competent, it will be found in memoranda of deceased witnesses and in book accounts, both of which will hereafter be noticed at large.

The present note will be more profitably employed by calling the attention of the student to the degree of proof by which hearsay is established, where the law recognizes its admissibility. If in writing, the document must of course be adduced, or its absence accounted for; and then, as in other cases, inferior evidence may be given. Adams v. Kelly, Ry. & Mood. N. P. Cas. 157, and several other cases cited *ante*. If there be no writing in the case, but only an objection that the person who pronounced the words should be produced, and the hearer excluded, it is quite obvious that this goes not to the *competency* as founded on *grade*. It relates merely to the strength or effect of the testimony, which, though, for that reason, open to observation before the jury, can never be excluded as secondary. Our author, in the text, considers this a matter so well settled as to answer for an illustration. Taking the written declaration of a third person, which makes a part of the *res gestæ*, after remarking that the declaration may be proved by the writing itself, he says: "It cannot be more necessary to call the party who wrote than, in the case of a verbal agreement, *to call the party who spoke the words*." That this is so in respect to the declarations of an agent, see *infra*, as to admissions made by agents. The agent who spoke need not be produced to prove his declarations, though a competent witness for either party. Any one who heard him is a good primary witness. So in all the numerous cases of the declarations of third persons, admissible as making a part of the *res gestæ*, which we shall have occasion to consider in the subsequent notes, the objection was never made that the *speaker* must be sworn, as being able to give evidence higher in degree than that of a *hearer*.

We should not for a moment have thought it necessary to make the above remarks, had it not been for the case of Coleman v. Southwick, decided in the late Supreme Court of New York, in 1812. 9 John. Rep. 45. The suit was for a libel. To mitigate damages the defendant offered one North, to prove what one S. told the defendant in respect to the plaintiff before the libel appeared. It was not denied by the court that S.'s information went much to extenuate the offence; but the sole objection was, that the *hearer's* testimony was inferior in *degree* to that of

dence. The observations of the court upon the inconvenience, which would result from making an exception to the general rule in such a case, illustrate the expediency of the rule. It was said, that "the rights of parties under wills would be liable to be affected at remote periods by loose declarations of attesting witnesses, which these parties would have no opportunity of contradicting or explaining by the evidence of the witnesses themselves. The party impeaching the validity of the instruments would, it is true, have an equivalent for the loss of his power of cross-examining the living witness; but the party supporting it would have none for the loss of his power of re-examination."(1)

It is now proposed to treat of the exceptions to this general rule of the exclusion of hearsay evidence, in the following order:—

First; in matters of public or general interest.

Secondly; in questions of pedigree.

Thirdly; of the exception with reference to ancient possession.

Fourthly; in the case of dying declarations.

Fifthly; in the case of declarations against interest by persons since deceased.

Sixthly; in the case of declarations or entries made in the course of office or business.

Seventhly; in the case of testimony given on a former trial by a witness since deceased.

Eighthly; in the case of an admission by a party to the suit, or by a partner or agent of a party.

Lastly; in the case of a confession by a prisoner.

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the *speaker;* and three of the judges (Kent, Thompson and Van Ness,) whose opinion was delivered by Kent, C. J., *contra* Spencer and Yates, J's, held that it was. The then learned chief justice tells us that this was the established doctrine. He certainly makes a series of remarks, *a priori*, which would have been sound argument to the jury upon the credibility of the testimony; but favors us with neither adjudication nor dictum for an application of the rule which excludes such testimony because degraded on the scale of competency. His animated exhortation for adhering to the established rules of evidence would seem most direct in its application to the familiar rule advanced by Spencer, J., in behalf of the dissenting judges, on the plainest authority: that words making a part of the transaction may be proved by any one. The judges all agreed that the representation was part of the *res gestæ*. The doctrine put forward by the chief justice would disqualify a bystander from speaking to any *act done* by a third person, as well as a participation in that act, so long as the actor himself continued a competent witness. The direct contrary to the decision of the majority in this cause has recently been held in Rice v. Bancroft, 11 Pick. 469, 471; Ponsonby v. Debaillon, 6 Mart. Lou. Rep. (N. S.) 238, 246, 247, S. P. The last case is all fours with Coleman v. Southwick. The defendant was sued for maliciously taking out an attachment, on his oath of belief, that the plaintiff had absconded. To show his motives he offered to prove what he was told, as to the plaintiff's absconding, by a woman. On objection that the woman should be produced as the best witness, the court were at once impressed with Judge Spencer's view of the question in Coleman v. Southwick. They remark: "Whether she told the truth or not, that which she stated was a circumstance, with others, to go to the jury, to show under what impressions the plaintiff acted; and of her declarations, *those who heard her were as good witnesses as she could be.*" Id. 147.

(1) 1 M. & W. 627.

SECTION III.

Exception to the Rule as to Hearsay in Matters of Public or General Interest.

It is obvious that the objections to hearsay evidence do not apply with the same force to every species of hearsay; and that the inconvenience of rejecting it must be greater in some kinds of inquiry than in others. Hence the courts have established various exceptions to the rule which excludes hearsay evidence. The expediency of this rule of exclusion cannot indeed be satisfactorily judged of, without taking a view of the exceptions. For, on the one hand, the exceptions may be thought to obviate many objections which would exist if the rule were unlimited in its operation, while, on the other, they have themselves occasioned a substantive mischief by that mass of legal decisions which has arisen out of them—decisions which contain many subtle distinctions, and not unfrequently conflicting opinions. It will also probably be thought, that in some instances the rule of exclusion has been injudiciously relaxed, and in others unnecessarily maintained in its full strictness.

It is proposed to treat, in the present section, of the exception to the general rule, in matters of public or general interest, of which the origin is in many cases, from their very nature, antecedent to the time of what is called *legal memory*, and, in the generality of instances, can be expected only to be found in times beyond the reach of living testimony.

Definition of *public* matters.

In speaking of matters of public interest, it is to be observed that the term *public*, as applied to this subject, is not always used in its strict and literal sense, which implies that all the queen's subjects are interested in the subject matter—such, for example, as a claim of highway; but the term is often used as synonymous with *general*, that is what concerns a large number of persons.(1) It will be seen, however, hereafter that there is a distinction between these cases, as to the extent to which hearsay evidence may be admitted.(2)

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(1) See by Bayley, J., in Weeks v. Sparke, 1 M. & S. 690.

(2) See Crease v. Barrett, 1 C., M. & R. 919.

NOTE 86.—General hearsay, or, in other words, public reputation, is sometimes adduced as ancillary evidence in laying the foundation for presuming a public corporate grant. Thus, the defendant justified in trespass *de bonis*, &c., as collector, the taking of goods for parish taxes; and the Massachusetts provincial records having been burnt by two several fires, and no charter of incorporation being found among those subsisting, the defendant was allowed to prove the incorporation of the parish by general reputation. Dillingham v. Snow, 5 Mass. Rep. 547.

Another and very common sort of hearsay is general reputation, to prove that a man holds a public office or employment. This is usually introduced in connection with evidence of such acts as the office or employment imputed presupposes his right or duty to perform. The extent to which this doctrine has been applied will be partially seen by consulting our subsequent notes,

In treating of this subject, it is proposed, in the first place, to illustrate by examples the nature of matters of public and general interest: secondly, to treat of the forms in which such hearsay evidence is usually presented; and lastly, of the qualifications with which it is received.

1. Examples of matters of public and general interest.

Reputation as to general rights.

On questions respecting the existence of a manor,(1) a manorial cus-

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with the text to which they refer. We there spoke of it, with reference to the degree of evidence, as primary or secondary. We shall here add some further instances, which, while they will tend to enlarge the illustration under that head, are intended more particularly to test the application and force of hearsay evidence. In Porter v. Luther (3 John. Rep. 431), the court held that public reputation was admissible to prove the defendant a deputy sheriff, which was part of his plea of justification; and they say, "It is a general rule to admit proof, by reputation, that a person acts as a general public officer or deputy." In pursuance of this rule, it was received, in connection with the defendant's acts, to show that he was overseer of a certain road, district No. 30 (Dean v. Gridley, 10 Wend. 254); to show that persons claiming to be trustees or collectors of school districts were in truth such (Ring v. Grout, 7 Wend. 341; M'Coy v. Curtice, 9 Id. 17. And see Doe ex dem. Davy v. Haddon, 3 Dougl. 310); that a captain, acting as president of a militia court martial, was really president (indeed his acting as such was alone holden sufficient evidence); (The State v. Gregory, 2 Murph. 69); to show that a man is a constable (Adams v. Jackson, 2 Aik. 145; Johnson v. Stedman, 3 Hamm. Rep. 94, 96, 97; Barret v. Reed, 2 Id. 411); the commissioner of a county (Keyser v. M'Kissan, 2 Rawle, 139); a justice of the peace (Snow v. Peacock, 2 Carr. & Payne, 215; Wilcox v. Smith, 5 Wend. 231); or a collector (Eldred v. Sexton, 5 Hamm. Rep. 215, 216). And in Adams v. Jackson (2 Aik. 145, 146, 147), Skinner, C. J., said, where third persons are concerned, that the officer is either reputed to be such or acts as such, is sufficient proof.

The distinction taken, *ante*, that the acts of an officer *de facto*, but not *de jure*, shall be good as to others, but void for himself, is reiterated in Keyser v. M'Kissan, *supra*.

This and the like proof was denied to an officer who sued as such for a share of prize money. It was said he must produce his commission, as that was the gist of the action. Allen v. M'Neel, 1 Rep. Const. Ct. 459. *Quere*. Sawyer v. Steele, 3 Wash. C. C. Rep. 464, stated *ante, contra*. A man doing the single act in question as an officer, *e. g.* the sale of land for taxes, and giving a deed as sheriff, will not prove his commission. Rockhold v. Barnes, 3 Rand. 473. And yet it has been holden otherwise as to the act of taking a deposition. And where the person acts in the character of an officer having authority to take it, it will be received though he do not give himself the title (Bryden v. Taylor, 2 Har. & John. 396); and his signature proves itself—as where an officer is bound to take a bond. Wood v. Fitz, 10 Mart. Lou. Rep. 196. To warrant receiving a certificate from the deputy secretary, his commission, or any other acts or reputation, need not be proved. Gourdine ads. Barino's Heirs, 1 Harp. Rep. 221. So of the certificate of a commissioner appointed to take testimony in another state. Clement v. Durgin, 5 Greenl. 9. But see Hagaman v. Stafford, 2 Blackf. Rep. 351.

But note; these latter cases of official depositions and the like should be distinguished from the acts of other officers having no connection with the court. There are many such cases in the law; not only of depositions, but also of acknowledgments and certificates which are made proof *per se;* in all which cases the person officiating is regarded as a *quasi* officer of the court; and his act is recognized, of course, like the return of a sheriff, or a rule certified by the clerk of the court which is to act upon it. Courts take what is called judicial notice, that the person assuming to act has the proper authority. The commissions and acts of other officers, not acting in the course of the cause pending, nor officially empowered to furnish proofs, are matters in *pais;* and must be established according to the general rules of evidence.

(1) Curzon v. Lomax, 5 Esp. 60; Steel v. Prickett, 2 Stark. R. 466.

tom,(1), a custom of mining in a particular district,(2) a parochial modus,(3) a boundary between counties, parishes, or manors,(4), the limits of a town(5), a custom of a corporation to exclude foreigners from trading within a town,(6) a right claimed by a corporation to collect tolls on a public road,(7) or by the corporation of London to collect from west country barges,(8) a right of common,(9) a prescriptive right to free-warren as appurtenant to a manor,(10) a prescriptive liability to repair bridges,(11) or sea walls,(12) *ratione tenuræ;* or respecting the jurisdiction of a court, whether it be or be not a court of record,(13) and the like—on

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(1) Denn v. Spray, 1 T. R. 466; Roe v. Parker, 5 T. R. 26, 31; Doe d. Foster v. Sisson, 12 East, 62. And see Chapman v. Cowlan, 13 East, 10.

(2) Crease v. Barrett, 1 C., M. & R. 919.

(3) Chapman v. Smith, 2 Ves. sen. 512; S. C., 3 Gwill. 854; Harwood v. Sims, 1 Wightw. 112; Moseley v. Davies, 11 Price, 162; White v. Lisle, 4 Madd. 214; Short v. Lee, 2 J. & W. 464; Robinson v. Williamson, 9 Price, 136.

(4) Nicholls v. Parker, 14 East, 331, n.; Steel v. Prickett, 2 Stark. R. 466; Plaxton v. Dare, 10 B. & C. 17; Coombs v. Coether, M. & M. 398; Barnes v. Mawson, 1 M. & S. 77; Doe d. Molesworth v. Sleeman, 9 Q. B. 293; Brisco v. Lomax, 8 A. & E. 198; Evans v. Rees, 10 A. & E. 151; Thomas v. Jenkins, 6 A. & E. 525.

(5) Ireland v. Powell, cit. Pea. Ev. 16. See also R. v. Bliss, 7 A. & E. 555.

(6) Davies v. Morgan, 1 C. & J. 593.

(7) Brett v. Beales, M. & M. 416; B. N. P. 233.

(8) London (City) v. Clerke, Carth. 181.

(9) Weeks v. Sparke, 1 M. & S. 679; Pritchard v. Powell, 15 L. J. (N. S.) Q. B. 166; S. C., 10 Jur. 154.

(10) Carnarvon (Earl) v. Villebois, 13 M. & W. 313.

(11) R. v. Sutton, 8 A. & E. 516.

(12) R. v. Leigh, 10 A. & E. 398.

(13) Goodtitle d. Braine v. Dew, 2 Peake, 204; Rogers v. Wood, 2 B. & Ad. 245.

NOTE 87.—Under this head of hearsay evidence in respect to territorial boundary, the attention of the student is directed, first, to the nature of the right in question as *public* or *private;* and if it be private, then to its nature as corporeal, or incorporeal.

Hearsay, on questions of public right, was in part considered, and its admissibility is so well established upon authority, that judges, the most fastidious in regard to this kind of evidence, do not pretend to dispute its competency, however widely they may differ upon its force and effect. See per Lord Ellenborough, C. J., in Weeks v. Sparke, 1 Maul. & Selw. 686, 687. It may, therefore, be taken as settled, that where the boundary concerns the extent of a public municipal jurisdiction, as whether lands lie, or rights are exercisable within its true limits, either public reputation, or the particular declarations of deceased persons, made *ante litem motam*, are receivable. See Nicholls v. Parker, 14 East, 331, note. This is well exemplified in a case tried before Mr. Justice Chambre, at Shrewsbury. The question on the record was, whether a turnpike was erected within or out of the limits of the town of Wem; that learned judge permitted the plaintiff, who contended that it was within the town, to give evidence of general reputation, that the town extended to a piece of land called the town and piece; and that old people, since deceased, said that such was the boundary of the town. Ireland v. Powell, Salop Sp. Ass. 1820, Am. ed. of Peak. Ev. (5th ed.) as edited by Norris, p. 27. And, on trying the validity of a distress for a poor's rate, by magistrates. on land claimed as part of the parish of B.; to determine whether it lay there, descriptions of it in ancient leases granted by the ancestor of the plaintiff's landlord; and old rates made by the parish officers of B. on the occupiers of the land and deceased overseer's accounts crossing out the tax of the occupier, were all received as evidence of reputation upon this question of public boundary. Plaxton v. Dare, 10 Barnw. & Cressw. 17. But see Cooke v.

Banks, 2 Carr. & Payne, 478. Orders of justices describing Nottingham Castle as being in the hundred of B., and evidence that it had long been reputed to be in that hundred, was received to show that it belonged to that hundred; and an extract from Domesday Book was received to repel the presumption. Duke of Newcastle v. Broxtowe, 4 Barnw. & Adolph. 273.

Private rights are entirely another affair. How far hearsay may be brought to bear upon those which are of an incorporeal nature, we shall leave mainly to the discussions in the text. These rights are a branch of learning more peculiarly belonging to England, where they so extensively prevail, and depend so much on ancient usage as often to call for hearsay, which is almost the only remnant of evidence left. It may be set down, therefore, that on this subject the limits of hearsay evidence have been as far enlarged as considerations of safety would warrant. In going beyond them, we should violate the best dictates of experience.

But in settling the litigated boundaries of corporeal property, no courts have, probably, been more extensively engaged, or upon questions of greater difficulty, than the American. In conducting the inquiry, therefore, how far can hearsay be brought to bear on the boundaries of private property, while the English decisions are doubtless, as usual, very high evidence of the common law; yet American courts ought not hastily to be condemned, though they may appear to have gone beyond them. It will, we think, be found that England has furnished the principle upon which the American cases may be sustained to a certain extent; though we have in some respects gone far beyond them. In one of their cases at Nisi Prius, A. D. 1805, the question was whether Street Hill Waste was parcel of Iveythrone farm, and the soil and freehold of one Rooke, or not, the evidence offered of the declarations of old persons deceased as to the ancient boundary of the waste belonging to Iveythrone farm, and that it extended to the inclosures on the north side of the hill, was rejected by Graham, B., because the question was not as to the boundary of a parish or manor; but between one person's private property and another. Clothier v. Chapman, 14 East, 331, note. The verdict being in favor of the party offering the evidence, says the report, the case could not be stirred again. But in another case, A. D. 1813, the defendant prescribed for a right of digging coal in the plaintiff's freehold tenement called Whichwell Slacks, within a tract called the new land, as contradistinguished from another called the old land; and to show that Whichwell Slacks, where he dug, was comprehended within the new land, "the chief evidence was that it lay within the known boundary line, and was surrounded by other farms that were within the new land, and was always so called by persons who knew the boundaries of the old and new land." The defendant having a verdict, on motion for a new trial, the plaintiff's counsel assailed this hearsay among other evidence. But Lord Ellenborough, interrupting them, said: "As to the reputation that the estate was always termed new land, the evidence was admissible in the same way as concerning the boundaries of a manor; to show what was the boundary of the new land, within the ambit of which this particular estate [Whichwell Slacks] was included." And there the discussion as to this part of the case ended. But as to this and the hearsay which had been received, touching the usage to dig, his Lordship, when he came to deliver his final opinion, said: "That to which the evidence of reputation was applied, was that to which it always is applied in such cases, namely, as to the limits of the new land, and the general right of the lord over it." Barnes v. Mawson, 1 Maule & Selw. 77, 78, 81, 84. The amount of this decision is, that where a tract of land is known by a certain name or designation, the extent to which that name has been applied, may be shown by general reputation, and the rights of parties who deal in that tract, may thus be controlled by that kind of evidence; and so of the relation which tract A. bears to tract B., as whether one lies within or adjoining the other. Having reputed names, they are known by them to the parties and the neighborhood, as a ship is known by its name to the mercantile community.

It will readily be seen by the professional reader that not only certain lots of land, tracts of land, or patents, may thus become the subject of hearsay evidence; but their lines, and objects in their ambit, may be, and very commonly are, dependent entirely on hearsay. A patent or farm is granted to run along the Hudson river. Hearsay or reputation comes in to tell us what stream bears that name, and to distinguish it from its tributaries, the Sacondaga or the Schroon. The Kayaderosseras patent was granted running on one line to the north west-most head of a creek, entitled Kayaderosseras. Public reputation was called in to fix the real head of that creek, and distinguish it from the head of the *Coesa* creek, which had been assumed as the true object of the line in a survey for the defendants. Brandt ex dem. Walton v. Ogden, 1 John.

Rep. 156, 157, per Spencer, J. Another object in the same patent was, the third falls of Albany river (Hudson), and reputation for forty years was called in to determine whether the third falls were Baker's or Fort Miller Falls, on the Hudson. S. C., 3 Cain. Rep. 6. In this view of the question, Henderson, J., speaks in Den ex dem. Tate v. Southard (1 Hawks, 45, 47): "Boundaries," says the judge, "frequently exist to common reputation; and it is for that reason that hearsay is evidence upon the question of boundary. It would, therefore, have been sufficient for the defendant to have shown that it was the common reputation and understanding of the neighborhood, that his land was bound by the lines of surrounding tracts." Evidence was also received in that cause that two different persons now (at the trial) dead, had, the one shown a branch to the witness as one line, and another, a certain place in the road as another line of the land in dispute. And per Peters, J., in Higley v. Bidwell (9 Conn. Rep. 451): "We are informed by the late Ch. J. Swift, that in this state (Connecticut) the declarations of old people respecting the ancient bounds or monuments between the lands of individual proprietors, who were acquainted with them, have constantly been admitted in evidence;" citing Swift's Digest, 766, and Swift's Evidence, 123. Accordingly, the declarations of a deceased tenant of the owner in fee were received in evidence as to the boundary of the land temporarily holden by him, even to affect the rights of his landlord. It is deducible, however, from the case, that such declarations must be made *ante litem motam*, or they are inadmissible. In a previous case, the court put it that the old people, whose declarations were offered, must appear to be dead; for then, as to ancient bounds, this was the best evidence the nature of the case would admit of. Nor would the declarations of a man interested in the question at the time, be receivable. Accordingly, they rejected declarations which came from a man who once owned and who had sold the land with warranty, according to the boundaries now in dispute, though it did not appear that, at the time he made the declarations, there was any *lis mota*. Porter v. Warner, 2 Root, 22. The rule appears to be the same in Massachusetts, subject to the qualification that the declaration must be made at the time of the declarant being on the spot, and actually showing the boundary. Van Dusen v. Turner, 12 Pick. 532. In ejectment, tried in 1806, a plat and survey, made in 1737, by order of A. & F., under whom the defendant claimed, and according to which the land had since been held, was rejected as evidence for the defendant. Lee v. Tapscott, 2 Wash. Rep. 276. But that objection being out of the way, the Supreme Court of New York suggested that a very ancient map of the premises in question, made by commissioners, might be evidence to fix the boundary or location. Jackson ex dem. Beekman v. Witter, 2 John. Rep. 180.

It is obvious, as we have seen, that, to a certain extent, hearsay must be adopted as evidence in the designation of boundaries. They are, many times, the mere creatures of general reputation. 2 Roll. Abr. 186, pl. 5; 17 Vin. 86, pl. 5. Where this is the case, all courts must receive evidence of *general* hearsay. When we come to *particular facts*, as that a certain tree is the corner of lot A., and propose to prove this in ejectment for the lot itself, by the declaration of a deceased witness, we are hardly sustained in doing so by any English case directly analogous. Barnes v. Mawson is a case of general reputation. It was also an inquiry into boundary as incident to a prescription, which some of the English cases agree is the subject of hearsay evidence in all its extent. The better opinion is, perhaps, the other way, as will be seen by the text. If so, Barnes v. Mawson will stand as fair authority for receiving general repute in a proper case, upon all boundary questions of real property, corporeal or incorporeal. But it stops there. And the only English adjudication upon particular hearsay (Clothier v. Chapman, *supra*), will still stand against us unreversed and unqualified.

Among the American adjudications, which appear cautiously to have avoided overstepping this most restricted view of the English doctrine, we may set down those of New York, Vermont, Maine, and perhaps some others; but we think it will be found that, in a majority of the states, hearsay, both general and particular, is received. The state of Kentucky began by adhering to the narrowest limits. In ejectment (A. D. 1800), the court below received evidence of what a deceased surveyor had told a witness in 1775, as to the lines appearing on the land in dispute, said to have been run by him in 1774 for the defendant. On error, the court said that hearsay evidence is legal to prove that land is parcel or not parcel of a certain tract; but it appeared to them that such evidence had always been confined to cases where the right to land commenced by parol, and depended upon it (such rights being numerous, in England); and that the point to be ascertained in every such case was, whether the land in contest had been commonly re-

puted to appertain to a tract of land in that predicament. All the rights to lands in this state (Kentucky) and their boundaries, at first commenced and still continue to depend on written evidence; and it seemed to the court, that hearsay evidence could not legally be admitted to prove such rights or boundaries, unless, perhaps, in cases where the name of a watercourse, or of some other object which commenced by parol, was to be established. They said, whatever the surveyor who made the lines, could have related concerning them, must have been particular facts, which could only be proved by hearsay, and that the court below erred. Cherry v. Boyd, Litt. Sel. Cas. 7, 9. But it would seem, by what fell from the court in the subsequent case of Smith v. Nowells, which we have stated *infra*, and which was decided in 1822, that the earlier case is not considered as maintaining an unshaken ascendancy. Nor are we aware that Virginia has gone farther than what is indicated by the following case: The complainant filed his bill to be relieved in part against the purchase money of a corner lot in Richmond, which he alleged fell about two feet short of the described width. To show this, he relied on a recent survey of the city surveyor, who, assuming certain other stations to be correct, made it out that the lot in question encroached on one of the streets upon which it cornered. The court said: "If the original survey of the town was erroneous, either because it was made without regard to horizontal distances, or from any other cause or accident, and the property has been sold, and held accordingly to such survey, it is now too late to correct such error. Ancient reputation and possession, in respect to the boundaries of streets, are entitled to infinitely more respect in deciding upon the boundaries of the lots, than any experimental survey that can now be made. If not, the whole city, and all other towns, would be thrown into the utmost confusion." Ralston &c. v. Miller &c., 3 Rand. 44, 49. Nor are we aware that the courts in New Hampshire have laid down the rule more broadly. The Superior Court of that state, on one occasion, cited the rule from a former edition of our author: "In questions upon a boundary, &c., declarations as to the common opinion of the place, made by deceased persons, who, from their situation, had the means of knowledge, and no interest to misrepresent, have been generally considered as admissible." See Amer. ed. of 1823, p. 189. The offer in this case was, however, to show specific declarations as to a particular fact; and the court did not deny that this might be done, but rejected the evidence as coming from persons *in pari jure*. Shepherd v. Thompson, 4 N. H. Rep. 213, 215.

On the whole, the doctrine, and reason of the doctrine, as it is now understood in the American courts, is, perhaps, well expressed by M'Lean, J., in Boardman v. Reed's Lessees, 6 Pet. Rep. 341. He remarks: "That boundaries may be proved by hearsay testimony, is a rule well settled; and the necessity or propriety of which is not now questioned. Some difference of opinion may exist as to the application of this rule, but there can be none as to its legal force. Landmarks are frequently formed of perishable materials, which pass away with the generation in which they were made. By the improvement of the country, and from other causes, they are often destroyed. It is therefore important, in many cases, that hearsay or reputation should be received to establish ancient boundaries." See also 7 Cranch, 296, per Marshall, C. J.

The qualifications under which particular declarations are received—we do not say uniformly, but by a decided weight of authority—will appear to be about the same as are attached to the rule admitting hearsay in cases of pedigree and its kindred subjects, as those qualifications are presented in the preceding pages of our author, and the notes we have made. "Such testimony," adds M'Lean, J., in the above case of Boardman v. Reed's Lessees, "must be pertinent and material to the issue between the parties. If it have no relation to the subject, or if it refer to a fact which is immaterial to the point of inquiry, it ought not to be admitted." This is the same case which we examined in connection with Boudereau v. Montgomery, in order to see whether the hearsay offered might not have come in as the testimony of a deceased witness on a former trial. In this respect it holds another point of analogy with hearsay as to pedigree. Not being admissible as having before come out between the identical parties now litigating, but as hearsay in another view, it is obnoxious to the objection of being uttered *post litem motam*; which, as we saw (*ante*, note 180), would be a fatal obstacle to the admission of a declaration concerning pedigree. We have also seen (Higley v. Bidwell, Porter v. Warren, and Lee v. Tapscott, *supra*) additional countenance given to this objection.

A majority of American decisions are, it is true, opposed to the objection that these declarations concerning boundary shall be excluded, by reason of being made *post litem motam*. It

existed, but appears to have been overlooked by counsel in Howell's Lessee v. Tilden (1 Har. & M'Hen. 84); and in a subsequent case, hearsay declarations of D. and his wife, made while they were in possession, and after a dispute had arisen between them and the adverse claimants, were received in favor of one claiming under D. and wife, according to the very boundaries to which their previous declarations related. These declarations were expressly objected to, as being made after the controversy had arisen. Redding's Lessee v. M'Cubbin, 1 Har. & M'Hen. 368. But they might, perhaps, have been received as part of the *res gestæ*, D. being in possession, according to the rule—*ante*, note 166, *et seq.*; though Shepherd v. Thompson, *infra*, is *contra*. In other cases it was held that what one deceased person swore, under a commission to take evidence respecting the boundaries, which commission was irregularly executed, and so the oath not receivable as a deposition, would yet come in as hearsay. Bladen's Lessee v. Cockey, 1 Har. & M'Hen. 230; Long's Lessee v. Pellett, Id. 531; Weem's Lessee v. Disney, 4 Har. & M'Hen. 156. In another case the court received mere *ex parte* depositions, showing the declarations of the proprietors and the reputation of the neighborhood as to a certain fence being the division line between the parties litigant. Sturgeon's Lessee v. Waugh, 2 Yeates, 476. So a voluntary affidavit, both parties being present, though objected to, was received to show that a survey made by S. excluded the *locus in quo*. Montgomery's Lessee v. Dickey, 2 Yeates, 212. The court said it was better than ordinary hearsay or reputation. And see Lilly's Lessee v. Kintzmiller, Id. 28.

While it must be confessed that these Maryland and Pennsylvania cases have proceeded in utter disregard of the rule repudiating declarations as made *post litem motam*, yet they were mostly, if not all, made before this rule was well established, even in England. Other and more recent cases come back to that rule. In Spear v. Coate (3 M'Cord, 227), the court received declarations touching boundary made *ante*, but rejected those made *post litem motam* by the same witness. Other cases have come back to all the scrupulosity of Porter v. Warren, *supra*, that the declarations of persons in *pari jure* shall be rejected; for, say the court, the declarant being possessed at the time, whether he is in as occupant or owner, he is interested to extend his boundaries. Shepherd v. Thompson, 4 N. H. Rep. 213, 215. In Hall v. Gittings (2 Har. & John. 112, 121), it is cautiously put that the declarant was *not interested* when he made the declaration. In another case, in order to prove a corner tree of the tract claimed by the plaintiff, he offered to prove the declarations of W., now dead, of what he heard his father, the patentee of the tract under whom the plaintiff claimed, say as to the corner while he was owner of the land, and while no dispute existed, or was expected, as to the title. This was held inadmissible. The court say they did not mean to alter the rule that, on questions of boundaries, permits evidence of common rumor and report, or what deceased persons who were disinterested have said. Nor would they say that no act done by the owner of land should be admitted. But they went on the ground that these were the declarations of one in his own favor. Smith v. Walker, 1 N. Car. Law Repos. 514. Note. It should be remarked that the very question decided by this case was long a vexed one in England as to customs, public boundaries, &c., insomuch that, on its coming directly before the Court of Exchequer, in 1822, the learned barons felt themselves at an entire loss as to authority, and went on *seriatim* to argue the point *a priori* at considerable length. On perusing the case, we are sure the learned reader must feel convinced that, though the declarant be so far interested at the time that he could not be a witness, yet, there being no *lis mota*, his declaration is admissible. Moseley v. Davies, 11 Price, 162.

In all the cases where these declarations have been received, it was first made to appear that the declarant was dead; and several cases have expressly decided that this is an essential condition. Blythe v. Sutherland, 3 M'Cord, 258. That he is beyond the reach of process of the court is not enough. Gervin v. Meredith, 2 N. Car. Law Repos. 635; Buchanan v. Moore, 10 Serg. & Rawle, 275, 281. The latter case puts it more cautiously, that persons who are living, and may be produced, must be sworn, and their declarations cannot be heard. See also Long's Lessee v. Pellett, 1 Har. & M'Hen. 531.

It is obvious, however, that in this and all other cases where hearsay testimony is admissible, a distinction must be made, as to proving the death of declarants, between particular declarations coming from individuals and general reputation. In the former case death must be proved. In the latter it is never required. The difference is acted upon every day at the circuit, in questions of general reputation upon other subjects; and the following case exemplifies its applica-

tion to boundary: In ejectment the plaintiff and defendant claimed under interfering grants from the same source, the plaintiff's being the eldest. The defendant then read in evidence a patent of land to one B., elder than that under which the plaintiff claimed; and, to show that it covered part of the ground in controversy, asked a witness whether certain lines were, before the commencement of this suit, generally reputed in the neighborhood to be the lines of B.'s survey. This was objected to, but admitted. On motion for a new trial the court held it was rightly admitted. "What any one, even a person who had been present at the making of the survey, had been heard to say, would no doubt be inadmissible, unless the death of such person was first proved; but there is a difference between hearsay of a particular fact and general reputation. From the nature of the thing, an old boundary cannot in general be proved by direct and positive proof; and reputation is, therefore, from necessity, admissible." Smith v. Nowells, 2 Litt. Rep. 159.

After the practice of receiving particular declarations had gained a foothold at the circuit, it was obvious that the more important class of this kind of posthumous testimony would be sought at the hands of deceased surveyors. To show the latitude with which it has in fact been received, we shall copy the evidence of one Adams, as it was offered before Gaillard, J., Pendleton circuit, So. Car., spring of 1825, and which was held admissible. The question was one of location, or boundaries between the parties, and arose in an action of *trespass to try titles*, which is equivalent to a real action at common law. The witness said, "I was well acquainted with the lines of Watt's tract, a short time after they were run, and derived my information from Burnet Crafton, the original surveyor who ran them. He showed them to me four or five weeks after he made the survey. He showed me a poplar station on the north side of the Oslondy river on Riley's line, which he said was a station for both tracts, viz: Watt's and Riley's. He then showed me a stake which he said was the northwestern corner of Watt's tract, and about two feet from it a hickory bush or small tree, now a stump, which he said was the corner of Riley's land. I have lived within a mile of this land ever since, and am well acquainted with it. The said Crafton further told me, that the line commencing at the fallen red oak and running west, was made by him, and intended at first as a boundary; but when he came to the good flat land, Watt directed him to annul and discontinue it, which he did. He then went to Riley's corner, and placed a stake as a corner for Watt's tract, near the hickory stump aforesaid, and then ran a line so as to intersect the Widow Criswell's line below." This testimony was rejected at the circuit, because the surveyor's death had not been proved; but on motion for a new trial, the court held it to be obviously admissible as secondary evidence; and the omission to provide proof of the death appearing to have been inadvertent, they granted a new trial, with a view that the formality might be supplied. Blythe v. Sutherland, 3 M'Cord, 258.

The foundation of this proof as to surveyors' declarations, and the qualifications and aspects under which it is to be received, had been examined in several cases before the decision in Blythe v. Sutherland. In ejectment, it became material for the plaintiff to show a survey by A., pursuant to instructions, for C., under whom the plaintiff claimed; and the plaintiff offered to show that A., who was dead, and whose papers had been burnt, had declared that he had been instructed in writing to make the survey, and the place where. This was held inadmissible, as not being hearsay in respect to boundary, but in respect to the contents of a paper. Bonnet's Lessee v. Devebauge, 3 Bin. 175. In another case, the plaintiffs claimed to a certain extent, and according to W.'s survey. W. was dead, and to prove the extent of the survey, they offered in proof what he had said. This was received, and held well. Tilghman, Ch. J., said: "When boundary is in question, what has been said by a deceased person, is received as evidence. It forms an exception to the general rule. It was impossible for the plaintiffs to show the extent of their possession without showing the lines run by W. Those lines were the plaintiffs' boundaries; at least, such was their claim. It appears to me, therefore, that what was said by W. comes within the exception which admits the words of a deceased person to be given in evidence in a matter of boundary. Caufman v. The Presb. Congreg. of Cedar Spring, 6 Bin. 59. Again; in ejectment, the lessor of the plaintiff claimed a tract called D., in Arundel county (Maryland), according to certain lines; and was allowed to show that the surveyor, appointed for that county, had run the lines, and made certain declarations as to the boundaries and termination of the lines, in connection with declarations from other persons who were dead. Weem's Lessee v. Disney, 4 Har. & M'Hen. 156. In another case, the plaintiff claimed the *locus in quo* under a survey, &c., in 1785, and the defendant under a survey in 1763. On the trial, the defendant

offered to prove that, in 1786, D., deceased, had shown a boundary line between the *locus in quo*, and his, D.'s, tract; and had also shown a witness a walnut tree, as the common corner of three surveys, one for D. and another for S. and F. This testimony was admitted; and on error, held well. Tilghman, C. J., said it is not denied that, in general, the declaration of a deceased person as to boundary is evidence; but it is said this declaration went to prove a survey. This objection is too refined. The substance of the evidence was, that D. showed the boundary; but this could not well be expressed without saying of what land it was the boundary. Undoubtedly, a boundary being shown, some implication would arise that a survey had been made; but this is unavoidable. It is no objection, however, to D.'s declarations. Those declarations are only in proof of a boundary; and if the jury thought the boundary established, the inference of a survey would be drawn directly from the fact of a boundary. The proving of a boundary is one thing, and the consequence of a boundary being proved another. Hamilton v. Menor, 2 Serg. & Rawle, 70. In trespass to try titles, the plaintiff claimed a gum tree as the true corner; and was allowed to prove that G., deceased, had said he was a chain carrier at the time of the original survey, and that the gum tree was the corner then made. Spear v. Coate, 3 M'Cord, 227. In ejectment, the defendant contended that the land in dispute lay within Granville's line, under which Granville he claimed; and to show this line, he was allowed to give in evidence various acts of the legislature pointing out Granville's lines as the boundaries of counties, from 1753 to 1759; and that, in 1772, the same line had been run out and marked by commissioners as Granville's line; and had ever since (down to 1825), been the reputed line. And though it did not appear how this line was ascertained by the survey, and it was run merely to ascertain county lines, yet this evidence was held admissible. And Henderson, J., said the rule, that common reputation was evidence in questions of boundary, was here much better applied than when we permit a witness to swear that a person since dead, told him that a certain tree in a remote wood, was a line or a corner tree of some other person's land. Doe dem Taylor v. Roe, 4 Hawks, 116, 132. And see Harris v. Powell's Heirs, *infra*.

And so with regard to others: "It cannot be doubted at this day that the declarations of deceased persons, who shall appear to have been in a situation to possess the information, shall, on a question of boundary, be received in evidence." Per Colcock, J., in Spear v. Coate, 3 M'Cord, 229. And there are several cases exemplifying this proposition. In ejectment, the defendant produced a witness who deposed, that eighteen years ago, Charles Ridgely, deceased, told him that an agreement in respect to boundaries between two tracts of land owned by T. and J. respectively, had been before entered into by them, giving particulars. It not appearing that Ridgely was interested, held his declaration was admissible. Hall v. Gittings, 2 Har. & John. Rep. 112, 121. In ejectment, the plaintiff's patent called for a white oak as the beginning. He proved a marked white oak; and that this was his place of beginning, he was allowed to prove the hearsay of a deceased person, who said he heard a former proprietor, now also dead, say that the white oak was the beginning tree; and also the hearsay of another, who said he ran out (surveyed) the land for the said proprietor when he purchased it, and began at the said white oak, in the year 1766. Harris v. Powell's Heirs, decided in 1805, 2 Hayw. 349.

One matter of observation arising upon the last case is, that the court received what our author calls hearsay in the second degree. On similar evidence being received and acted upon at a trial in Tennessee, the Supreme Court of Errors and Appeals in that state had occasion to pass directly upon its admissibility. In ejectment (A. D. 1812), it became necessary for the defendant to show where Julius Sanders and others crossed Elk river, in 1781; it being the place of beginning called for both in the entry and grant of the defendant. The defendant introduced Joseph Greer to prove what Alexander Greer told him had been said by Sanders on that subject; both Sanders and Alexander Greer being dead. The court allowed this, though it appeared that another witness, still alive, was present, and heard what Sanders said; and *per Cur.*: "We admit that every remove which is made from Julius Sanders renders the testimony weaker; but it is still competent. The object is to prove where Sanders crossed the Elk river. No doubt exists but what this may be done from evidence of what persons now dead have been heard to say. The same rule applies to all cases of pedigree, prescription, or ancient landmarks. If Alexander Greer were living and present, it would be competent for him to prove what Sanders had said; and he being dead, Joseph Greer may be permitted to prove what Alexander Greer told him had been said by Sanders. It is equally competent, though weaker testimony. The reason why, in

cases of pedigree, prescription, and ancient boundary, the party may prove what persons, then dead, have been heard to say when living, is, that in such cases the party claiming the benefit of the evidence, shall not be deprived of it by the death of the witness, if he can in anywise show what knowledge the witness had on the subject. What he has been heard to say, is pretty strong evidence of what he knew." The court admittted that perhaps the statement of the witness who heard Sanders would be more satisfactory; but it might be contended, with the same propriety, that evidence direct of what Sanders has said, would not be admissible testimony, because other persons were along with him when he crossed Elk river, who are now living and capable of being produced. Beard's Lessee v. Talbot, 1 Cooke's Rep. 142.

But no oral evidence, much less hearsay, can be received to change the objects mentioned in a deed, entry or survey, or, in other words, to substitute one object for another. When corners in a deed are lost, they may be proved by reputation; but not to contradict the deed; as where the deed sets up a sugar and ash tree as the southeast, and two beeches for the northeast corner, reputation is not admissible to substitute a hickory, oak and beech tree for the first, nor two hickories for the other. M'Coy's Lessee v. Galloway, 3 Hamm. Rep. 282, 283.

The admissibility and influence of hearsay and reputation, in respect to boundaries, was much considered by Judge Washington, on a question which arose as to the extent of a tract of land called the manor of Springetsbury, in the state of Pennsylvania. William Penn, the patentee of the whole state (province) from Charles the First (in 1668), and his descendants, the proprietors, established and kept on foot a land-office, and issued regulations whereby settlers might, by locations and surveys, to be made according to the rules of the office, acquire equitable rights to conveyances of the lands so designated by them; the proprietors reserving a right to appropriate to themselves one-tenth of the state, by the like surveys. These regulations continued, and were recognized by the government as valid, from the time of the original grant down to 1776. Under them, in 1722, a survey was made by the government, and recognized by the proprietors, of about 70,000 acres, reserved lands, under a warrant to surveyors, pointing out the precise metes and bounds of the tract. This tract was surveyed for the use of Springet Penn, one of the proprietors. But it did not appear whether the survey was made in fact on the land, by marks, designation or admeasurement; or whether it might not have been a mere paper survey, drawn out into a map from calculations made under the warrant. Afterwards, from this time to 1768, various contracts or licenses of sale, and warrants of survey, &c., were granted by the proprietors of this manor to settlers as within the manor; and others claimed to have located upon territorial lands without the manor; but the latter, as the proprietors claimed, had located, in truth, within the manor. There had been a re-survey by the proprietors in 1768, in consequence of the one in 1722 having been destroyed. This last comprehended all the settlers whose rights were in question in the suit. That of 1722 comprehended only a part. A bill in equity was filed by all those settlers against J. and W. Penn, the now legal proprietors, to compel a specific execution of the several contracts made by those under whom they claimed; and it became quite material, in respect to the different interests of the complainants, to ascertain the true bounds of the manor.

It appeared most abundantly from the acts of the proprietors intermediate 1722 and 1768, such as licenses to take up, and grants of specified tracts of land, and a warrant for laying out a town; warrants to agree for land, and warrants to adjust differences among settlers, &c., that they all along supposed the manor to comprehend the lands covered by the last survey. A letter was received in evidence respecting the boundary, directed to one of the proprietors. The actual settlements and improvements made by licensed settlers within the manor, and the surveys and settlements made around and adjoining the different lines of the manor, were also in evidence. All these were intermediate the survey of 1722 and 1768; and they all had reference to, or accorded with the boundaries in the last survey. These things together showed the putative boundaries of the manor to agree with the last survey as early as 1736, and from that time to 1814; and this although, as Judge Washington expresses it, the two surveys varied extravagantly. He could find in the proof no intermediate survey to account for this. And he supposes that the locations being made in such utter disregard of the first survey, might have arisen from the lines of that survey not being actually measured, but guessed at, or some of the courses only being run. On the subject of such surveys, followed by reputed and practical boundaries which conflicted with them, and the evidence receivable on this head, he proceeds: "No gentleman of the profes-

all these questions in which the public are concerned, as having a community of interest from residing in the same neighborhood, or being entitled to the same privileges, or being subject to the same liabilities, common reputation and the declarations of deceased persons, asserting or disclaiming the right at issue, are admissible in evidence.

Right of common.

A leading authority upon this subject is the case of Weeks v. Sparke,(1) which was an action for a trespass on the plaintiff's close, parcel of a com-

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sion, who is at all conversant with land trials, can be ignorant that the courses and distances laid down in a survey, especially if it be ancient, are never in practice considered as conclusive; but, on the contrary, they are liable to be materially changed by oral proof, or other evidence tending to prove that the documentary lines are not those actually run. How often have we known reputed boundaries, proved by the testimony of aged witnesses, and even by hearsay evidence, established in opposition to the most precise calls of an ancient patent? Such evidence has been constantly received; and distances have been lengthened or shortened without the slightest regard to the calls of the patent. The reason is obvious; it is not the lines reported, but the lines actually run by the surveyor, which vests in the patentee the area included within these lines. The survey returned, or the patent, is the evidence of the former; natural marks or reputation is, in almost all cases, the evidence of the latter. The mistakes committed by surveyors and chain carriers, more particularly in an unsettled country and wilderness, have been so common, and are so generally acknowledged, as to have given rise to a principle of law, as well settled as any which enters into the land titles of this country; which is, that when the mistake is shown by satisfactory proof, courts of law, as well as courts of equity, have looked beyond the patent to correct it. It will readily be admitted, that such evidence should be cautiously received, if it should have a preponderating influence in determining the question of boundary. Subsequent locators look, in the first instance, to the survey as made and returned, for a demarcation of the tract; with which they must not interfere. But if a mistake is apparent upon the face of the survey, taken in connection with the natural and artificial marks on the ground, if the reputation of the neighborhood has assigned to the tract of land so surveyed, boundaries different from those delineated on the survey returned, a subsequent location is so far affected by notice of the real boundaries of the tract on which it would adjoin, that a claimant under it cannot, even in a court of equity, set up his posterior equitable title against the legal or equitable title of the first locator. In short, he cannot assert that he was a purchaser without notice, in the face of strong evidence to the contrary." Conn and others v. Penn, 1 Pet. C. C. Rep. 496.

(1) 1 M. & S. 679.

The dedication of lands to a public use, presents a case in which the acts of the owner and his declarations are allowed in evidence, so as to preclude him from exercising his original rights over the dedicated premises (Hunter v. The Trustees of Sandy Hill, 6 Hill R. 407); and the manner in which the premises have been used, may be proved to show the fact as well as the character of the dedication. The acts and declarations of the owner are sufficient to complete the dedication, without any writing on the subject; for the Statute of Frauds does not apply to the transaction. Godfrey v. City of Alton, 12 Ill. 29. Once made, the dedication cannot be revoked so long as the premises are used for the purpose for which the dedication was made (Adams v. Saratoga and Washington Railroad Company, 11 Barb. 414); but as soon as the public use of the premises ceases, the owner's right to re-occupy them revives, the title remaining all the while in him. C. C. Court v. Newport, 12 B. Mon. 538; Curtis v. Keesler, 14 Barb. 511; The Mayor, &c., of Macon v. Franklin, 12 Geo. 239. See also Gould v. Glass, 19 Barb. 179, 428; 18 Id. 222; Warren v. The President, &c., of Jacksonville, 15 Ill. 236.

The case of Weeks v. Sparke, cited in the text, has been much shaken by a late case, Earl of Dunraven v. Llewellyn, 19 L. J. 388, Q. B.

mon, &c.; the defendant justified for a prescriptive right of common at all times over the place, and the plaintiff in his replication prescribed to use the place for tillage, &c., qualifying the defendant's general right. To support this prescriptive right of tillage, the plaintiff offered evidence of reputation, which was received at the trial; and the Court of King's Bench were of opinion, that it had been properly received, on the ground that the right claimed by the plaintiff, although claimed by prescription, was yet an abridgment of the general right of common over the waste, and affected a large number of occupiers within the district. Dampier, J., in delivering his judgment observed: "It is not to be disputed, that in questions of public rights reputation is admissible; and the rule has been extended to other rights which cannot be strictly called public, such as manors, parishes, and a modus. A modus is, strictly speaking, a private right, but it has been considered as public, so far as regards the admissibility of this species of evidence, because it affects a large number of occupiers within a district. Here the right claimed goes to abridge the rights of all the persons concerned over a large district of common; and, therefore, I think evidence of reputation is admissible."

District modus.

In the case of Rudd v. Wright,(1) on a motion for a new trial of an issue from the Court of Exchequer, to try the validity of a modus which was claimed in respect of a district (not being a legal division of the country, as a hundred, parish, vill, or hamlet), Lord Lyndhurst was of opinion, that evidence of reputation in favor of the modus was properly received on the trial, upon the authority of the case of Weeks v. Sparke;(2) the district comprising a great number of farms, and extending over more than two thousand acres, and the questions applying to a great number of persons.(3)

Farm modus.

On questions of farm modus, relating to individual occupiers, and strictly private interests, it should seem that hearsay evidence of reputation in favor of the modus is not receivable. But there has been some difference of opinion upon this point. It has generally been understood in the Exchequer, that the evidence is inadmissible.(4) In an ancient case(5) it was received; and also in some modern cases, where, however,

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(1) Before Lord Lyndhurst, C. B., in Eq. Ex. 11 July, 1832.

(2) *Supra*, p. 227.

(3) See also Williamson v. Thompson, 9 Price, 186, a township modus; Donnison v. Elsley, 1 M'Clel. & Y. 1, a modus for a district consisting of 274 acres.

(4) See by Lord Lyndhurst, C., in Wright v. Rudd, *ubi supra*. In Wells v. Jesus College, 7 C. & P. 284, such evidence appears to have been rejected by Alderson, B.

(5) Webb v. Potts, Noy, 44. In White v. Lisle (4 Madd. 214), this case was said to stand alone, and to be too loose to be relied on.

the point was not much considered.(1) The weight of authorities seems to be against the admission of such evidence.(2)

It is to be observed, that the receiving of hearsay evidence is founded on a principle of necessity, in consequence of the antiquity frequently belonging to particular inquiries, and that although a custom must necessarily be immemorial, it is assuming the question in dispute, to say that a private right of way, or common, and the like, is prescriptive and immemorial. Even supposing a private right to have necessarily originated, if at all, before the reign of Richard I, yet it may reasonably be expected, that in the instance of any private right, the case should be sufficiently established by modern use, without recourse to evidence of reputation; whereas a greater latitude may be allowed in the instance of public rights, which it is not the interest of any individual in particular to guard from encroachment.

Hearsay as to private prescriptive rights, whether admissible.

The authorities in favor of the admission of this evidence are as follows: In the case of Morewood v. Wood,(3) where the question related to a prescriptive right, annexed to a particular estate, of digging stones on a waste,(4) the Court of King's Bench was equally divided upon the point.

And a book of authority(5) lays it down broadly, that in questions of

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(1) In Donnison v. Elsley (3 Eag. & Y. 1396, n.), evidence of reputation in the case of a farm modus was read *de bene esse;* and similar evidence appears to have been received in Wooley v. Brownhill, 1 M'Clel. 317. In Bullen v. Michel (2 Price, 399), which related to a farm modus, much *documentary* evidence was adduced, and was treated as evidence of reputation; but most of the documents were of a *public* nature.

(2) See by Lord Kenyon, C. J., and Ashurst, J., in Morewood v. Wood, 14 East, 329, n. In Reed v. Jackson (1 East, 356), Lord Kenyon appears to confine the admissibility of evidence of reputation to cases of *public* prescription. In Blackett v. Lowes (2 M. & S. 500), where evidence, of reputation was tendered as to the right of the tenants of a particular copyhold estate to cut and sell wood, Lord Ellenborough, C. J., said, that reputation was out of the question, *because the tenants' right could only arise by some grant or deed.* In Richards v. Bassett (10 B. & C., 663), Littledale, J., said, that it was by no means clear that evidence of reputation was admissible in matters of prescriptive right. He thought it was not admissible, to determine whether an individual had a right to the soil itself, or only a right of common over it. In Weeks v. Sparke (1 M. & S., 691), Dampier, J., intimates, that reputation would not be evidence of a private right of way over a particular field. In White v. Lisle (4 Madd. 214), the vice chancellor said, that in late times evidence of reputation had not been tendered in cases of prescription as to individual rights, except as to rights of way.

(3) 14 East, 327, n. Lord Kenyon, C. J., and Ashurst, J., against the evidence; Buller, J., and Grose, J., for it.

(4) It did not appear whether the prescriptive right claimed was in derogation of the rights of common in the copyholders; in which case it would seem from Weeks v. Sparke (*ut supra*), that evidence of reputation was admissible.

(5) B. N. P. 295, citing Skinner v. Lord Bellamont, Worcester, 1744. And see the opinions of Buller, J., and Grose, J., in Morewood v. Wood, 14 East, 330, n.; also of Grose, J., 3 T. R. 709. In Price v. Littlewood (3 Camp. 288), Lord Ellenborough, C. J., admitted proof of entries in a parish book, as evidence of the reputation of the parish respecting the private right of pew. But he also assigned as a reason for admitting the evidence, that the entries were made by church-

prescription it is allowable to give hearsay evidence to prove general reputation; and therefore that where the issue was on a right of way over the plaintiff's close, the defendants were admitted to give evidence of a conversation between persons not interested, then dead, wherein the right to the way was acknowledged.

Hearsay not admissible as to private boundaries.

Where the title to a private right is not prescriptive, the principles upon which evidence of reputation is admitted seem more completely to fail; it cannot be said, in the generality of such cases, there is a necessity for resorting to hearsay testimony. The authorities confirm this opinion. Although evidence of reputation is received of the boundaries of parishes or manors, which are generally of remote antiquity, such evidence has been held to be inadmissible for the purpose of proving the boundary of a private estate.(1) The boundaries of private estates are as likely to have been of recent as of ancient date; and are not so likely to have been publicly notorious.

In the case of Thomas v. Jenkins,(2) an action of replevin, where the question was strictly as to the line of boundary between two adjoining estates, the court held that evidence of reputation had been properly admitted. But this was under peculiar circumstances, and in consequence of the course of inquiry allowed by the counsel on both sides; it having been settled by admissions between the parties, that the only question to be raised at the trial should be, of which of two sheepwalks the land in dispute was parcel. A witness for the defendant, after speaking to the way in which he used to keep cattle on one of the estates, said that the boundary of the estate was the same as that of the *hamlet*. This was not objected to. He was then asked whether he had heard from old persons, since deceased, what was the boundary of the hamlet. The question was

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wardens, upon a subject within the scope of their official authority. See *post*, Vol. II, *On the Admissibility of Public Writings, not judicial.* It may be observed, that the right in question affected the general rights of parishioners. In Davies v. Lewis (2 Chitt. R. 538), hearsay evidence was admitted in a question of private right, as to the point whether a particular place was parcel of a sheep-walk. But that case was compromised and not much argued. In Barnes v. Mawson (1 M. & S. 77), evidence of reputation was received as to what was *new* land within a manor. In Rogers v. Allen (1 Camp. 310), judgments were admitted in a case of prescriptive right. But the evidence was in the nature of acts of possession, and the like observations may apply to the evidence of court rolls, and the judgments and allowances in Eyre, in Biddulph v. Ather (2 Wils. 23). In Williams v. Goodchild (2 Eagle on Tithes, p. 440), Leach, V. C., allowed as evidence in support of an exemption from tithes, claimed for a particular estate, a catalogue, and particulars of sale, and also a map. His Honor said, that every fact which is to be carried beyond time of memory may be proved as matter of reputation, on account of the principle, that it is impossible to bring direct evidence as to such a fact; a proposition (it is conceived) much too large. In Anscombe v. Shore (1 Taunt. 262), the right was prescriptive, but related to a matter of general interest to commoners.

(1) Clothier v. Chapman, 14 East, 331, n. And see Donnison v. Elsley, 3 Eag. & Y. 1396.

(2) 6 A. & E. 525.

objected to as an attempt to prove the limits of a private estate by reputation; but the evidence was received. It seems to have been admitted by the counsel, and therefore assumed by the court as an established fact, that the boundaries of the farm and the hamlet were the same. The admission was unwarily made, and strongly pressed; but clearly, upon such an admission, the inference must necessarily be, that any legitimate mode of proving the boundary of the *hamlet*, was allowable for proof of the boundary of the *farm;* and, therefore, that reputation, which is proper evidence of a *hamlet* boundary, must be admitted in this case as evidence also of the *farm* boundary. Patteson, J., said, "On this precise question" (meaning the *issue settled* between the parties), "evidence of reputation was clearly not admissible; but such proof is receivable to show the boundary of a *hamlet;* and that being so, I do not see how it could be excluded in the present case, when it was established that the boundaries of the *hamlet* and of the *farm* were the same."(1)

Hearsay not admissible as to private title.

The objection to receiving hearsay testimony upon matters of private right, applies with still greater force to those cases which are unsupported by any analogy to matters of public or general interest; as where the fact sought to be proved is not matter of prescription or of boundary. Thus, in an ejectment,(2) where the lessor of the plaintiff claimed the land as tenant in tail under a will, by which the testator gave his son an estate for life, and the defendant claimed as devisee of the son, the question was, whether the land in dispute was part of the entailed estate, or had been purchased by the son; evidence of reputation, that the land had belonged to Sir J. S., and had been purchased of him by the father, the first testator, was held to be clearly inadmissible.

Private right or public duty.

In like manner, evidence of reputation has been rejected upon a question as to the usage in electing a schoolmaster, as it related to a private right.(3)

So reputation has been rejected upon a question whether the tenants of a particular copyhold estate had the right of cutting and selling wood,(4) or whether the lord of a manor had a prescriptive right to all wreck within the boundaries of the manor.(5)

In The King agt. Antrobus,(6) on the trial of an information against a

(1) See also Brisco v. Lomax, 8 A. & E. 198.
(2) Doe d. Didsbury v. Thomas, 14 East, 323.
(3) Withnell v. Gartham, 1 Esp. 324.
(4) Blackett v. Lowes, 2 M. & S. 494, 500.
(5) Talbot v. Lewis, 1 C., M. & R. 495.
(6) 2 A. & E. 794.

NOTE 88.—Hearsay is admissible in the case of a custom. Per Marshall, Ch. J., in Mima Queen v. Hepburn, 7 Cranch, 296. (A custom or usage is a fact to be proved by testimony, by

sheriff of a county, for not executing a convict sentenced to death, it was held, that a witness could not be asked whether he had heard that it was the custom for the sheriff to be exempt from performing, or for another person to perform the duty in that particular county, although it had been proved that such other officer had in fact always performed it within living memory. It was said that this was not a matter of public interest, the public not being interested in the question, which officer was to perform the duty.

It has been said that in the case of The Bishop of Meath v. Lord Belfield,(1) in a *quare impedit,* after the plaintiff had given in evidence an entry in the register of the diocese of the institution of one K. (in which entry there was a blank where the patron's name was usually inserted), parol evidence of the general reputation of the country was offered, that K. was in by the presentation of one under whom the defendant claimed; and, on a bill of exceptions, the evidence was adjudged to be admissible, on the ground that a presentation may be by parol, and that what commences by parol may be transmitted to posterity by parol; and that this creates a general reputation. But Lord Kenyon, C. J., adverting to this case,(2) said he admitted that a presentation might be by parol, and might be proved by parol—that is, by a witness who was present and heard it; but he denied that in such a case common reputation could be given in evidence. "If it can," he added, "why might not such evidence decide titles to estates, at least before the Statute of Frauds, when no written instrument was required to make a good feoffment of the greatest landed property in the kingdom."

There appears to be a conflict of authority upon the question whether evidence of reputation is admissible as to the *liability* of the occupiers of certain land to repair a road, *ratione tenuræ.* In The King agt. Cotton,(3) it seems to have been assumed that such evidence was admissible, although the particular evidence tendered was rejected upon another ground. But in the later case of The King agt. The Inhabitants of Wavertree,(4) similar evidence was rejected. It was tendered on behalf of the defendants, but, as the verdict was returned in their favor, there was no oppor-

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persons who are acquainted with the locality or business to which it relates. Putnam v. Tillotson, 13 Met. 517; Cope v. Dodd, 13 Penn. State R. 33. A present custom of business manifestly must be proved by persons engaged in or acquainted with the business. Isolated instances will not establish it (Cope v. Dodd, *supra*); there must be a general concurrence of action. Knowles v. Dow, 2 Foster (N. H.), 387. The mode of proving its existence, and the number of witnesses necessary to be called, must depend upon the circumstances of the case (Vail & Adams v. Rice, 1 Selden, 151), and upon the object for which it is sought to be proved.)

(1) B. N. P. 295, cited by Buller, J., in R. v. Eriswell, 3 T. R. 719; S. C., reported 1 Wils. 215.

(2) In R. v. Eriswell, 3 T. R. 723. See also Tellard v. Shebbeare, 2 Wils. 366.

(3) 3 Camp. 444, before Dampier, J.

(4) 2 Mo. & R. 353, before Maule, J.

tunity of carrying the question any further. It is to be observed that, although such evidence would establish a *private* liability, it would, at the same time, disprove the liability of the *public*. It is not, therefore, a question of private liability *per se*, in which the public are not interested. And, as reputation is admissible equally to disprove a *public right* as to establish one,(1) so it would seem such evidence should be admissible to disprove a *public liability*, in the same manner as to establish it. And there seems to be no good reason, why reputation should not be as good evidence to establish a liability to repair a road *ratione tenuræ*, as it is in the case of a bridge or a sea-wall.(2)

Hearsay is, in general, inadmissible to prove particular facts, unless where such facts have become matter of general reputation. Thus, on a question of parochial modus, hearsay evidence that a particular person, since deceased, paid a certain sum in lieu of tithes, would not be admissible: but if the witness says he has heard from old inhabitants that so much per acre was always paid in lieu of tithes, or that it had always been the custom to make such payments, that will be good evidence, for it does not consist of hearsay of a particular fact, but comes within the general rule of evidence of reputation.(3) Macdonald, C. B., said in one case:(4)—"The essence of reputation is, that if you prove a fact—as, for instance, payment of a sum of money—it must be accompanied with this, that it was so paid in consequence of a reputation. If evidence is confined to the fact of payment, it is inadmissible, unless the tradition that came with it was a reputation that it had always been the case."

But though hearsay of a custom to make certain payments is evidence, hearsay that certain lands were formerly given to the vicar in lieu of tithes, is not admissible;(5) this being evidence of a particular fact, and being confined to a particular occasion. Again, though reputation is good evidence of the boundaries of a town, it is not admissible to prove that houses once stood where now there are none.(6)

Upon a question whether a part of Lincoln's Inn was part of the parish of St. Andrew Holborn, an ancient book of antiquities, relating to the parish and collected by a churchwarden, was produced, and several entries were tendered in evidence concerning the repairs of pews and the glazing

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(1) See Drinkwater v. Pater, 7 C. & P. 181.

(2) See R. v. Sutton, 8 A. & E. 516; R. v. Leigh, 10 A. & E. 398.

(3) Harwood v. Sims, 1 Wightw. 112, 169; Moseley v. Davies, 11 Price, 162; Garnons v. Bernard, 1 Anstr. 298; Deacle v. Hancock, 13 Price, 226; Wells v. Jesus College, Oxford, 7 C. & P. 284.

(4) In Harwood v. Sims, *ut supra*.

(5) Chatfield v. Fryer, 1 Price, 253. And see Leathes v. Newel, 4 Price, 355; 8 Price, 562; Crease v. Barrett, 1 C., M. & R. 919.

(6) Ireland v. Powell, Peake Ev. 14, cited in Chatfield v. Fryer, 1 Price, 256; and in R. v. Bliss, 7 A. & E. 555.

of windows. Abbott, C. J., refused to receive this as evidence of reputation, as it related only to particular facts.(1) But entries in an old parish book, in which the names of the surveyors of the highways were stated, have been admitted, upon the principle that it would be difficult to give other proof of persons being surveyors at the time in question.(2)

Where the question is whether a road be public or private, the declaration of a deceased person as to a certain fact having been done (as the planting of a tree) for the purpose of showing the boundary of the road, is not admissible as evidence of reputation, or as a statement accompanying an act.(3) It might have been shown that a tree was planted on the spot, and that persons were accustomed to keep within the line pointed out by it; but a declaration that it was planted with a particular motive and object is not evidence.(4) In like manner, declarations by deceased persons that they had seen repairs done upon the road, will not be admissible upon such a question.(5)

Perambulations.

Perambulations, although they consist of particular acts done (as the making of an ambit, digging turves, putting down posts, &c.), and though they give rise to much hearsay evidence, are, properly speaking, only the exercise of a right. The custom of perambulating parochial boundaries is notorious in all parts of England, it is recorded by all text writers and has been confirmed by high judicial sanction.(6) It is usual and perfectly consistent with principle, to admit what old persons since deceased, who accompanied the perambulations, were heard to say on such occasions respecting the boundaries. But there does not appear to be any authority for admitting hearsay of particular acts done, as conducive to the proof of boundary, even though it be delivered on the occasion of a perambulation. In Weeks v. Sparke,(7) Lord Ellenborough, C. J. observed, upon the subject of perambulations, that they are in the nature of hearsay evidence, not of particular acts done (as that such a turf was dug, or such a post put down in a particular spot,—for that would amount to evidence of ownership), but evidence of the ambit or survey of a particular place or parish, and of what the persons accompanying the survey have been heard to say

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(1) Cooke v. Banks, 2 C. & P. 478.

(2) R. v. Pembridge (Inhabs.), Car. & M. 157.

(3) R. v. Bliss, 7 A. & E. 550.

(We shall see presently that in this country the declarations of a deceased person have been frequently admitted, on questions of boundary involving private rights, where the witness appeared to have had the means of knowledge, and no interest in making them. Smith v. Powers, 15 N. Hamp. 546.)

(4) R. v. Bliss, 7 A. & E. 550.

(5) By Patteson, J., Id. 552.

(6) *Per Cur.* in Taylor v. Devey, 7 A. & E. 409, 415.

(7) 1 M. & S. 687, 689.

and seen to do on such occasions. Le Blanc, J., observed, in the same case, that the evidence of perambulations might be considered in a certain degree as evidence of the exercise of a right, yet that it had been usual to go further, and admit the evidence of what old persons, since deceased, had been heard to say on those occasions. Entries in parish books recording the fact, that perambulations had taken a particular line, have been held inadmissible.(1)

2. Of the forms in which hearsay is usually presented, in matters of public or general interest.

In the next place it is proposed to consider the different forms in which evidence of reputation, upon matters of public or general interest, is usually presented to the courts.

Old documents.

Reputation respecting public rights may be shown by old deeds or other old documents, even though of a private nature, as well as by the oral declarations of deceased individuals.(2) Thus where the question was whether certain land was in the parish of A., or in that of B. where the land was tithe free, ancient leases granted by the ancestors of the plaintiff's landlord, describing the land as being in the parish of B., were held admissible as evidence of reputation, notwithstanding that such ancestor had a direct interest in describing the land to be situated in that parish.(3)

In the case of the Cambridge Tolls,(4) a composition deed between the corporation of Cambridge and the University, regulating the amount of payment of tolls, was received as evidence of reputation of the existence of the tolls. It appeared that the deed had not been exactly followed in practice; but it was held that this objection did not apply to its admissibility. So depositions in ancient suits have frequently been produced to prove reputation.(5)

Manorial documents.

A customary of a manor delivered down with the court rolls from steward to steward, and purporting to be *ex assensu omnium tenentium*, although not signed by any person, has been held to be good evidence to prove the course of descent within a manor.(6) So the presentment of a custom of

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(1) Taylor v. Devey, 7 A. & E. 409.

(2) This subject will receive further illustration in that part of the work which treats of documentary evidence.

(3) Plaxton v. Dare, 10 B. & C. 17. See also Arundell v. Falmouth (Lord), 2 M. & S. 443; Freeman v. Phillipps, 4 M. & S. 486; Coombs v. Coethier, 1 M. & M. 398; Barnes v. Mawson, 1 M. & S. 78; Anglesea (Marq.) v. Hatherton (Lord), 10 M. & W. 218; Bullen v. Michel, 4 Dow, 297; Clarkson v. Woodhouse, 5 T. R. 412, n.; S. C., 3 Doug. 189.

(4) Brett v. Beales, 1 M. & M. 416. See also Curzon v. Lomax, 5 Esp. 60.

(5) Freeman v. Phillipps, 4 M. & S. 493. And see the cases of the Settle and Leeds Mills, cited by Lord Ellenborough, C. J., Id.

(6) Denn v. Spray, 1 T. R. 466.

a manor by the homage, entered on the rolls of the manor, is receivable.(1) So ancient answers of conventionary tenants of a manor, stating the rights of the lord of the manor, and made to interrogatories put to them by commissioners, but which interrogatories were lost, have been received in evidence.(2)

A presentment in a manor court, setting forth the boundaries of a manor, has been adjudged to be admissible evidence of boundary; although a part of the document, but not connected with the subject of the particular boundary, appeared to have been cut off.(3)

In an action by a copyholder against the freeholder of the manor, for the disturbance of the plaintiff's right of common,(4) by reason of the defendant surcharging the common (the plaintiff setting up a restricted right), parchment writings produced on the part of the defendant from among the muniments of the manor, purporting to be signed by many persons, copyholders, and stating an unlimited right of common in the commoners (which had been found inconvenient, and they had therefore agreed to stock it in a restricted manner), were held admissible as evidence of reputation respecting the general right at that period, and in disproof that the restricted right originated in prescription; there being no evidence that the plaintiff's tenement had belonged to any of those who had signed the writings, so as to render them admissible against him on that ground.

Maps.

It would seem that maps, stating the boundaries of manors or parishes, would be receivable in evidence to prove such boundaries, provided it appeared that they had been made by persons having adequate knowledge. In the cases, however, where maps have been admitted in evidence, their admissibility has depended on the ground of their being public documents, or of their being in the nature of admissions. Where they relate merely to the boundaries of private property, there is no ground for receiving them, however ancient.(5)

In a late case of an indictment against a parish for the non-repair of a highway,(6) in order to show that the highway was not within the parish, a map was produced, which had been made, about thirty years before, by a surveyor from information derived from an old parishoner, who had pointed out the boundaries to him; and Erskine, J., held, that if proof were given of the informant's death, the map would be admissible as evi-

(1) Roe v. Parker, 5 T. R. 26. See Lord Kenyon's remarks as to the credit due to such presentments. See also Arundell v. Falmouth, (Lord), 2 M. & S. 441.

(2) Crease v. Barrett, 1 C., M. & R. 923. See Evans v. Taylor, 7 A. & E. 617.

(3) Evans v. Rees, 10 A. & E. 151. See also R. v. Leigh, 10 A. & E. 398, 400, 404, 411.

(4) Chapman v. Cowlan, 13 East, 10.

(5) With respect to private maps, see Doe d. Hughes v. Lakin, 7 C. & P. 481; Sir J. Bridgeman v. Jennings, 1 Ld. Raym. 734; Donnison v. Elsley, 2 Eagle & Y. 1396, n.

(6) R. v. Milton (Inhabs.), 1 C. & K. 48.

dence of reputation, although it was produced from the chest of the parish that was indicted.

In an older case,(1) upon a question of highway, Lord Kenyon, C. J., rejected the evidence of a copperplate map, purporting to have been made by the direction of former churchwardens. But there does not appear to be any valid objection to the reception of such evidence.

Verdicts, &c.

On questions of immemorial customary rights, and on questions of public or general interest, it seems to be settled that verdicts, judgments and decrees in suits in which the same right was in litigation, are admissible in evidence, although the suits were between other parties.(2)

In the case of Reed v. Jackson,(3) where, in an action of trespass, issue was joined on a plea of public right of way, the plaintiff was allowed to give in evidence a verdict found in his favor against a different defendant, upon an issue joined as to the existence of the same right of way. Lawrence, J., is reported to have said in this case:—"Reputation would have been evidence of the right of way in question; *a fortiori* the finding of twelve men upon their oaths."

Formerly, when juries were summoned *de vicineto*, as being cognizant of the facts in dispute, and when their functions were less limited than at present,(4) their verdicts would be entitled to greater weight on the score of reputation than they are now. Still, it has been established by a long course of authorities,(5) that verdicts, as well as judgments and decrees (which latter would not have the same weight in this respect as verdicts), are admissible as evidence of reputation. If not amounting to reputation itself, they are as good evidence as reputation.(6) And in all cases involving a general right, where reputation is evidence (as in cases in which all the queen's subjects are concerned), a verdict or a judgment—although between other parties—is evidence; not, indeed, of any *specific fact existing at the time*, but as evidence of the most solemn kind of an adjudication of a competent tribunal upon the state of facts, and the question of usage, at that time.(7)

In an early case,(8) where the question discussed was concerning the right of the city of London to take certain tolls upon malt brought to

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(1) Pollard v. Smith, Peake, 18.

(2) See Brune v. Thompson, Car. & M. 34.

(3) 1 East, 356.

(4) See by Alderson, B., in Pim v. Curell, 6 M. & W. 254.

(5) See by Lord Denman, C. J., in Evans v. Rees, 10 A. & E. 156.

(6) By Littledale, J., in Brisco v. Lomax, 8 A. & E. 211.

(7) By Lord Abinger, C. B., in Pim v. Curell, 6 M. & W. 266.

(8) City of London v. Clerke, Carth. 181. See also Cost v. Birkbeck, 1 Doug. 218; The case of the Manchester Mills, 1 Doug. 221, n.; Somerset (Duke of) v. France, 1 Str. 659; Clarkson v. Woodhouse, 5 T. R. 412; Travis v. Chaloner, 2 Eag. & Y; Biddulph v. Ather, 2 Wils. 23.

London by west-country barges, it was held that verdicts against certain owners of barges were admissible in evidence against other owners who were neither parties nor privies to the former records. The like evidence has been received upon a question respecting the right of electing church-wardens.(1)

It does not affect the admissibility of such evidence, though it may diminish its weight, that a judgment has been suffered by default, and does not appear, though of recent date, to have been followed up by execution or the payment of damages,(2) or even that the verdict has not been followed up by a judgment or decree.

Thus, in the case of Brisco v. Lomax,(3) on a question as to the boundary between the manors of A. and B., the finding of a jury under an ancient commission from the Duchy Court of Lancaster, for the purpose of determining the boundary between the manors of B. and C., on a petition of the owners of the two last-mentioned manors, representing that the boundary was uncertain, and that suits were likely to arise between them, was adjudged to be admissible evidence; it appearing that the three manors of A., B. and C. were so situated with reference to each other, that the ascertaining of the boundaries between B. and C. would throw light upon the boundaries between A. and B.; although the verdict of the jury did not appear to have been followed up by a decree or judgment. "For," as Coleridge, J., said, "on a question of manorial boundary between two owners, reputation is admissible; and verdicts are evidence, where reputation is admissible, between third parties. The necessity of a decree or judgment to render the verdict admissible, exists only where it is sought to bind the parties conclusively by the finding; but here the verdict is not offered as conclusive evidence, but as evidence in the nature of reputation."

Judgments, decrees and orders.

In an action by the lord of a manor against a copyholder for trespassing on his free warren,(4) a judgment on a *quo warranto* brought against a former owner of the manor, wherein the then defendant pleaded, and the attorney-general confessed a prescriptive title to the franchise of free warren as appurtenant to the manor, has been held to be evidence for the plaintiff in support of the right of free warren by prescription; as being the judgment of a competent court upon a matter of a public nature, which concerned the crown and the subject.

On the trial of an issue, whether the deputy oyster masters of the city of London have an immemorial customary right as claimed by them,(5) a

(1) Berry v. Banner, Peake N. P. C. 157.
(2) Carnarvon (Earl of) v. Villebois, 13 M. & W. 313, 329, 332.
(3) 8 A. & E. 198.
(4) Carnarvon (Earl of) v. Villebois, 13 M. & W. 313, 331.
(5) Laybourne v. Crisp, 4 M. & W. 320, 327.

decree of the Court of Exchequer, relative to the matter in issue, has been held to be admissible in evidence, upon the same footing as a verdict is admissible on a question of custom. If the decree has a tendency to prove any fact material to the issue, it is admissible.

In like manner, decrees and orders of other competent tribunals are admissible as evidence of reputation.

Thus, orders of commissioners of sewers requiring landowners to repair sea-walls, will be evidence upon an issue as to the liability of a party to make such repairs; and, if they are of ancient date, it will be presumed that they have been duly acted upon.(1)

But a decree or order, to be admissible, must be final; mere interlocutory orders will not be evidence.

Thus, in the case of Pim v. Curell and others,(2) in an action for the infringement of a right of ferry, ancient proceedings in the Court of Chancery of the duchy of Lancaster, containing orders made by the court in the matter of an information relating to the ferry (the ultimate result of which proceedings did not appear), were offered in evidence on the part of the plaintiff, and received at the trial; but the Court of Exchequer adjudged the order to be inadmissible, inasmuch as it was a mere interlocutory order, and did not involve any judgment upon the facts or on the rights of the parties.

But this rule as to the admissibility of verdicts and other judicial documents as evidence of reputation, does not extend to awards, even in cases where the cause has been referred by order of a judge at Nisi Prius; as the authority of an arbitrator is entirely derived from the consent of the parties to the reference; and the award is but the opinion of the arbitrator, formed upon the result of evidence laid before him, generally in private.(3)

Nor will a verdict or other judicial document be receivable, unless it appear that the tribunal was acting under legal authority.

Thus, upon a question respecting the jurisdiction of the Court of Session of the county of Chester,(4) an order and decree upon the subject by the Lord High Treasurer and certain other public functionaries of the kingdom (not forming any court known to the laws), was held inadmissible as evidence of reputation, because (as was said by Lord Tenterden, C. J.) declarations are only evidence of reputation, when made by those who have a personal knowledge of the fact; whereas, in the case in question, the persons acting as judges had no knowledge of the fact, except what was derived in the course of the proceeding.

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(1) R. v. Leigh, 10 A. & E. 398.
(2) 6 M. & W. 234, 266.
(3) Evans v. Rees, 10 A. & E. 151, 155. See also R. v. Cotton, 3 Camp. 444.
(4) Rogers v. Wood, 2 B. & A. 245.

3. Of the qualifications with which hearsay is received in matters of public and general interest.

It is, in the next place, proposed to consider the qualifications under which evidence of reputation is receivable upon matters of public and general interest.

Caution necessary.

It may be remarked, that judges have differed in opinion concerning the weight to be given to evidence of reputation. There are several judicial remarks of a very strong nature to be met with, which show, at least, that such evidence is open to much observation calculated to weaken its effect. Lord Ellenborough, C. J., has observed:(1) "Reputation is, in general, weak evidence; and when it is admitted, it is the duty of the judge to impress on the minds of the jury how little conclusive it ought to be, lest it should have more weight with them than it ought to have." And Grose, J., has also remarked,(2) that this kind of evidence ought to be very cautiously admitted. On the other hand, Wood, B., on one occasion(3) expressly dissented from Lord Ellenborough's opinion, and said that upon questions of moduses, reputation was entitled to great weight; and Richards, C. B.,(4) has spoken of reputation as having great weight and effect. The force of these observations, as well as the value of the evidence itself, must of necessity vary according to the peculiar circumstances of each case.

The first qualification to be noticed, with respect to receiving evidence of reputation upon matters of public and general interest, is, that the statements should have been made by persons likely to possess a competent knowledge of the facts to which their statements relate. It has been supposed, that this qualification must necessarily be satisfied, where the matter is of public interest, because, as Lord Kenyon, C. J. has observed,(5) all mankind being interested therein, it is natural to suppose that they may be conversant with the subject, and that they should discourse together about it, having all the same means of information. And Lord Ellenborough, C. J., has stated it to be the general understanding upon which the decisions of the courts have proceeded, "that upon questions of public right all are interested, and must be presumed conversant with them."(6)

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(1) In Weeks v. Sparke, 1 M. & S. 686.
(2) In Morewood v. Wood, 14 East, 330.
(3) In Robinson v. Williamson, 9 Price, 136.
(4) In Moseley v. Davies, 11 Price, 162.
(5) In Morewood v. Wood, 14 East, 329, n.
(6) In Weeks v. Sparke, 1 M. & S. 686.

Distinction between public and general rights.

In a modern case,(1) the court observed, it was clear that hearsay evidence upon some subjects could not be received, unless with a qualification that it came from persons who had a special interest to inquire; that in cases of pedigree the line was clearly defined; and that in cases of rights or customs,—which are not, properly speaking, public, but of a general nature, and concern a multitude of persons (as questions with respect to boundaries and customs of particular districts), though the rule is not so clearly laid down, it seems that hearsay evidence is not admissible, unless it is derived from persons conversant with the neighborhood. The court further observed, that where the right is really public (a claim of highway for instance, in which all the king's subjects are interested), it seemed difficult to say that there ought to be any such limitation, and the court were not aware that there was any case in which it had been laid down, that such a limitation existed; that in a matter in which all were concerned, reputation from any one appeared to be receivable; but of course it would be almost worthless, unless it came from persons who were shown to have some means of knowledge, as, by living in the neighborhood, or frequently using the road in dispute. And in that particular case, which related to a custom, in which all the king's subjects had not an interest, but only such as chose to become adventurers in mines within a certain district, it was said that hearsay from persons wholly unconnected with the place in which the mines were found would be of no value, and probably altogether inadmissible. But it was held, that the hearsay of persons under whose estates the minerals lay, with respect to which the custom existed, was admissible; inasmuch as they were sufficiently connected with the subject, though not concerned in mining, nor receiving the dues of mines.

In Rogers v. Wood,(2) before cited, it has been seen that a document, purporting to be a decree of certain public functionaries who had no authority as a court, was held to be inadmissible as evidence of reputation, on a question whether the city of Chester, before it was made a county of itself, formed a part of the county palatine; because those persons from their situations had no peculiar knowledge of the fact.

In one case,(3) Le Blanc, J., lays stress upon the circumstance that the evidence of reputation in that case proceeded from persons who had been conversant with the neighborhood where the waste lay to which their statements referred; and that no evidence was received, except from persons connected with the district then in question. However, actual inhabitancy in the place of which the boundaries are in dispute is unnecessary.

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(1) Crease v. Barrett, 1 C., M. & R. 927.
(2) 2 Bing. 86; *Supra*, p. 239.
(3) Weeks v. Sparke, 1 M. & S. 688, 689.

In another case,(1) justices of the peace, at the sessions of the county within which the district was alleged to be, were considered, on account of the character and nature of their office, without proof of their being residents, to have sufficient connection with the subjects in dispute to render the statements in their orders (as to the locality of Nottingham Castle) admissible evidence of reputation.

On a question of parochial or manorial boundary, the declarations of old persons, deceased, are admissible, though they were parishioners, and claimed rights of common on the wastes, which their declarations had a tendency to enlarge.(2) And on a question of parochial *modus*, it was allowable to give in evidence the declarations of deceased parishioners and occupiers of lands in the parish who were liable to pay tithe.(3) In Crease v. Barrett,(4) certain answers of conventionary tenants were objected to, as not being admissible against the freeholders of a manor, to whom it was said they had an adverse interest, and it was contended that all the cases in which the hearsay of copyholders had been received, related to questions between lord and copyholder, or copyholder and copyholder. The answers, however, were held to be admissible evidence.

Hearsay inadmissible in questions of private rights.

The probable want of competent knowledge in the person whose hearsay is admitted, is usually alleged as the ground for rejecting such evidence, respecting matters of private interest. "How is it possible for strangers," said Lord Kenyon, C. J., "to know anything of what concerns only private titles?"(5) Even if the evidence were confined to statements of persons immediately interested in the private rights in question, it may be observed, that in cases of private right, incorrect statements would be less likely to be checked and contradicted at the time, than where (as in matters of general interest) they are supposed to be addressed to persons conversant with the subject, who have an interest to inquire into it, with the means of investigation in their power.(6)

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(1) Newcastle (Duke) v. Broxtowe (Hundred), 4 B. & A. 273.

(2) Nicholls v. Parker, 14 East, 331, n.

(3) Harwood v. Sims, 1 Wightw. 112; Moseley v. Davies, 11 Price, 162, 180; Deacle v. Hancock, 13 Price, 226. See what is said by Graham, B., in 13 Price, 236.

(4) 1 C., M. & R. 927.

(5) By Lord Kenyon, C. J., in Morewood v. Wood, 14 East, 329, n. Lord Kenyon applies this observation also to private *customs*. Lord Ellenborough, C. J., in Weeks v. Sparke (1 M. & S. 686), observes; "It is said that, upon questions of public right, all are interested, and must be presumed conversant with them; and that is the distinction taken between public and private rights."

(6) It will be seen afterwards that no objection arises from the circumstance of the declarant being in *pari jure* with the party who uses the declaration.

Evidence from ecclesiastical courts and old documents may be consulted and received in evidence for the purpose of ascertaining the pecuniary rights of persons holding official places. Stephenson v. Higginson, 18 Eng. Law & Eq. 50; Showbridge v. Clark, 22 Id. 435.

In Talbot v. Lewis,(1) the answer of tenants of a manor to a commission issued by the lord of the manor, in which answer it was stated that the lord was entitled to wreck, was rejected, on the ground that the right was a private right, of which the parties making the declarations possessed no peculiar means of knowledge.

Position of parties presumed to be as stated in ancient documents.

Where proceedings in an ancient suit are produced as evidence of reputation upon matters of public or general interest, it may generally be presumed that the parties to the suit and the witnesses were actually in the respective capacities which they purport to have been, without proving this by evidence *dehors* the proceedings themselves.(2) Thus, in Freeman v. Phillipps,(3) an action by a copyholder against the lord of a manor, in which the defendant gave in evidence the proceedings in a suit in equity in the time of King William III, brought by a copyholder of the same manor against the then lord, it was held that no evidence *aliunde* was requisite to make the proceedings admissible. Bayley, J., said: "We must assume at this time of day, that the bill was not a mere fabrication, but was really filed by such a copyholder against the lord, and that the trial was had, and the depositions made between such parties as were really litigating their rights in the characters claimed and disclosed on the record." And with respect to the depositions the same judge observed: "These I do not look upon merely as the declarations of persons unconnected with the subject, but as the depositions of persons, made by them in the character of witnesses brought forward by the copyholder, whose interest it was to put foremost such witnesses as were best able to depose to the matter in dispute. Why am I to assume that the copyholder brought forward witnesses who were ignorant? I do not agree that it was necessary to prove the witnesses to have been copyholders, in order to let in their testimony. The plaintiff's witnesses in the last trial do not all appear to be copyholders, yet as they were present at the holding of courts, and therefore knew what passed, they were competent to speak to that. So in the former suit I cannot infer that they were incompetent to have a knowledge of the facts they deposed to; on the contrary, it is to be presumed they had a competent knowledge, being brought forward as witnesses by a copyholder." Lord Ellenborough, C. J., in the same case, observed: "Considering the depositions as made in a suit, which may now be said to be lost in remote antiquity, we should give this record but very little effect, if we did not attribute to it verity in many of the particular

(1) 1 C., M. & R. 497.

(2) A stricter rule has been laid down in some pedigree cases, *vide infra*, sect. 2, the Banbury and Berkeley Peerage Cases. The same point occurs in regard to declarations against interest, *infra*. See Davies v. Morgan, 1 C. & J. 591; Adamthwaite v. Synge, 1 Stark. R. 183, 189; S. C., 4 Camp. 372; Slane Peerage, 5 Cl. & Fin. 23.

(3) 4 M. & S. 495.

matters which it contains; such as, that the parties litigant were clothed with the rights in which they profess to stand, and were agitating the claim put forward on the record."

Proof of modern exercise of right.

Another qualification, or cautionary rule, in receiving hearsay evidence in matters of public or general interest, has been supposed to be, at least where the nature of the case admits of it, that a foundation for it should be laid by proving acts of modern enjoyment. Le Blanc, J., in speaking of the manner in which matters of this nature are to be proved, says,(1) "First, they are to be proved by acts of enjoyment within the period of living memory; and when that foundation is laid, then inasmuch as there cannot be any witnesses to speak to acts of enjoyment beyond the time of living memory, evidence is to be admitted from old persons of what they have heard other persons of the same neighborhood, since deceased, say respecting the right." Again, "After a foundation is once laid for the right by proving acts of ownership, the evidence of reputation becomes admissible." And Buller, J., in another case, observed,(2) "Thus far I agree with Lord Kenyon and Mr. Justice Ashurst, that in no case ought evidence of reputation to be received, except a foundation be laid, by other evidence, of the right."

But in a later case,(3) in answer to an observation, that all evidence of reputation was inadmissible, unless confirmed by proof of facts, it was said that such proof was not an essential condition of its reception; but that it was only material as affected the value of the evidence when received.(4)

Where the subject matter of the question does not, from its nature, admit of acts of enjoyment, as in a question of parochiality, proof of reputation, though unaccompanied by evidence of acts done, is admissible. On a question respecting the custom of descent within a manor, it has been held that reputation is admissible, without showing any instances of its having been put in use:(5) for were it otherwise, if no instances were to happen within the memory of man, and the old court rolls were to be lost, the custom itself would be entirely destroyed.(6) And in one case, Lord Tenterden, C. J., intimated an opinion that the existence of a manor might be proved by reputation alone, without evidence of the exercise of any manorial rights.(7)

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(1) In Weeks v. Sparke, 1 M. & S. 688.

(2) In Morewood v. Wood, 14 East, 330, n. And see Ratcliff v. Chapman, 4 Leon. 242, commented on in 5 T. R. 32. In White v. Lisle (4 Madd. 214), the vice-chancellor said, that evidence of reputation was only admitted in confirmation of actual enjoyment, and not against it.

(3) Crease v. Barrett, 1 C., M. & R. 927.

(4) There was, however, sufficient proof of enjoyment given in that case.

(5) Beebee v. Parker, 5 T. R. 26, 31; Doe d. Foster v. Sisson, 12 East, 62.

(6) By Grose, J., 5 T. R. 32; Roe v. Jeffery, 2 M. & S. 92; Doe v. Mason, 3 Wils. 63.

(7) 2 Stark. R. 466. This was ruled also by Lord Kenyon, C. J., in Curzon v. Lomax, 5 Esp. 60.

And it does not seem to be necessary that statements of opinion upon any subject by deceased persons, should expressly appear to be founded upon reputation derived from others; thus, on an issue whether or not certain land, in a district repairing its own roads, was a common highway, it has been held to be admissible evidence of reputation (though slight), that the inhabitants held a public meeting to consider of repairing such way, and that several of them, since dead, signed a paper on that occasion, stating that the land was not a public highway; there being at the time no litigation on the subject.(1)

Rule with reference to the *lis mota.*

The next qualification in receiving hearsay evidence of matters of public or general interest is, that declarations made by persons since deceased are not receivable, if they were made *post litem motam.*

In the Roman law the term *lis mota* appears to have been applied strictly to the commencement of a suit; but in the English law the term *lis* is not so confined in its application, but is taken in its primary meaning of a dispute or controversy.(2) In our law therefore, declarations of deceased persons, made after a controversy has arisen touching the matter to which they refer, are inadmissible.(3)

The admissibility of such traditionary evidence at all, is founded upon the presumption that the statements given in evidence are the natural effusion of the party, upon an occasion when his mind stands even, without bias to exceed the truth or fall short of it.(4) But this foundation fails where a controversy concerning any matter has already commenced. Statements connected with such matters are then considered as made under a bias, and even though made under the sanction of an oath, they are not free from suspicion, the absence of which is necessary to insure their admissibility.(5)

In one case, which was an issue out of chancery,(6) Alderson, B., considered that the commencement of the controversy must be taken to be the arising of that state of facts on which the claim is founded, without anything more; and his Lordship said on another occasion,(7) that his

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(1) Barraclough v. Johnson, 8 A. & E. 99.

(2) By Lawrence, J., in the Berkeley Peerage Case, 4 Camp. 411. "*Philosophi ætatem in liti. bus conterunt.*" Cic. cit. Ibid. *in not.*

(3) See by Mansfield, C. J., in the Berkeley Peerage Case, 4 Camp. 417. By Lord Brougham, C., in Monckton v. Att. Gen., 2 Russ. & M. 161.

(4) By Lord Eldon, C., in Whitelocke v. Baker, 13 Ves. 514. See also R. v. Cotton, 3 Camp. 446, by Dampier, J.

(5) See the cases cited in the last two notes, and Richards v. Bassett, 10 B. & C. 657.

(6) Walker v. Countess Beauchamp, 6 C. & P. 552, 561. This was a case of pedigree.

(7) In Davies v. Lowndes, in error, 6 M. & G. 517.

ruling had been upheld by Lord Cottenham, C. But it seems doubtful whether this is a correct exposition of the doctrine as to *lis mota*.(1)

It was laid down by Lawrence, J.,(2) with regard to declarations of persons deceased, respecting questions of right of way, rights of common, and other matters depending upon usage, that, according to his experience, whenever a witness had admitted, that what he was going to state he had heard after the beginning of the controversy, his testimony had been uniformly rejected.(3) This qualification applies equally to hearsay evidence in matters of pedigree: and as almost all the cases, in which the qualification has been discussed, have been on questions of pedigree, the subject will be more conveniently considered in the next section, which treats of the admissibility of hearsay evidence in that class of cases.

It has been seen(4) that an award is not admissible as evidence of reputation, upon the ground that it is the mere private opinion of the arbitrator. It seems that its admissibility is also affected by the consideration of its being a proceeding had *post litem motam*.

In the case of the King agt. Cotton,(5) where the question was whether the occupier of a particular farm was liable to the repair of a public road, and to prove the affirmative an award was produced, which had been made some years before, when the same question was the subject of dispute between a former occupier and the township where the lands were situated, the evidence was rejected as inadmissible. The very submission, observed Dampier, J., shows that the question was then agitated between the township and the occupier; and as the account which deceased witnesses might have given to the arbitrator on that occasion could not have been received, because the declarations were made *post litem motam*, so the opinion of the arbitrator formed upon such testimony could be entitled to no more credit.

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(1) See by Lord Denman, C. J., in S. C., 6 M. & G. 528. See also Reilly v. Fitzgerald, 1 Drury Ch. R. (Ir.), temp. Sugden, C., 120, 140; S. C., 6 Eq. R. (Ir.), 335, 344.

(2) In the Berkeley Peerage Case, 4 Camp. 411.

(3) In Nicholls v. Parker (14 East, 331, n.), upon a question of *boundary* between two parishes and manors, declarations were admitted, although the boundary had been long in dispute between the respective parishes and manors, and intersecting perambulations had been made both before and after the declarations, there being no litigation actually pending at the time. The rule respecting *lis mota*, does not, however, appear to have been well settled at that time.

(Declarations made by a deceased person in his lifetime, *ante litem motam*, *i. e.*, before the litigated point has become the subject of controversy, afford a reasonable presumption in relation to remote transactions, and are held admissible. Jones v. Jones, 3 Strobh. 315. When such declarations are made in derogation of his own interest and before any dispute arose, they are justly considered strong evidence of the truth. Richards v. Swan, 7 Gill, 366; Pike v. Hayes, 14 N. Hamp. 19. On the other hand, when made by a person to extend the limits of his possession, or when made *post litem motam*, they are uniformly excluded. Smith v. Powers, 15 N. Hamp. 546; Mattter of Hall, Wallace, jr. 85.)

(4) *Supra*, p. 186.

(5) 3 Camp. 444.

In the case of Evans v. Rees,(1) where also an award was held to be inadmissible as evidence of reputation, Lord Denman, C. J., after observing that a verdict was equally open to the objection of being given *post litem motam*, said: "It is sufficient to say that the admissibility of a verdict as evidence of reputation is established by too many authorities to be now questioned, but that the principle of these authorities is not clear enough to embrace an award."

In a case where an ancient presentment of a homage was produced, according to which, the jurors purported on their oaths to have considered and negatived the claim of a freeholder of the manor after hearing the evidence produced by him, the presentment was held to be inadmissible, on the ground that it appeared upon its face to have been made *post litem motam*.(2)

In the case of Freeman v. Phillips,(3) an action was brought by a copyholder against the lord of a manor, in which the copyholder relied upon a custom, that the lord could not assess a fine on filling up lives in copyholds held for life without the intervention of the homage. The lord gave in evidence the proceedings in an ancient suit brought by a copyholder against the then lord, in which the copyholder insisted on a particular custom relative to the filling up of lives, not being that which was in dispute in the latter suit, and throughout the former suit no mention was made of the approbation of the homage being necessary. The court held, that there was no good reason for not admitting the proceedings in evidence, on the ground of the objection that the litigation was not on the very same point; and that the proceedings were not evidence of anything *affirmed* by the witnesses, but were material on account of what the witnesses *omitted* to affirm, that is to say, that where a dispute existed concerning the copyholder's right to renew on some terms, it was never made a term that the fine should be assessed by the homage.

In the case of the Duke of Newcastle v. The Hundred of Broxlowe,(4) orders of magistrates at sessions were received as evidence of reputation whether Nottingham Castle was situated within the hundred; for although they were made upon controverted matters, there was no controversy upon that particular question.

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(1) 10 A. & E. 151.
(2) Richards v. Bassett, 10 B. & C. 657.
(3) 4 M. & S. 493.
(4) 4 B. & Ad. 279.

SECTION IV.

Exceptions to the General Rule in Questions of Pedigree.

Another subject, whereon statements are receivable upon the credit of deceased persons, who have neither been sworn to the truth of those statements, nor been cross-examined respecting them, relates to matters of pedigree.

Reasons for the admission.

Hearsay statements of deceased persons are allowed to be received in matters of pedigree, subject however to various qualifications. This exception appears to be founded on the considerations, that the facts which are the subject of inquiry are frequently of an ancient date, and that the knowledge of them is usually confined to few individuals. By limiting the exception to the statements of deceased persons, a resort to this kind of evidence is precluded, where the hearsay tendered indicates the existence of more satisfactory proof, and it is only admitted on failure of the ordinary channels of information. According to the qualifications under which evidence of pedigree is received, provision is made that the statement should be derived from a person likely to be well informed upon the subject on which he was speaking, and free from any apparent motive for perverting the facts.

The exception in question is framed upon general principles adapted to circumstances of frequent occurrence. It may happen that these principles will fail of application in many instances to which the exception might seem to extend. The exception is not confined to ancient facts, but extends also to matters of pedigree which have recently transpired; and the hearsay of deceased witnesses is admitted as to facts which have occurred in the presence of living witnesses.

It would be impossible to prove descents according to the strict rules for establishing contracts, or for regulating rights of property, which require the proof of facts from witnesses who had personal knowledge of them.(1) On inquiring into the truth of facts which happened a long time ago, the courts have varied from the strict rule of evidence applicable to facts of the same description happening in modern times, on account of the difficulty or impossibility (by lapse of time) of proving those facts in the ordinary way by living witnesses.(2) On this ground hearsay and reputation (which latter is no other than the hearsay of those who may be supposed to be acquainted with the fact handed down from one to another),

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(1) By Erskine, C., in Vowles v. Young, 13 Ves. 143. And see by Best, C. J., in Johnson v. Lawson, 2 Bing. 86; S. C., 9 B. Moore, 188.

(2) By Le Blanc, J., in Higham v. Ridgway, 10 East, 120.

have been admitted as evidence in particular cases.(1) On that principle, in cases of pedigree, stands the evidence of declarations of deceased members of the family, of monumental inscriptions, and of entries made in family Bibles. Such evidence is admitted on the principle, that it is the natural effusion of a party who must know the truth, and who speaks upon an occasion where he stands in an even position, without any temptation to exceed or fall short of the truth.(2)

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(1) NOTE 89.—Per Best, C. J., in Doe ex dem. Futter v. Randall, 2 Moore & Payne, 15. And see 2 Ev. Poth. 290, who recognizes the same principle. All the cases which we shall have occasion hereafter to cite, in respect to hearsay of pedigree, recognize the general proposition that it is admissible. See, also, per Marshall, C. J., 7 Cranch, 296; Strickland's Lessee v. Poole, 1 Dall. 14; Negro John Davis v. Wood, 1 Wheat. 6. The vexed questions are, in what form, and under what qualifications? for which, mainly, consult the ensuing pages of the text and notes.

Ex parte affidavits made *abroad*, out of the United States, may be received to prove pedigree, as well as the identity of persons married, but not to establish an independent fact. Fogler's Lessee v. Simpson, 1787, cited 2 Dall. Rep. 117; Douglass' Lessee v. Sanderson, 1 Yeates, 15; Winder v. Little, Id. 152; Lessee of Lilly v. Kintzmiller, Id. 28. Though otherwise, it seems, of an affidavit made in another state. Douglass' Lessee v. Sanderson, 2 Dall. 116, 118. Yet it has again and again been held, that depositions of deceased witnesses, taken between other parties, and with whom the new parties are in no way privy, may come in as hearsay of pedigree, in whatever court taken. Boudereau v. Montgomery, 4 Wash. C. C. Rep. 186; Banert's Lessee v. Day, 3 Wash. C. C. Rep. 243.

These are merely *ex parte* as to the persons immediately concerned, though they are not in every sense extra-judicial. The cases cited from the Pennsylvania Reports relate to those which were entirely extra-judicial, as well as, probably, *post litem motam.* Those decisions were doubted in a subsequent case (Keller v. Nutz, 5 Serg. & Rawle, 251), and it was held, that where the deponents reside in the state, within the jurisdiction of the court, such depositions would, clearly, not be admissible. Id. If that objection were out of the way, the capital one in the Berkeley Peerage Case would still be left, that they are not *ante litem motam*, but probably concocted for the very purpose of turning the cause; a most dangerous sort of evidence.

In ejectment, the plaintiff had proved his pedigree under a commission to France; and the substance of the depositions, on the point of pedigree, had been copied into a bill of exceptions in the same cause; but the originals were lost. Judgment being for the plaintiff, in an action for mesne profits, against the landlord of the defendant, the former having retained counsel to defend the ejectment, though not a formal defendant on the record, the bill of exceptions was received in evidence. Chirac v. Reinecker, 2 Pet. S. C. Rep. 613, 620, 621.

A conversation of the deceased ancestor, in which he and another, now living, reckoned up their descents; and the ancestor observed, if that be so, we are second cousins; is inadmissible as a declaration of the ancestor, that they were related within that degree. But proof that he afterwards explicitly admitted that connection, though the credit of the admission may be weakened by the former conversation, is admissible. Charlotte Hall School v. Greenwell, 4 Gill & John. 407.

The proof of hearsay to make out pedigree, is not confined to questions in respect to descent or other claim to real estate; but extends to all questions of relationship for other purposes; as to show the degree of relationship with a view to claim as the distributee of an intestate. Charlotte Hall School v. Greenwell, 4 Gill & John. 407.

(2) By Lord Eldon, C., in Whitelocke v. Baker, 13 Ves. 514. These observations are adopted by Lord Brougham, C., in Monckton v. Att. Gen., 2 Russ. & M. 162. See, upon the subject of hearsay and relaxations of the old rules of evidence, Burke's Works, Vol. XIV; Report from Committee appointed to inspect the Lords' Journals.

NOTE 90.—A leaf torn from an old family Bible, belonging to the father, was admitted to prove that those persons were his sons under whom the lessor of the plaintiff claimed. Douglass'

It will be convenient in the present section, to consider in order, first, what are matters of pedigree; secondly, the different forms of hearsay evidence in cases of pedigree; thirdly, the qualifications under which hearsay evidence is received in cases of pedigree.

1. What are matters of pedigree.

First, pedigree, with reference to the subject under consideration, consists of general evidence of descent or relationship, evidence of particular facts (as births, marriages and deaths), and of the time when such events occurred, either absolutely or relatively to each other.(1)

Thus, general kindred, as that a person was heir to another, being his cousin or relation, is matter of pedigree, and declarations to that effect appear to be receivable in evidence.(2) So the identity of a party is a matter of pedigree, and may be proved by hearsay evidence.(3)

And not only may relationship in general be proved by the hearsay of a family, but particular facts also may be proved, such as the ages of persons, dates of death or birth. There are several authorities for admitting hearsay as to dates.(4) Thus, upon a question whether a testator at the time of making his will was of full age, a written memorandum by a deceased parent, stating the time of his birth, has been admitted to be good evidence.(5) In like manner, the declarations of parents are admissi-

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Lessee v. Sanderson, 1 Yeates, 15; S. C., 2 Dall. 116. See note 92. Many of the American judges have mentioned family Bibles and inscriptions on monuments as familiar and well settled media of proof in cases of pedigree. Indeed, every variety of hearsay mentioned may be considered as receivable upon American authority. Per Thompson, J., in Jackson ex dem. Ross v. Cooley, 8 John. R. 131; Per Duncan, J., in Keller v. Nutz, 5 Serg. & Rawle 251; (Copes v. Pearce, 7 Gill, 247; Primm v. Stewart, 7 Texas, 178. Declarations by deceased members of the family, in regard to pedigree, are of equal weight as writing made in the family register. Clements v. Hunt, 1 Jones' Law (N. C.) 400; but such declarations are not admissible, if they appear to have been made *post litem motam.* Matter of Hall, 1 Wallace, Jr,, 85.)

(1) See Monckton v. Att. Gen. 2 Russ. & M. 161.

(See, as to proof of marriage, Copes v. Pearce, 7 Gill, 247; of death, Primm v. Stewart, 7 Texas, 178; Jackson v. Boneham, 15 John. R. 226; but not of death in a particular manner, 5 Cowen, 314; nor that a person who is shown to have been absent and unheard of for more than seven years, has been since seen in the state. Smothers v. Mudd, 9 B. Mon. 490.)

(2) Doe d. Futter v. Randall, 2 M. & P. 24. And see by Lord Erskine, C., 13 Ves. 147; by Lord Brougham, C., 2 Russ. & M. 158.

(3) R. v. St. Mildred's, Canterbury, 2 Jur. 46, Q. B.

(4) Entries in family Bibles, made by parents, as to births and deaths of their children, with the dates respectively, are admitted after the decease of the parents, without objection. In Kidney v. Cockburn (2 Russ. & M. 167), it is reported that Tindal, C. J., at Nisi Prius, rejected the evidence of inscriptions on a tombstone and monumental tablet, and also of declarations, and of a letter stating the ages of individuals; on the ground, that although relationship in general might be proved by hearsay, particular facts, such as the ages of parties, could not. Lord Brougham, C., however, expressed a contrary opinion, as also did Park, J., and Littledale, J., to whom the point was submitted. The Lord Chancellor granted a case for the opinion of the court of K. B. But the case was compromised. In R. v. Eriswell (3 T. R. 707), although the declarations of deceased persons were held inadmissible relating to a question of settlement, the court seemed to admit that such declarations would be receivable in a case of pedigree.

(5) Herbert v. Tuckal, T. Raym. 84, recognized by Lord Ellenborough, C. J., in Roe d. Brune

ble to prove, that a birth took place before marriage, as well as to disprove the fact of marriage entirely.(1) Upon a question, which of three children, all born at a birth, was heir, evidence was admitted, on one side, of declarations by the father stating which was the eldest son, and that he called them Stephanus, Fortunatus, and Achaicus (according to the order of names from St. Paul's Epistle), for the purpose of distinguishing their seniority; on the other side, the court received declarations by a relative, who was present at the birth, and who, upon the birth of the second and

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v. Rawlings, 7 East, 290. And see Johnston v. Parker, 3 Phill. 42; by Lord Mansfield, C. J., in Goodright d. Stevens v. Moss, Cowp. 593. See also Ryder v. Malborne, cit. 2 Russ. & M. 169; Vulliamy v. Huskisson, 3 Y. & Col. 82.

(1) Goodright d. Stevens v. Moss, Cowp. 591; Lord Valentia's Case and Stapylton v. Stapylton, cited Ib., 593; R. v. St. Peter, Burr. Sett. Cas. 25; R. v. Bramley, 6 T. R. 330; May v. May, B. N. P. 112. See, also, Cooke v. Lloyd, Peake Ev. App. xxviii.

NOTE 91.—A distinction is taken in some of the cases between pedigree, where such declarations are admissible, and other cases where it is not allowed. Thus, in a settlement case where a legal residence was claimed for the wife on the simple ground that she had married a freeholder of the town, the declarations of the freeholder as to his previous marriage with another woman living at the second marriage, and his reception of that woman on presenting herself as his wife, were refused in evidence. Westfield v. Warren, 3 Halst. 249. The cases cited in the text are those of settlement in right of parentage, and therefore present questions of pedigree. It is so likewise with most of the cases cited *infra*. The distinction is ably and satisfactorily supported by Ewing, C. J., p. 250 to 253, though it is certain that the rule is in the other cases laid down without that distinction; and the direct action of our courts upon it has been, we believe, pretty much confined to this case of Westfield v. Warren. In that case, it is to be observed, that the acknowledgment was of a former marriage in the abstract, the supposed husband and wife having been long separated. It was different from their declarations while they are living together. In the latter case, their condition, whether in marriage or concubinage, would seem to be deducible from their declarations as a part of the *res gestæ*, within the rules as to possession, forbearance, domicile, &c. (*ante*, note 166). After all, this may be the true sense of the cases which sanction cohabitation, reputation, reception in the family, hearsay of the parties, &c. 1 Stark. Ev. 58, 59. Such matters have often been received entirely independent of pedigree, and even in favor of the parties themselves, claiming as husband and wife. Hammick et ux. v. Bronson, 5 Day, 290, 293. So on a claim of a widow for her dower. Whitehead v. Clinch, 2 Hayw. 3, 4; Jackson ex dem. Van Buskirk v. Claw, 18 John. Rep. 346. And see Jenkins v. Bisbee, 1 Edw. Ch. Rep. 377, 378. Another court acted upon a principle more firmly fixed, when in a settlement cause involving pedigree, they rejected such hearsay, because the parent was alive and adducible as a witness, his corporal oath being evidence of a higher grade. Raynham v. Canton, 3 Pick. 293, 296. As the courts had heretofore apparently shaped this matter, the rule was, that except in prosecutions for bigamy, or incest, and indictments or actions for adultery, the acknowledgment of the parties, the father or mother, was admissible to prove or disprove a marriage, even against third persons not claiming under them. Fenton v. Reed, 4 John. Rep. 52, 54; Allen v. Hall, *infra*. *A fortiori*, where the claim is under the declarant. Johnson's Legatee and Ex'x v. Johnson's Ex'r, 1 Dessauss. Eq. Rep. 595; Allen v. Hall, 2 Nott & M'Cord, 114, 115, 117, 118. And general reputation was allowed even though the father was alive. Doe dem. Fleming v. Fleming, 12 Moore, 500; S. C., 4 Bing. 266. Common reputation alone was held sufficient. Id. But it was denied in another case, that mere rumor of a previous marriage to a wife living at the time of the second marriage, in order to invalidate the latter, would be sufficient. Williams v. Williams, 1 J. J. Marsh. 105. The declaration in an imputed father's will, casting doubt on the legitimacy of the claimant, though admissible, may be overcome by cohabitation and reputation in the neighborhood a long time ago, the parties being dead, and no adverse heir appearing. Johnson's Legatee and Ex'x v. Johnson's Ex'r, 1 Dessauss. Eq. Rep. 595.

third child, took some string and tied a piece round their arms, to know them from the eldest.(1) A variety of illustrations of what is deemed in law to be matter of pedigree, will be found under the subsequent heads of this subject.

In an action of assumpsit,(2) in which there was a plea of infancy, and the question was whether, in support of this plea, letters written by the deceased father were admissible to show the age of the defendant, Patteson, J., upon a motion for a new trial in the Bail Court, intimated a strong opinion against their admissibility. And in an action for use and occupation of certain property, which had been demised to the defendant for a term determinable on three lives,(3) Parke, J., rejected hearsay evidence of the death of one of the *cestuis que vie*, upon the ground that it was not a question of pedigree.

Hearsay not admissible, as to place of birth.

It has been held that the declarations of a deceased parent, though they are good proof of the *time* of a child's birth, are not admissible as evidence

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(1) Vin. Ab. Ev. T. b. 91: referred to by Lawrence, J., in Spadwell v. ———, in the Berkeley Peerage Case, 4 Camp. 401, 410.

(2) Figg v. Wedderborne, 6 Jur. 218.

NOTE 92.—Where in actions on contract a plea of infancy is interposed, hearsay of age coming from the plaintiff's father has been refused; but the case mentions no reason. Albertson's Lessee v. Robeson, 1 Dall. 9. In another case a passport, signed by the father as consul, stating his son's age, was received, it having been made before the controversy arose, though it did not appear that the father was absent. But in Louisiana, where this case was decided, lineal ascendants or descendants are not witnesses for each other. David v. Sittig, 1 Mart. Lou. Rep. (N. S.) 147, 149. In general, the notion of primary and secondary evidence is closely adhered to in the admission of these declarations as to age. Per Colcock, J., in Taylor v. Hawkins, 1 M'Cord, 165. They cannot be received where the father, mother or other declarant is present in court, or within reach of process. Id. Thus the mother's entry in the family Bible was properly rejected, she being in court. Per Marcy, J., in Leggett v. Boyd, 3 Wend. 376, 379. In Woodward v. Spiller (cited *post*), the father was dead. The deceased father's original entry in the Bible should be produced, or its absence accounted for. In the latter case only can a copy be received, though it be a transcript by direction of the father from one family Bible into another. Curtis v. Patton, 6 Serg. & Rawle, 135. But this is only where you seek to prove the contents of the memorandum itself; for the entry in a family Bible is but a memorandum, and not superior in degree to any other proof admissible in itself. It is not, therefore, superior to the recollection of a witness, which may be adduced, although it appear that the age be entered in the family Bible. Berry v. Waring, 2 Har. & Gill, 103; Taylor v. Hawkins, 1 M'Cord, 164.

A parish register was denied as evidence of age, Ld. Tenterden, C. J., saying it was only evidence of baptism. Rex v. Clapham, 4 Carr. & Payne, 29. Where, on trying the charge of rape, it was material to show that on the 5th of February, 1832, a female child was under ten years of age, its father proved that on his return after an absence from home for a few days, on the 9th of February, 1822, he found that the child had been born, and was told by her grandmother that she had been born the day before. The register of baptisms showed that the child had been baptized on the 9th of February, 1822. The mother was dead; but the court held the testimony insufficient, as the grandmother was alive, and might be called. The whole depended on what she told the father. Rex v. Wedge, 5 Carr. & Payne, 208.

(3) Whittuck v. Waters, 4 C. & P. 375.

of the *place* of the birth.(1) "The point in dispute," said Lord Ellenborough, C. J., in a case where the admissibility of such evidence was discussed, "turns on a single fact involving no question but of locality, and therefore not falling within the principle of, or governed by the rules applicable to, cases of pedigree."(2) In this case, the declaration of a deceased father as to the birthplace of his illegitimate child was rejected. And this distinction between the time and place of birth, as matters of pedigree, has been recognized in a recent case.(3)

It may indeed be observed, that the fact where a child was born is seldom provable except by the evidence of relations, and that they are quite as likely to remember accurately the *place* as the *time* of the birth, if not more so. But the reason of the distinction appears to be that pointed out by Lord Ellenborough, C. J., namely, that the place of birth is not a question of pedigree, or at least not necessarily so,—whereas, the time of birth is so, as showing the age of a party.(4)

Locality, however, may be so involved in a question of pedigree, as to fall within the general rule, and render hearsay evidence admissible on the subject; as, where the object is to identify certain persons connected

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(1) R. v. Erith (Inhabs.), 8 East, 539.

(2) Ibid. p. 542.

(3) R. v. Rishworth (Inhabs.), 2 Q. B. 476, 483, 485, 487. See also R. v. Yelvertoft (Inhabs.) 6 Q. B. 801.

NOTE 93.—The American cases are uniform in denying declarations to prove the mere place of birth. They have, accordingly, been denied on trying a petition of freedom as to the place of birth and residence of a black woman (Mima Queen v. Hepburn, 7 Cranch, 291); in ejectment, where the plaintiff asked one of his witnesses if it was not reputed, in 1784 or 1785, that Tanner, the patentee under whom the plaintiff claimed, was a native of North Carolina (Shearer v. Clay, 1 Litt. 260, 266; S. C., 3 Marsh. 549, 550, S. P.); and on hearing a settlement case before the general Quarter Sessions, where the appellees offered a witness to prove the pauper's *place of birth* by what he had heard his deceased parents say concerning it. Independence v. Pompton, 4 Halst. 209. Although pedigree may be proved by hearsay, the place of birth cannot. Jackson ex dem. People v. Etz, 5 Cowen's Rep. 320, per Sutherland, J. The declaration of a pauper is not evidence as to the place of his birth; nor is a man's declaration that he was born in Germany, on trial of a question of citizenship. Braintree v. Hingham, 1 Pick. 245, 247. On a question where T. was born, in a suit respecting the settlement of his descendants, evidence as to the declaration of persons who brought him to their house while he was an infant, that he was brought from M., was held inadmissible. Wilmington v. Burlington, 4 Pick. 174.

But in a case respecting a settlement derived from the deceased grandfather, it being material to show that he was settled in Oxford, a deed, with his last will executed by him, describing him as of Oxford, were held admissible. And the court distinguished this from a mere case of oral declaration of a pauper as to his residence; the evidence coming from a more solemn and a most disinterested act, and being in the nature of a fact rather than a declaration. Ward v. Oxford, 8 Pick. 476, 477, 478.

(4) Entries of baptism in *parochial* registers are not evidence of the *place*, or even of the *time* of the child's birth; but this is on the ground that it is not the duty of the minister to enter such matters. R. v. Clapham, 4 C. & P. 29; Burghart v. Angerstein, 6 C. & P. 696; Wihen v. Law, 3 Stark. R. 63. See this subject more fully treated *post*, Vol. II: *On the Admissibility of Public Writings, not judicial.* And see *ibid.* as to registers made under the Registration Act (6 & 7 Wm. IV, c. 86, § 38).

with a particular place, as belonging to a family. Thus, where it is important to show that a family had relatives living at a particular place, A., a declaration by a deceased member of the family that "he was going to visit his relatives at A.," may be given in evidence—not, indeed, of the fact that the declarant did go to that place, or that any one of the family name was living there—but as showing a tradition in the family that they had relations living there; and in the event of its being shown by other evidence that there were persons of that name living at that place, the declaration in question might be referred to, for connecting those persons with the family.(1) In like manner, evidence has been received of a tradition that a particular individual had died in India, for the purpose of connecting that individual with a certain family.(2)

On questions of settlement.

Formerly, it was the practice to admit the declarations of deceased persons as to particulars concerning their settlements, though not relating to matters of pedigree.(3) But it is now settled that all such evidence is inadmissible.(4)

Non-access.

It has been stated as a ground for rejecting the evidence of a father or mother, as proof of want of access (in order to bastardize a child born during wedlock),(5) that the want of access, implying the continued separation of the parties, must be notorious to the whole neighborhood where they resided, and is therefore capable of more satisfactory proof;(6) and this objection would apply to their declarations, if by the term *non-access* is meant the want of opportunity for sexual intercourse. If by that

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(1) Rishton v. Nesbitt, 2 Mo. & R. 554.

(2) Monckton v. Att. Gen., 2 Russ. & M. 147, 151.

(3) R. v. Greenwick, Burr. Sett. Ca. 243; R. v. Nuttey, Id. 701; R. v. Wareham, Cald. 141; R. v. Bury, Id. 486; R. v. St. Sepulchre, Id. 547.

(4) R. v. Eriswell, 3 T. R. 707; R. v. Nuneham Courtney, 1 East, 373; R. v. Chadderton, 2 East, 29; R. v. Ferry Frystone, Id. 55; R. v. Abergwilly, Id. 63.

(5) As to which see *supra*, ch. 4, § 4, and ch. 7, § 2.

(6) B. N. P. 113, citing Roe v. Reading, Rep. temp. Hardw. 79.

NOTE 94.—The defendant admitted, in his answer to a bill in chancery, that he had always insisted that H. (in whose right the plaintiff claimed property, the title to which depended on his establishing H.'s illegitimacy), though born in wedlock, was not his child. Held insufficient to establish her illegitimacy. Bowles v. Bingham, 2 Munf. 442. It was said, on a question of bastardy, that the condition of a child born during marriage cannot be affected by the declaration of one or both of the spouses. Tate v. Penne, 7 Mart. Lou. Rep. (N. S.) 548, 555, citing 2 Toullier, lib. 1, ch. 2, no. 859; Cross v. Cross, 3 Paige, 139, 141; Cope v. Cope, 5 Carr. & Payne, 604. The great case of the Sieur Bouillerot de Vivantos (2 Ev. Poth. 450 to 469), decided by the French Chancellor D'Aguesseau, presents a splendid discussion upon the maxim *Pater est is quem nuptiæ demonstrant*, as opposed to the uniform acts and declarations of the father, mother and adulterer, all conspiring to bastardize the appellant. (See also Page v. Dennison, a recent case decided in the Supreme Court of Pennsylvania; Amer. Law Reg. for June, 1857, p. 469, and cases there cited by KNOX, J.)

term is meant the fact of sexual intercourse, it should seem that the declarations could be rejected only on the ground of interest or public policy. Expressions of the parents tending to bastardize their issue have, however, been held admissible.(1)

2. Of the various forms in which the hearsay may be presented in matters of pedigree.

Entries, inscriptions.

The hearsay evidence which is admissible in matters of pedigree may be supplied in various forms. One class of proofs seems to rest principally on the credit due to the authors of the statements; such as entries made by members of the family in family Bibles or other family books, family correspondence, descriptions in wills, recitals in deeds, statements in bills or answers in chancery. There is another class, apparently resting not so much upon the credit due to the authors of the statements as upon the adoption of the statements by the family, such as inscriptions on tombstones or on coffin plates, engravings on rings, pedigrees hung up in a family mansion, or the like. The authorities, however, do not admit of being arranged with much precision according to these classifications. The distinction is here noticed, because it will afterwards become important to advert to the examples about to be detailed, according to this view of them.

An entry in a family Bible has been considered to derive credit from the circumstance of its being entered in a book which is kept as the ordinary register of families, and as admissible, therefore, on account of its publicity in the family, without proof that such entry was made by a member of the family.(2) But memoranda inserted in other books, as an almanac,(3) a missal,(4) a prayer book,(5) and in other family documents or papers,(6) have been admitted in evidence, to show the fact or date of

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(1) Hargrave v. Hargrave, 2 C. & K. 701. And see Stapylton v. Stapylton, Rep. temp. Hardw. 277; Goodright d. Stevens v. Moss, Cowp. 593; R. v. Luffe, 8 East, 203; R. v. Kea, 11 East, 133; R. v. Rook, 1 Wils. 340; R. v. Bedall, 2 Str. 941, 1076; R. v. Mansfield, 1 Q. B. 444; Cope v. Cope, 1 Mo. & R. 269; S. C., 5 C. & P. 604.

(2) By Lord Ellenborough, C. J., and Lord Redesdale, C., in the Berkeley Peerage Case, 4 Camp. 421. And see Johnston v. Parker, 3 Phill. 82; by Lord Mansfield, C. J., in Goodright d. Stevens v. Moss, Cowp. 594; Lord Erskine, C., 13 Ves. 514; Le Blanc, J., 10 East, 120. See also by Lord Brougham, C., in Monckton v. Att. Gen., 2 Russ. & M. 162, 163.

(3) Herbert v. Tucknal, T. Raym. 84.

(4) Slane Peerage, 5 Cl. & Fin. 41; Print. Min. part 2, p. 49.

(5) Leigh Peerage, Print. Min. p. 310; Sussex Peerage, 11 Cl. & Fin. 85, 98.

(6) Berkeley Peerage (3d quest.), 4 Camp. 401. See also Vin. Ab. tit. Evidence, b. 87, pl. 5; by Lord Mansfield, C. J., in Goodright d. Stevens v. Moss, Cowp. 591; Monckton v. Att. Gen., 2 Russ. & M. 164.

NOTE 95.—In ejectment, a sworn copy of the records of the town of Stonington, in Connecticut, which contained the date of the marriage of the parents of the lessors of the plaintiff, and the time of their birth, was held properly receivable in evidence to prove their pedigree. Jackson ex dem. Miner v. Boneham, 15 John. Rep. 226. The register of births and deaths kept by

the birth, marriage or death of a child or other relative of the family. This latter class of entries, however, should be shown either to have been made by some member of the family,(1) or to have been acknowledged or treated by a relative as a correct family memorial;(2) or, in the case of ancient writings, at least that they were made at the period when they purport to have been written.(3)

Family correspondence.

Correspondence between members of the family, addressing each other as relatives and making statements of pedigree, have been admitted in several claims of peerage.(4)

Recitals.

Recitals in family deeds, as marriage settlements and the like, have been admitted on the footing of declarations of relatives.(5) Perrott, B., is said to have rejected a slip of parchment, found in a shoemaker's shop,

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a religious society is evidence of death, but at common law it must be proved. A copy, under the seal of the corporation, is not evidence. Stoever v. Whitman's Lessee, 6 Bin. 416. But when the original is of a public nature—*e. g.*, the records of the Reformed Dutch Church in the city of New York—a sworn copy is admissible. Jackson ex dem. Bogert v. King, 5 Cowen's Rep. 237. A register book of baptism was refused as evidence of legitimacy, because the entry was made more than a year after it took place, by a minister, from the information of the parish clerk, the person making the entry not being minister where the baptism took place; for he was recording a fact not within his own knowledge; and though the clerk made a memorandum at the time, this was no part of his duty as clerk, but a mere private entry. Doe dem. Warren v. Bray, 8 Barn. & Cress. 813. The copy of a register of a dissenting chapel was denied as evidence, the register being a mere private memorandum, and not a public document in official custody. But the original would be admissible. Newham v. Raithby, 1 Phill. Rep. 315. Where such an unofficial register or memorandum is signed by a deceased parent, it is admissible as a declaration of the parent. Said in Doe dem. Warren v. Bray, 8 Barn. & Cress. 813. A parish register of marriages, births and deaths, kept pursuant to the N. Car. Act of 1715, is evidence to prove pedigree, and that the several persons whose pedigree is thus proved are within the savings of the Statute of Limitations. Den ex dem. Jacocks v. Gilliam, 3 Murph. 47. A parish register stated the day of baptism and the day of birth, and was produced to show the defendant was of age. But Lord Tenterden would not allow that part respecting the birth to be read, saying the register was only evidence of baptism. Rex v. Clapham, 4 Carr. & Payne, 29.

(Declarations by members of a family, after they or their relatives have set up a claim to an estate, are not admissible; nor are recent entries in a family Bible, where there is a better witness who may be called. People v. Fulton Fire Ins. Co., 25 Wend. 205; Leggett v. Boyd, 3 Id. 376.)

(1) Tracy Peerage, cit. Hubbuck Ev. Success. 673.

(2) Hood v. Beauchamp, 8 Sim. 26.

(3) Tracy Peerage, 10 Cl. & Fin. 154.

(4) Berner's Peerage, Collins on Baronies, 355, 356, 361; Leigh Peerage, Print. Min., part 2, p. 140; Huntingdon Peerage, Rep. by Att. Gen., p. 357; Hastings Peerage, Print. Min. 196. See also Kidney v. Cockburn, 2 Russ. & M. 168.

(5) B. N. P. 233; Neal d. Athol (Duke) v. Wilding, 2 Str. 1151; Chandos Peerage, Print. Min. p. 27; Stafford Peerage, Print. Min. p. 110; Zouch Peerage, Print. Min. p. 275; Lisle Peerage, Print. Min. pp. 116, 127; Banbury Peerage, Print. Minn. pp. 6, 117; Devon Peerage, by Nicholas, App. pp. 44, 46; Vaux Peerage, Print. Min. p. 44; Huntley Peerage, Print. Min. p. 15; Roscommon Peerage, Print. Min. p. 36.

and marked Mr. A. B.'s measure, which purported to be two lines of a deed, and contained a recital of descent, but the Court of King's Bench granted a new trial, on the ground that the evidence ought to have been admitted.(1)

In an early case, where *viva voce* evidence was offered on the part of the plaintiff, that on a former trial in ejectment against the same defendant, a deed had been produced on the part of the defendant, having a clause in it relating to a pedigree, the court held such proof to be admissible, on the ground that the defendant had the deed in his custody, and might disprove the witness if he swore falsely.(2)

Recitals in deeds which are not family documents are receivable, if it be shown that the deeds were executed by some member of the family to which the statements have reference.(3) In two modern cases in chancery it has been considered, that recitals in deeds were not evidence of pedigree against persons who were strangers to the deeds.(4) It may be observed, that recitals are frequently in the nature of conventional admissions between the parties to a deed, by which they agree to be bound, without reference to the real state of facts.

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(1) Cited by Thompson, B., Peake Add. Ca. 204.

(2) Eccleston v. Petty, Carth. 79.

(3) Marmyon Peerage, Print. Min. p. 111; Hastings Peerage, Print. Min. p. 200; Bathwick Peerage, Print. Min. p. 62.

(4) Fort v. Clarke, 1 Russ. 604; Slaney v. Wade, 1 Myl. & C. 338. On the effect in general of recitals, see *infra*, chap. *On Admissions*, and Doe d. Pritchard v. Dodd, 2 Nev. & M. 45; Bowman v. Taylor, 2 A. & E. 278.

NOTE 96.—The following cases may serve to illustrate the rule, as it has been held in this country. In ejectment, the lessor of the plaintiff claimed under the heirs of Charles Sparks; and gave in evidence a deed of the premises, purporting to be from divers persons, *said to be children of Sparks*, and containing a covenant that his youngest son should convey, when of full age. This was held admissible as evidence of their pedigree. Paxton's Lessee v. Price, 1 Yeates, 500. The same description of evidence, under similar circumstances, was recognized as correct, for a like purpose, in Jackson ex dem. Ross and others v. Cooley, 8 John. Rep. 128. In ejectment, the plaintiff claimed under a provincial governor (Crosby, of New York), through one of his two devisees. A deed executed by W. as the attorney of persons styling themselves, in the power of attorney (which was dated thirty years before the trial), heirs of the governor, which deed recited the seizin of the governor, the death of his devisee, and the descent of the estate from him, the devisee, to Elizabeth, and the heirship from her to those who gave the power, was received in evidence for the plaintiff, as part of the proof of pedigree; and, connected with other slight proof, was holden sufficient. Jackson ex dem. Schuyler v. Russell, 4 Wendell's Rep. 543. In a writ of entry *sur disseisin*, the tenant (defendant) claimed under one Daniel Mountjoy, the son of Daniel Mountjoy and Rebecca Stokes, the latter of whom he alleged was the daughter of Benjamin Stokes, whose seizin was proved. To show the pedigree of the younger Daniel, the tenant first proved a marriage in Sept. 1739, between one Daniel Mountjoy and Rebecca Stokes; and then a deed, dated Sept. 1765, from one Daniel Mountjoy, expressed to be "of all his right and title in and to the real estate of his grandfather, *Benjamin Stokes*, or his mother, *Rebecca Stokes*." Possession had gone according to the deed, which, at the time of the trial, was sixty years old. This statement in the deed was holden *prima facie* evidence of Daniel Mountjoy, the grantor's descent from Benjamin Stokes. Stokes v. Dawes, 4 Mason's Rep. 268.

A description in the will of a member of the family is also admissible on the same ground,(1) and this even though the will is found canceled and not known to have been proved or acted upon, if it appears to have been treated as a paper relating to the family.(2) In the Lisle Peerage Case,(3) a description in a will of certain individuals, as being the next "heirs in blood," was relied upon as showing that a particular person was illegitimate.

It may be observed that, upon the principles applicable to the proof of documentary evidence, a probate would not be evidence even of the fact of relationship in an action for the recovery of real estate; though it would be otherwise with respect to the ledger-book of the Ecclesiastical Court or a copy of it.(4)

In the cases respecting the admissibility of bills, answers and depositions in chancery as evidence of pedigree, some confusion occurs, attributable chiefly to a difficulty in determining in what particular cases these sources of evidence are open to the objection of being *post litem motam*.(5) Lord Kenyon, C. J., held the opinion that a statement in a bill in chancery by an ancestor was evidence to prove a family pedigree stated therein, in the same manner as an inscription on a tombstone or entry in a Bible.(6) And although, before this, answers and depositions were held inadmissible as proofs of pedigree, there appears always to have been some other ground of rejection peculiar to the case—as that the answer was made by an infant through his guardian,(7) that the party making it was alive,(8) or that the depositions were not accompanied by the answer.(9) The judges, however, held, upon a question put to them by the House of Lords in the Banbury Peerage Case,(10) that a bill or depositions in chancery, in a suit to perpetuate testimony, could not be received as evidence in the courts below, on the trial of an ejectment against a party not claiming or deriving in any manner under the plaintiff in the chancery suit, either as evidence of the facts therein deposed to, or as declarations respecting pedigree. They added (though the question does not appear to have been put

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(1) Vulliamy v. Huskisson, 3 Y. & Col. 82.

(2) Doe d. Johnson v. Pembroke (Earl), 11 East, 504. See also 7 East, 279.

(3) Rep. by Nicholas, 51, 53; Print. Min. pp. 203, 206.

(4) Roll. Abr. 678; B. N. P. 246; Doe d. Weld v. Ormerod, 1 Mo. & R. 466; Dike v. Polhill, Ld. Raym. 744; Marchmont Peerage, p. 5; Kilmorrey Peerage, Print. Min. p. 10.

For the purpose of raising a presumption or of proving a pedigree by the recitals contained in an ancient instrument, the probate of a will before the proper officer, or the record thereof in the office as required by law, has been held admissible. Russell v. Schuyler, 22 Wend. 277.

(5) *Vide infra*, where the subject of the *lis mota* is considered.

(6) Taylor v. Cole, 7 T. R. 3, n.

(7) Eccleston v. Petty, Carth. 79; S. C. as Eccleston v. Spoke, Comb. 156; 12 Vin. Ab. 94.

(8) Hiliard v. Phaly, 8 Mod. 180.

(9) Piercey's Case, Jones, 164.

(10) 2 Selw. N. P. 759; S. C., 1 Sim. & Stu. 153; Le Marchant's Gardiner Peerage, App. 411. And see the opinions of the judges in the Berkeley Case, 4 Camp. 412.

to them) that it would not make any difference in their opinion, if the bill had been a bill seeking relief.

But the judges, in their answer to the question put to them by the House of Lords, appear to consider the existence of a controversy (*lis mota*) as invalidating the deposition; and it certainly has been the practice of the House of Lords, both before and since the opinion was delivered, to admit, as evidence of the pedigrees of claimants of peerage, bills and answers in chancery made in suits where the facts of the pedigree were not in dispute, but only incidentally stated.(1)

In the report of the attorney-general (Sir Arthur Pigott) on the claim of Charles Augustus Ellis to the barony of Howard de Walden, in 1806, he stated that part of the evidence offered to him in support of the claimant's pedigree, was a bill and answer in chancery with the decree thereon, which he considered as adequate evidence; because the bill having set forth the pedigree to show an heirship, the answer did not controvert such

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(1) Roos Peerage, Print. Min. 1804, pp. 293, 294; Zouch Peerage, Print. Min. 1804, p. 221; Slane Peerage, Print. Min. 1830, part 1, p. 32; part 2, p. 42; Netterville Peerage, Print. Min. 1827, p. 43.

NOTE 97.—Concerning the quality of being *ante litem motam*, which the English court still consider essential to the character of hearsay evidence (see per Lord Tenterden in Doe ex dem. Futter v. Randall, 2 Moore & Payne, 25), the American cases are not uniform, though, perhaps, there is little difficulty in seeing to what they must finally come. After the rule admitting these declarations had been put with great caution in an early case in Pennsylvania, which says that hearsay, *a great while ago* and *before any dispute stirred*, was received (Strickland's Lessee v. Poole, 1 Dall. 14, A. D. 1765); a cause came to a hearing in the same state before Washington, J., sitting as chancellor (U. S. C. C., A. D. 1821), which brought the rule into direct discussion, as it was presented by the Berkeley Peerage Case, stated in the text. Depositions taken in another cause, in relation to the title now in question, depending on pedigree, were offered by the plaintiffs as hearsay to prove the pedigree, which was necessary to making out their case. This was objected to on the ground that the declarations were made *post litem motam*, and the cases in the text were cited against their admission. Washington, J., did not consider himself bound by those cases; and he admitted the evidence, after a very full examination of ancient and modern authorities. He strongly inclined to think that the rule of *post litem motam* had never been recognized in the United States, though he had not had time to examine the American cases. He mentioned, however, Jackson ex dem. Ross v. Cooley (8 John. R. 128), and cited 1 Yeates, 17, 152, and Swift's Law of Evidence, 122. These were in addition to the books and cases cited by the plaintiff's counsel, which were 4 Dall. 123; Bar v. Gratz, 4 Wheat. 220; 2 Hen. & Munf. 167; 1 Wheat. 6; 7 Cranch, 290; 1 Wash. 123; 2 Id. 146, 148. He said he would receive the depositions, the death of the deponents being first proved. Boudereau v. Montgomery, 4 Wash. C. C. Rep. 186. It is doubtless true that, at this time, the point had not been distinctly passed upon and denied or recognized by any American court, whose reported decision had appeared. It had, however, been incidentally noticed in Chapman v. Chapman, 2 Conn. R. 347, A. D. 1817; and afterwards in Elliott v. Peirsol's Lessee, 1 Peters R. 328. In David v. Sittig (1 Mart. Lou. R. (N. S.) 147, 149), the passport of the father, used to prove the age of the son, was very cautiously put as having been made *ante litem motam*. See also Gregory v. Baugh, 2 Leigh, 665, recognizing the general doctrine of the *lis mota*. (As usually stated, the rule allowing hearsay evidence in cases of pedigree, implies that it cannot be invoked to let in declarations made *post litem motam*. The People v. Fulton Fire Ins. Co., 25 Wend. 205; Jones v. Jones, 3 Strobh. 315; Matter of Hall, Wallace, jr., 85; Richards v. Swan, 7 Gill, 366; Stone v. Strand, 6 Rich. 306.)

heirship; and the decree, after giving leave to the plaintiffs to bring an ejectment to try the title, directed the defendant to admit the heirship.(1) This evidence had been admitted by the House of Lords in an earlier claim to the same barony,(2) and was again admitted in the claim upon which this report was made.(3)

General rule.

The general rule upon this subject may perhaps be thus stated—that recitals of facts, which are not in dispute, may be admitted as ordinary declarations: but recitals of facts in controversy are inadmissible.

Engravings upon rings,(4) and charts of pedigree, either made by members of the family,(5) or found among family documents,(6) or hung up in family mansions,(7) have been received in evidence. Pedigrees that have been thus hung up are admissible, even without proof of their having been made by the directions of the family, on the ground of being acknowledged by the family; their publicity in the family supplying the defect of proof in not showing that they were declarations made by members of the family.(8)

In the case of Davies and Lowndes,(9) upon the trial of a writ of right a pedigree was tendered in evidence, at the foot of which was the following memorandum:—"Collected from parish registers, wills, monumental inscriptions, family records and history. This account is here presented, as correct and as confirming of [*sic*] the tradition handed down from one generation to another, to Thomas Lloyd, Esq., of Cwm Gloyne, this 4th day of July, A. D. 1733, by his loving kinsman, &c., William Lloyd." The signature was shown to be in the handwriting of William Lloyd, who was one of the ancestors of the demandant. On the back of the document was an indorsement in the handwriting of Thomas Lloyd, in these words:—"A true account of my family and origin; Thomas Lloyd, Cwm Gloyne."

This document was insisted upon by the counsel for the demandant as being altogether admissible; but the Court of Common Pleas rejected it, as being upon its face a mere compilation from existing documents, which ought to be produced as the primary evidence. It was then tendered as admissible in part, viz: as evidence of the pedigree of certain branches

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(1) Rep. by Att. Gen. 1806, p. 35.
(2) Claim of Sir John Griffin in 1781, Min. reprinted 1806, p. 15.
(3) Howard de Walden Peerage, 1806, Print. Min. p. 25.
(4) Vowles v. Young, 13 Ves. 144.
(5) Monckton v. Att. Gen., 2 Russ. & M. 161.
(6) De Lisle Peerage Case, Rep. by Nicholas, p. 45. See also Berner's Barony Case, Collins on Baronies, 333.
(7) Goodright d. Stevens v. Moss, 2 Cowp. 594.
(8) By Lord Brougham, C., in Monckton v. Att. Gen., 2 Russ. & M. 161.
(9) 5 N. C. 161, 166.

therein named, or as evidence of who were the relations of certain parties living at the time. The court, however, rejected it upon every ground, considering that no part of it was legally admissible.

A bill of exceptions having been brought, the Court of Exchequer Chamber held, that the document had been improperly rejected, it being at all events admissible to show the relationship of those persons who were described by the framer of the pedigree as living, and who might be presumed to be personally known to him.(1)

The reasons given in the judgment of the court as delivered by Lord Denman, C. J., are so important and throw so much light upon the general question of the admissibility of such evidence, that no apology is necessary for transcribing them here.

"It does not admit of any doubt that this pedigree, if it had been signed by William Lloyd, with the date of 1733 and without any memorandum of his, and had borne the memorandum indorsed by Thomas, would have been altogether admissible. The signature of William Lloyd, one of the family of the demandant, would have been equivalent to a declaration of the relationship of the persons therein mentioned. And the signature of Thomas Lloyd, of Cwm Gloyne, would have amounted to a similar recognition by another member of the same family. But it is argued that the memorandum of William Lloyd places this pedigree upon a different footing, and renders it altogether inadmissible. If this were so, there would still be a question what the meaning of Thomas Lloyd's indorsement, coupled with the fact of its preservation by him, was. If the words 'A true account of my family and origin,' were written on the back of the document, merely as denoting what its contents were—a sort of index to it—the indorsement would not amount to a recognition by Thomas of its correctness, and would not render it admissible on the footing of its being equivalent to a declaration by Thomas. If the words intended to convey, that the writer had satisfied himself of the correctness of William's statement from independent sources of information, that is, from his own knowledge of the traditions prevailing in his own branch of the family, then the whole pedigree would have been admissible as a declaration by one of the family of Cwm Gloyne. There is some evidence of such a recognition to go to the jury for their consideration; but passing by that objection, and adverting to the memorandum of William only, the question is, whether that memorandum destroys the effect of his recognition, and renders it wholly inadmissible in evidence, as the lord chief justice and the judges of the common pleas have decided.

"The ground of that decision appears to have been that the memorandum bore, upon the face of it, a sort of certificate, that the statement in the pedigree was merely secondary evidence of existing originals from

(1) S. C. (in error), 6 M. & G. 471.

which it was compiled, and that the absence of those originals was not accounted for; and that if any part of the pedigree was derived from legitimate sources, viz: personal knowledge or family tradition, it did not appear distinctly which was such part, and therefore the whole was inadmissible. We think this view of the case is not correct.

"A pedigree, whether in the shape of a genealogical tree or map, or contained in a book, or mural or monumental inscription, if recognized by a deceased member of the same family, is admissible, however early the period from which it purports to have been deduced. On what ground is this admitted? It may be, because the simple act of recognition of the document, and consequent acknowledgment of the relationship stated in it, by a member of the family, is some evidence of that relationship, from whatever source his information may have been derived; because he was likely, from his situation, both to inquire into the truth of such matters, and from his means of knowledge to ascertain it.

"If this be a correct view of the law, the pedigree in question was admissible; because it was certainly acknowledged by W. Lloyd to be correct.

"But the reason why a pedigree, when made or recognized by a member of the family, is admissible, may be that it is presumedly made or recognized by him in consequence of his personal knowledge of the individuals therein stated to be relations, or of information received by him, from some deceased member, of what the latter knew or heard from other members who lived before his time. And if so, it may well be contended, that if the facts rebut that presumption, and show that no part of the pedigree was derived from proper sources of information, then the whole of it ought to be rejected; and so also if there be some, but an uncertain and undefined part, derived from improper sources. But where the framer speaks of individuals whom he describes as living, we think the reasonable presumption is, that he knew them and spoke of his own personal knowledge, and not from reference to registers, wills, monumental inscriptions, and family records or history;(1) and consequently, to that extent, the statements in the pedigree are derived from a proper source, and are good evidence of the relationship of those persons."(2)

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(1) In the course of the argument, Alderson, B., had remarked: "The pedigree is stated to have been 'collected from parish registers, &c., and as confirming of the tradition handed down from one generation to another;' it is, therefore, derived from both sources. Suppose a person to say, 'There is a certain tradition in my family, and I have looked into history, parish registers, &c., and I am satisfied that such tradition is correct;' is not that the same, in effect, as what is stated here?" 6 M. & G. 513.

(2) Id. pp. 524—529. In the same case, Parke, B., said, that the ground upon which inscriptions on monuments, &c., were receivable, was, that they are presumed to have been put up by a member of the family *cognizant of the facts*, and not on the ground of *recognition*. But see Monckton v. Att. Gen., 2 Russ. & M. 161, cit. *supra*.

Place where pedigree found.

In the Chandos Peerage Case,(1) a pedigree found in the Ashmolean Library at Oxford, unaccompanied by any proof that it was made by a member of the family, or by any person connected with it, was rejected.(2)

Monuments, inscriptions on tombstones.

Inscriptions on tombstones are constantly received in evidence in questions of pedigree, both in courts of law and by the House of Lords, in claims of peerage;(3) and inscriptions on coffin plates in family vaults and graves have also been given in evidence, on the same ground, in several peerage cases.(4) Examined copies of those inscriptions are admitted for the sake of convenience, the case forming an exception to the rule, which does not admit copies except when the originals are public books. The admissibility of this evidence is clearly not affected by the circumstance of the originals being in a church or churchyard.

In the case of the Barony of Say and Sele, in 1781, part of the evidence for the petitioner was an inscription on a tombstone in the burial ground for Dissenters at Bunhill Fields;(5) and in another case at Nisi Prius,(6)

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(1) Print. Min. p. 11. See *infra*, where the proper custody of documents is more particularly considered.

(2) See also the Vaux Peerage, 5 Cl. & Fin. 526.

(3) Goodright d. Stevens v. Moss, Cowp. 594. See also Vin. Ab. tit. Evidence, T, b. 87; 13 Ves. 144, 514; B. N. P. 233; 7 T. R. 3, n.; 10 East, 120; Duncomb Tr. *per pais*, 424; 1 Lilly's Pract. Reg. 552; Sty. 208; Monckton v. Att. Gen., 2 Russ. & M. 163, and cases there cited; Lisle Peerage, by Nicholas, 50, 173; Vaux Peerage, 5 Cl. & Fin. 526; and Peerage claims, *passim*.

(4) Chandos Peerage, Print. Min. p. 10; Rokeby Peerage, Print. Min. p. 4; Lovat Peerage, Print. Min. p. 77.

(5) Mr. Serjt. Hill's Collections in Linc. Inn Library, Vol. 26, p. 173.

(6) Whittuck v. Waters, 4 C. & P. 376.

NOTE 98.—Hearsay of death seems to be receivable, under the same restrictions as that respecting other matters connected with questions of pedigree. In those courts where you may go out of the family, to general reputation, to the particular hearsay from domestics and other acquaintances, where you take hearsay indifferently from the living and dead, &c., on other questions of pedigree, you may do so as to death. On the other hand, where, as in the English rule, you are tied up to the deceased members of the family for hearsay, it is presumed that proof of death is to be similarly restricted.

The repute of the deceased's family, that he died at a certain time, was received in Doe ex dem. Banning v. Griffin, and Doe ex dem. George v. Jesson, cited in the text. The same thing was allowed in Pancoast's Lessee v. Addison (1 Harr. & John. 350, 356, 357), and in Ewing's Heirs v. Savary (3 Bibb, 235); though, in the latter case, it was added as an excuse, that the deceased resided abroad in a foreign jurisdiction. In another case, the court say that the declarations of relatives, neighbors, and perhaps of intimate acquaintances, have been received, but not so of a mere stranger; and they refused the declaration of one in Missouri, as to the death of a resident in the same state, it not appearing that the speaker was even an acquaintance of the deceased. Dudley v. Grayson, 6 Monroe, 259, 262, 263. And in a previous case, it was held that neither loose neighborhood hearsay or report, nor even common report, will be received, where it appears that the deceased has relatives in the state, or in an adjoining state. Nicholas v. Lansdale, Litt. Sel. Cas. 21.

But a witness has been received to testify that, in 1811, being at the city where the deceased

resided in his lifetime, the witness was then and there told of his death, without saying by whom she was told. Scott's Lessee v. Ratcliffe, 5 Pet. 81, 85, 86. The register of burials in Christ Church (Philadelphia) was received to show the fact of death, and the time (Lewis v. Marshall, 5 Pet. 470); and an entry in the deceased's father's Bible, to show the death of his son, and the time when he died. Id. Both the two last cases came on error from the state of Kentucky.

The certificate of an officer, having charge of the state prison, was rejected as evidence of the time when a prisoner died, though *semb.* if it were his legal duty to register the death, a sworn copy, or the original, would be evidence. Gill v. Philips, 6 Mart. Lou. Rep. (N. S.) 298, 300, 301.

The proof was, that the witness heard that her relative was with the New York troops in 1776; but she never heard anything more of him till fourteen years after, when she was told he had been killed; and the general opinion of her family was, that he was dead. The court said, hearsay of his being killed in the army was admissible, for the purpose of showing his death, and the place where he was killed. Jackson ex dem. Miner v. Boneham, 15 John. Rep. 226. The fact that a soldier, or any other individual, was missing at a particular time, accompanied with a report and general belief of his death, must be, in many cases, not only the best, but the only evidence which can be supposed to exist of his death. It is, perhaps, reasonable that it should be held *prima facie* sufficient. Jackson ex dem. People v. Etz, 5 Cowen's Rep. 319, per Sutherland, J. "But a report that the body of a particular individual was found, and buried at a particular time and place, carries, on the face of it, an admission that, if it is well founded, it is not the best evidence which exists in the case; for the body must have been found and buried by human agents, who are presumed to be competent and capable of testifying to the facts, especially if they did not occur at a very remote period." Hearsay and reputation were therefore held inadmissible to prove such facts. Jackson ex dem. People v. Etz, 5 Cow. Rep. 319, per Sutherland, J.

Proof that a witness went from his residence more than twenty years ago (as the witness testifying understood), to New Orleans, or somewhere to the southward, and the witness testifying had since heard he was dead, was received without objection, to let in secondary evidence of the dead or absent witness's attestation, by showing his handwriting. Jackson ex dem. Woodruff v. Cody, 9 Cow. Rep. 140.

In replevin, the plaintiff claimed that his intestate (A.) had title to a certain negro, under a bequest to A. in the will of T. To show that A. survived the testator, the plaintiff proved by a witness that the testator and A. died, and were buried on the same day at their father's: that the witness was well acquainted with their respective families, was at their funeral, and there heard from their father and one of their sisters, both father and sister now being dead, that the testator died a few hours before A. Another sister, who also gave him the same information, was still alive, and resided in Baltimore (within reach of process). This hearsay evidence as to the time of the death was objected to, but admitted so far as it respected the information from the deceased father and sister. On appeal, held well. The court said it did not appear that the living sister saw the deaths; nor if she did, would the court even intimate that the hearsay was not still admissible. Raborg's Adm'x v. Hammonds's Adm'r, 2 Har. & Gill, 42, 52.

In a late English case, it became necessary to show the determination of a life estate, by proving the death of a *cestui que vie*. The register of a dissenting chapel was repudiated as incompetent, though after considerable hesitation, a tombstone inscription was received for that purpose. But hearsay in the deceased's family was denied, Park, J., saying, "this is not a question of pedigree, where hearsay in the family is admissible." Whittuck v. Waters, 4 Carr. & Payne, 375. *Quere.* If the proof did not rest on the same principle as it would in a case of pedigree, how can the proof by the inscription be sustained, which is equally hearsay? The decision was at Nisi Prius, and seems not to have been fully considered. See Newham v. Raithby, 1 Phill. 315. As to hearsay of marriage, see notes 89, 91.

(In a recent case, a parish register stating the fact of marriage, at a private house, signed by the parties, was received, though the license was not produced, to confirm evidence of cohabitation and general repute. Doe d. Wyndham v. Grazebrook, 45 Eng. Com. Law, 406. So, a declaration made by the party, that a certain paper was the mother's marriage certificate, it having been made before any controversy on the subject had arisen. Jenkins v. Evans, 59 Id. 312.)

Park, J., admitted, though with some hesitation, an inscription on a tombstone in a Dissenter's burial ground, for the purpose of proving the death of a *cestui que vie*. There does not appear, however, to be any good ground for the learned judge's doubts upon this subject; as the admissibility of the inscription depends on a totally different principle from that of the admissibility of registers.

An inscription on a foreign monument has also been received in a peerage case;(1) and where monuments have been decayed by time, or surreptitiously destroyed or removed, evidence of the recollection of witnesses respecting them, and as to the inscriptions they bore, has been admitted by the House of Lords.(2) But in such cases the prior existence of the monuments and the genuineness of the inscriptions are required to be established in the strongest manner that the circumstances of the case will admit.(3)

The credit due to monumental inscriptions must necessarily depend much upon the circumstances, whether they are cotemporaneous with the events to which they relate, and whether they are set up in the view or with the knowledge of surviving relatives.(4) It is to be observed that this species of evidence often trenches upon the rule which rejects secondary evidence; inasmuch as the author of the evidence may be alive. In Monckton v. The Attorney-General,(5) Lord Brougham, C., considered such inscriptions to stand on the same footing as rings, pedigrees hung up, and family Bibles, and as admissible on account of their publicity, without connecting them with the family. Such inscriptions, however, may always be impeached, and their evidence seems peculiarly open to attack, not only on account of the great facility of forgery, but also because the preparation of them is often committed to undertakers, executors, or other persons not members of the family, or because perhaps the inscription has been delayed, till a period when the facts are but imperfectly remembered. In the claim of Katherine Bokeman to the Barony of Berners, an inscription upon the tombstone of a person who was one of the links in the pedigree, was given in evidence; but it appeared from the entry of her burial in the parish register, and from her will, that there was a mistake of a year on the tombstone as to the time of her death; and the mistake is said to have arisen from a delay in laying down the stone.(6)

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(1) Hastings Peerage, Print. Min. p. 197.

(2) In the Roscommon and Leigh Peerage Cases. The latter case turned wholly on the existence of a monument, alleged to have been surreptitiously removed from Stonely Church. Numerous witnesses were examined for and against its existence. See the printed evidence, 1829.

(3) See Tracy Peerage, 10 Cl. & Fin. 154, 181, 182, 189, 192.

(4) See Athenry Peerage, Print. Min. p. 45; Vaux Peerage, Print. Min. p. 129; S. C., 5 Cl. & Fin. 526; Fitzwalter Peerage, Print. Min. p. 34.

(5) 2 Russ. & M. 163. See also by Lord Erskine, C., in Vowles v. Young, 13 Ves. 144.

(6) Collins on Baronies, 363, and note. There are several well known instances of similar mistakes. In the epitaph upon Spenser's monument in Westminster Abbey, there is a mis-

Armorial bearings.

Armorial bearings have sometimes been relied on in questions of pedigree. Lord Coke speaks of its use to the bearers in "manifesting of what families they be;"(1) and Siderfin says:—"Arms serve to distinguish family from family, and to prevent branches of the same family interfering with one another."(2) So long as the heralds possessed and exercised the power of punishing usurpations, some credit may have been due to this evidence, probably on the ground that, by the assumption of a particular bearing, the party must have meant to affirm that he was connected in that manner with the family to which it belonged. The claim of Sir Michael Blount to the barony of Mountjoy, in the time of Queen Elizabeth, turned almost wholly on the arms in a window at Iver, in Buckinghamshire, set up in the reign of Henry the Seventh; and elaborate arguments of the heralds have been preserved,(3) as to the credit due to this evidence, in support of the claim of Sir Michael as heir male of the body of Walter, first Lord Mountjoy, in contradiction to the books in the heralds' office, which deduced his descent from Thomas, a brother of this Walter.

In the modern case of the Barony of Chandos,(4) where the claimant alleged that he was descended from the third son of the first Lord Chandos, he was allowed to give in evidence the arms of his family in the heralds' visitation books, and upon seals of deeds, delineations on parchment, and other family papers; which arms a herald proved were those of the Chandos family, with the mark of the third branch. An achievement with the same arms was likewise produced, which the mother of the claimant proved to have been hung up in the family mansion when she first married, and that she had heard her husband say it had belonged to his grandfather.(5)

The value, if not the admissibility, of this evidence, depends upon its antiquity; and therefore the attorney-general, in the Chandos Peerage Case,(6) cross-examined the herald, to show that, at the time when it was

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statement as to the time of his birth of no less than forty years, and as to that of his death of three years; the monument was erected by the Countess of Dorset thirty years after the poet's death. See Biog. Brit. nom. Spenser. The time of death is erroneously stated on the monument of Sterne, see Biography, prefixed to his Works, ed. 1816; and the time and place of birth on that of Goldsmith, see Boswell's Johnson, Vol. 3, p. 69, Oxford ed. 1826. See also Aikin's Mem of Goldsmith.

(1) Co. Litt. 27, *a*.

(2) 1 Sid. 354.

(3) Harl. MSS. 1386, 6141.

(4) Chandos Peerage, Print. Min. pp. 6, 24, 37.

(5) Ibid. pp. 40, 49.

(6) Print. Min. p. 40. The date of the first visitation was 1528. See Hubback Ev. of Success. 542. And see further as to the authority of the Herald's Visitation Books, Russell's Case, 4 Mod. 128; Oddis v. Domville, Show. Ca. Parl. 66; Blunt v. Blount, 1 Atk. 295. As to the Earl Marshal's book, see Lisle Peerage Case, p. 12; Vaux Peerage, 5 Cl. & Fin. 526. With re-

proved that the achievement before mentioned was in the family of the claimant (about 1699), there was no authority in existence to correct usurpation. The year of the last heralds' visitation (1686) seems to have been thought the time when this authority, or at least the exercise of it, ceased. When evidence of this kind is required, it is usual, and indeed necessary, to call some officer from the Heralds' College to explain the meaning of different armorial bearings.(1)

In the Huntingdon Peerage Case,(2) the attorney-general admitted in evidence an armorial shield, carved upon oak, which had been given by the late Earl of Huntingdon to the father of the petitioner, and which was produced from a family chest. So, in support of the presumption of a marriage, evidence has been adduced, that the husband impaled his wife's arms with his own on his plate, seals and carriage.(3)

Conduct or treatment in family.

It may be convenient to mention, in treating of the subject of pedigree (though it perhaps more properly belongs to the head of presumptive evidence), that the conduct of parties to each other, the disposition of property, the devolution of property and title, and similar circumstances, are frequently received in questions of pedigree on the footing of hearsay. They are properly *facts*, from which an inference as to the opinion and belief of families is drawn; and, therefore, they ultimately rest upon the same basis as hearsay evidence of family tradition. Lord Mansfield, C. J., speaking of a father bringing up a son as legitimate, said:—"This amounts to a *daily assertion* that the son is legitimate."(4) And in Goodright v. Saul,(5) Ashurst, J., observes, that in that case "there were strong circumstances to show that the son was a bastard; amongst others, a very forcible one occurred, namely, that the son had taken a different name from his birth—the name of the person with whom his mother was living at the time, which had been retained by him and his descendants ever since; this was a very strong *family recognition* of his illegitimacy." In the Leigh Peerage Case,(6) much stress was laid upon the alleged fact that an ancestor of the claimant, in indigent circumstances, had once paid a visit to Lord Leigh, which he used to boast of among his neighbors, and that his Lordship had given him a suit of clothing. And in the Clinton Peerage Case,(7) part of the evidence for the claimant was, that the sole

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spect to the evidence of the Herald's books, *vide infra*, where the subject of public documents is more particularly considered.

(1) See the Chandos Peerage Case, *ut supra*, and the other cases above referred to.

(2) Huntingdon Peerage by Bell, p. 280; Attorney-General's Report, p. 359.

(3) Hervey v. Hervey, 2 W. Bl. 877.

(4) In the Berkeley Peerage Case, 4 Camp. 416.

(5) 4 T. R. 356.

(6) Print. Min. p. 298, *et seq.*

(7) Claimant's Case, Mr. Serjt. Hill's Collections, Vol. 30, p. 331.

descendant of an elder branch of the family, who died unmarried, had bequeathed several family pictures to a person who was the claimant's undoubted ancestor; and that the sole descendant of another elder branch had limited certain estates to the right heirs of his maternal grandfather, which estates were then in the possession of the claimant as such right heir.

In the Banbury Peerage Case,(1) the illegitimacy of the claimant was principally established by inferences arising out of the conduct of the parties; as that the birth was concealed, and that the child took the name of Vaux; and that Lord Banbury accepted dignities from the king, and made a disposition of his property inconsistent with the idea of his knowing that he had any children. And in the Gardiner Peerage Case,(2) where a great deal of evidence was adduced as to the conduct of the parties concerned, Lord Eldon, C., says that evidence of conduct, and of declarations connected with conduct, were to be considered, in order to come to a just determination upon the subject of the claim.

In the Tracy Peerage Case, where the question was, whether A., from whom the claimant traced his descent, was the son of B., the fact that all the members of B.'s family appeared to have been mentioned in his will, but that no notice was taken of A., was considered strong evidence, either that he was not the son of B., or at least that he had died without issue before the date of the will.(3) So, where the object was to show that a man had died without issue, the production of his will, in which no notice was taken of his family, and whereby he left his property to collateral relations or strangers, was considered cogent evidence to show that he died without children.(4)

Declaration upon declaration.

There appears to be no objection, in questions of pedigree, to receiving hearsay in the second degree, when both declarants are within the family. Accordingly, it has been held, that the declarations of a deceased lady, that her first husband was accustomed to make certain statements respecting the pedigree of the family, were receivable in evidence.(5) And the

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(1) 1 Sim. & Stu. 153; S. C., App. to Le Marchant's Report of the Gardiner Peerage, n. *e*.

(2) See the speech of Copley, Att. Gen., in the Gardiner Peerage Case, p. 285.

(3) By Lord Campbell, 10 Cl. & Fin. 190. See also Robson v. Att. Gen., Id. 498—500.

(4) Hungate v. Gascoyne, 2 Phill. 25. See further upon this subject, Morris v. Davies, 5 Cl. & Fin. 163, 241, *et seq;* Townshend Peerage, 10 Cl. & Fin. 289; R. v. Mansfield, 1 Q. B. 444.

(5) Doe d. Futter v. Randall, 2 M. & P. 20, by Best, C. J. In the earlier case of Johnson v. Lawson 2 (Bing. 88), his Lordship observed that "hearsay two deep" never could be evidence. But in the case his Lordship alluded to (Brown v. Shelley), the evidence consisted of statements made by a deceased physician of declarations by a deceased relation. Common repute in a family may often arise from hearsay more than "two deep."

same principle has been recognized in a case in chancery.(1) Indeed common reputation in the family is admissible in evidence, if proved by a member of it.(2) Thus, in order to prove a person to have died unmarried, a relative was allowed to state, that according to the repute of the family he had died in the West Indies, and that she had never heard in the family of his being married.(3) Nor is it necessary to show that the declarations were cotemporaneous with the events to which they relate.(4)

Inquisitions *post mortem.*

Evidence of pedigree is frequently presented in other forms, and derived from other sources, besides those which have been enumerated; and particularly from public documents, as inquisitions *post mortem,* parish books, parish and marriage registers. But the admissibility of these documents and of heralds' books, which have been incidentally noticed, depends upon principles differing in some respects from those which have been treated of in the present section, and which require a separate consideration.(5) In the same part of the work will be more conveniently considered the cases relative to various kinds of unauthorized registers containing evidence of pedigree.

3. Of the qualifications with which the hearsay is received in matters of pedigree.

In matters, then, of pedigree, as defined by the preceding illustrations, hearsay evidence in the various forms that have been mentioned is receivable. But it remains to be stated under what qualifications it is received.

Requisite knowledge.

As to qualifications—it is obvious that the value of declarations in matters of pedigree, as indeed of all hearsay evidence, must greatly depend upon the knowledge which the declarant possessed of the facts spoken to by him. It was long unsettled whether any, and what kind of connection should have subsisted between the party making the declaration and those to whom it referred. Formerly there seems to have been

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(1) Monckton v. Att. Gen., 2 Russ. & M. 165. See also Athol v. Ashburnham, B. N. P. 295; Slaney v. Wade, 7 Sim. 611; S. C., 1 Myl. & C. 355; Robson v. Att. Gen., 10 Cl. & Fin. 500–503; Davies v. Lowndes, 6 M. & G. 525–527.

(2) See Grimwade v. Stephens, cit. B. N. P. 294; Doe d. Barring v. Griffin, 15 East, 293; Stafford Peerage, Print. Min. p. 145.

(3) Doe d. Barring v. Griffin, *ut supra.*

(4) By Lord Brougham, C., in Monckton v. Att. Gen., 2 Russ. & M. 157, 158. See also Lovat Peerage, Print. Min. p. 89.

(5) *Vide post,* Vol. II, where the subject of public and official documents is more particularly treated of. Parish books frequently afford evidence on matters of pedigree. Thus the date of Caxton's burial was fixed by a charge of twenty pence for two torches and four tapers used at his funeral, entered in one of the parish books of St. Margaret's Westminster.

no limitation to any particular class of persons; and evidence of the reputation of the country or neighborhood, and of general tradition, as to the facts of descent or relationship, was in some cases admitted.(1) Afterwards it was thought necessary that the hearsay should proceed from those whose connection with the family afforded them peculiar means of knowledge. "The doctrine of Lord Madsfield, C. J.—that tradition is sufficient evidence in point of pedigree(2)—must," said Lord Eldon, C., in the case of Whitelocke v. Baker,(3) "be understood as it has been practiced and acted upon. The tradition must be from persons having such a connection with the family, that it is natural and likely, from their domestic habits and connections, that they are speaking the truth, and that they could not be mistaken."

The nature of this connection was, however, undefined, though it does not appear to have been thought requisite that the declarant should be related to the family by blood or affinity. Upon several occasions at Nisi Prius, the declarations of servants, physicians, and intimate friends have been admitted;(4) and the practice was countenanced by *obiter dicta* of Lord Kenyon, C. J., Buller, J., and other judges.(5) But at a later period, Lord Eldon, C., speaks doubtfully upon the point;(6) and afterwards, in the case of Beer v. Ward,(7) Abbott, C. J., received the declarations of servants and acquaintances, subject to further discussion, expressing at the same time an opinion against their admissibility. The question remained thus undecided, when it came before the Court of Common Pleas, in the case of Johnson v. Lawson,(8) upon a motion for a new trial,

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(1) Annesly v. Anglesea (Earl of), 17 How. Tr. 1160, 1195. Claim of Sir Michael Blount to the barony of Mountjoy, temp. Elizabeth, where "common fame" was relied on as evidence of his descent; Harl. MSS. 1386, 6141. And see as to general tradition, by Lord Mansfield, C. J., in Goodright d. Stevens v. Moss, Cowp. 594. See also 2 W. Bl. 1099; 14 East, 330. In the Huntingdon Peerage Case, the attorney-general admitted affidavits of persons resident in Leicestershire, as to the reputation of the county: Attorney-General's Report, 359. According to the Scotch law, fame is admissible in questions of propinquity of blood; Stair Inst. lib. 4, c. 42, § 16. And in the disputed election of Scotch peers, 1790, the House of Lords admitted evidence, that it was the general belief of the country, that a claimant was lineal descendant and lawful heir male, and that he was "habite and repute as such." Prin. Min. of Evidence, p. 136.

(2) In Goodright d. Stevens v. Moss, Cowp. 594.

(3) 13 Ves. 514. And see Vowles v. Young, *infra*.

(4) Athol (Duke) v. Ashburnham, (Lord), E. 14 Geo. II, B. N. P. 290; S. C., Gilb. Ev. 112. See a different statement of this case from a MS. of Mr. Wegg, in 2 Selw. N. P. 734, (5th edit.), and 9 B. Moore, 192; Roe d. Bushnell v. Gore, Lanc. Sum. Ass. 1763; 9 B. Moore, 187, n.; Brown v. Shelley, E. 1776; 9 B. Moore, 187, n. cit. 2 Bing. 88, by Buller, J., 3 T. R. 719. See also Walker v. Wingfield, 18 Ves. 446.

(5) By Lord Kenyon, C. J., and Buller, J., in R. v. Eriswell, 3 T. R. 719. Buller, J., cites an authority for admitting declarations of persons not of the family. See by Le Blanc, J., in Weeks v. Sparke, 1 M. & S. 679. See also 13 Ves. 514.

(6) 18 Ves. 446.

(7) Printed report of second trial, pp. 189, 192, cited 9 B. Moore, 188; 2 Bing. 87, 89.

(8) 2 Bing. 86; S. C., 9 B. Moore, 183. And see Whitelocke v. Baker, 13 Ves. 514; Goodright d. Stevens v. Moss, Cowp. 594.

on account of the rejection of the declarations of a deceased housekeeper, that a certain person, under whom the plaintiff claimed, was the heir of her master. The court were unanimous in thinking the evidence properly rejected. Best, C. J., in delivering judgment, observed that the admission of hearsay evidence in these questions must be subjected to some limits, otherwise great uncertainty would ensue: that the limitations to the declarations of relatives or members of the family connected by blood or affinity afforded a certain and intelligible rule; and if that were passed, it might be necessary, on every occasion, to enter into a long and almost endless inquiry as to the degree of intimacy or confidence which subsisted between the family and the party who had made the declaration.(1)

This authority has been recognized in later cases, as having established a clear and definite rule upon the subject. Thus, in Doe d. Sutton v. Ridgway,(2) the dying declaration of a servant of a family concerning the family pedigree was rejected. And in Crease v. Barrett,(3) it was said by the court, that in cases of pedigree the hearsay must be derived from relatives by blood, or from the husband with respect to his wife's relationship, and that it was not admissible if it proceeded from servants or friends.(4)

Principle of limitation.

The principle upon which the declarations of relatives only are to be received, was pointed out in the case of Vowles v. Young;(5) namely, that the law resorts to the hearsay of relatives upon the principle of a feeling of interest, in the relation from whom the descent is made out, to know the connections of the family; and, therefore, that the opinion of the neighborhood of what passed among acquaintances, would not be admissible.(6)

Upon this principle, chiefly, the declarations of a deceased husband respecting the legitimacy or descent of his wife, seem to be admissible, though he was not related to her by blood;(7) it may be remarked, also, that the husband is interested in the succession of his wife to real property (to which he might become tenant by the curtesy), as well as to personal property (to which he would be wholly entitled).(8) An objection is said to have been taken in one case, that the husband's declarations were inadmissible, because made after the death of the wife when he was no longer connected with her family; but it was overruled, upon the ground that

(1) 2 Bing. 89; 9 B. Moore, 188.
(2) 4 B. & A. 53.
(3) 1 C., M. & R. 928.
(4) See also Monckton v. Att. Gen., 2 Russ & M. 159; Stafford Peerage, Print. Min. p. 4.
(5) 13 Ves. 140.
(6) Id. 147.
(7) Ibid.; Doe d. Northey v. Harvey, 1 Ry. & M. 297; Doe d. Futter v. Randall, 2 Moo. & P. 20.
(8) 13 Ves. 147.

his knowledge must have been acquired at a time when he was married to her.(1)

It may be observed, that there seems to be no limitation to the rule as to the admissibility of declarations made by relations by blood; but with regard to relationship by affinity it is different; the rule in this last case seems to be confined to the instance just mentioned, of declarations by a husband as to his wife's relations.(2)

Illegitimate member of family.

This principle has been carried so far, that the declarations of an illegitimate son relating to one of his natural brothers has been ruled to be inadmissible.(3) In an earlier case,(4) where the question was, whether a certain party deceased, through whom the defendant claimed, was illegitimate by reason of his having been born before the marriage of his parents, evidence was tendered, on the part of the plaintiffs, of declarations, made by the party, after he had conveyed to the defendant's father, that he was a bastard; that all the world knew he was such, and that that was the reason of his selling the land so cheap to the defendant's father, who might fight it out with the declarant's brother (who was born after wedlock). Le Blanc, J., said, that a declaration made under such circumstances was entitled to very little credit, and would avail nothing of itself, but that he thought it admissible as the representation of one of the family of the degree of relationship he bore to it. It would appear, from the case just before cited, that this decision could not be supported upon that ground, for if the declarant were illegitimate, he would bear no degree of relationship to the family. But the ruling of Le Blanc, J., may, perhaps, be upheld upon the ground that it was a declaration of the *status* of the party making it, not referring it to any other member of the family; and the declarant may have learned the fact of his illegitimacy from his own mother, whom the law would recognize, though but to a certain extent, as his only relative.(5) In the same case, evidence was given of the declarations of the parents as to the date of their marriage; of opprobrious epithets applied by the father

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(1) Vowles v. Young, as cited by Burrough, J., who was counsel in the cause; 2 Bing. 92; 9 B. Moore, 194. This statement does not appear in the report in Vesey. That a person need not be connected with both the branches of the family, touching which his declaration is tendered, see 2 Russ. & M. 156.

(2) By Parke, B., in Davies v. Lowndes, 7 Scott N. R. 188.

(3) Doe d. Bamford v. Barton, 2 Mo. & R. 28.

(4) Cooke v. Lloyd, Peake Ev. App. xxviii.

(5) In R. v. Nottingham (13 East, 57, n.), Page, J., said, a bastard being of years of discretion might upon an application for an order of bastardy, properly be examined as to some circumstances relating to her illegitimacy, such as whether the putative father had acknowledged her to be his daughter, and whether she were constantly reputed to be his daughter, and such like. As to general reputation on such a subject, it seems doubtful whether it would be admissible; but the acknowledgment of the putative father would of course be admissible in such a case, as an admission against himself. See further as to a statement of illegitimacy made by the party himself, R. v. Rishworth, 2 Q. B. 476, 480.

to his wife and to the children alleged to have been born before the marriage, by calling them bastards, and of declarations of the father on his death-bed, who pointed to a younger son as his heir. It would seem, however, that such declarations of the father as to the illegitimacy of his offspring are not properly admissible; for if the offspring were illegitimate, the alleged father would bear no relationship to them.(1)

Declarations by other persons.

In the case of Annesly v. The Earl of Anglesea,(2) to prove the birth of a child, the declaration of a midwife that she had delivered the mother of a child, was offered in evidence, but was held inadmissible. In the same case, the declaration of a deceased lady, that she had stood godmother to the child, was also after argument rejected.(3)

On a question of legitimacy depending upon the validity of a marriage, Lord Kenyon, C. J., in one case,(4) admitted evidence of a declaration by the clergyman, that a friend of the wife had forbidden the banns; the evidence seems to have been received, on the ground of its being a confession by the clergyman, that he had married the parties, without the banns having been duly published; and therefore made against his interest; but it has since been decided in the Sussex Peerage Case,(5) that, in a declaration against interest, the interest must be of a pecuniary or proprietary nature.(6) And therefore in that case statements made by a deceased clergyman, who had married the Duke of Sussex and Lady Augusta Murray at Rome, were rejected, although it was urged that they were clearly against his interest, as they related to an act either rendering him liable to a prosecution while living, or which at any rate he believed to be an illegal act. Lord Lyndhurst, C., remarked: "It is not true that the declarations of deceased persons are in all circumstances receivable in evidence, when in some way or other they might injuriously affect the interest of the party making them. Nor is it true, that because, while living, a party would be excused from answering as to certain facts, his declaration as to those facts become evidence after his death."(7) And Lord Brougham, C., observed: "To say, if a man should confess a felony for which he would be liable to prosecution, that therefore, the instant the grave closes over him, all that was said by him is to be taken as evidence

(1) In the same case the mother was examined, to prove that the son, whose legitimacy was in question, was born before wedlock. This evidence was admissible upon a different principle. *Vide supra, Of the incompetency of the husband or wife.*

(2) 17 How. St. Tr. 1157.

(3) 17 How. St. Tr. 1160.

(4) Standen v. Standen, Peake, 45.

(5) 11 Cl. & Fin. 103.

(6) See also Davis v. Lloyd, 1 Car. & K. 276.

(7) 11 Cl. & Fin. 110.

in every action and prosecution against another person, is one of the most monstrous and untenable propositions that can be advanced."

In the Berkeley Peerage Case,(1) where it being proposed to give in evidence declarations of a deceased clergyman, who was the domestic chaplain of the Earl of Berkeley when the claimant was born, that he had married the Earl of Berkeley and the claimant's mother in the parish church of which he (the clergyman) was vicar, and also his declaration that the claimant was legitimate, the opinion of the judges was taken on the admissibility of such evidence, and all the judges present agreed that the evidence could not be admitted.

In the case of Neal d. Duke of Athol v. Wilding,(2) the majority of the judges would not allow a special verdict to be given in evidence to prove a pedigree, on the ground that it was *res inter alios acta*, and because the same evidence might possibly be produceable before the second jury as before the first.

It has been thought that, notwithstanding the rule laid down for excluding declarations not made by relatives, the evidence of strangers as to general reputation is receivable in matters of pedigree; but the evidence must be of a general nature; as that A. was commonly reputed to be the son of B. or the father of C.: or that A. and B. were married. There does not appear, however, to be any sufficient reason for excepting such evidence from the rule under consideration. For the evidence usually produced in such cases, cannot properly be called hearsay evidence, as it consists of original evidence of facts and circumstances: thus, in the case of general reputation as to parties being married, it consists of evidence that they were received in society as man and wife, or that respectable families in the neighborhood visited them, or that the woman was churched after childbirth, and the like; all which circumstances show that the parties acted or demeaned themselves as if they were married, and not as living in a state of concubinage; and thus the ground of a presumption is afforded, that they were actually married.(3)

In a case of ejectment,(4) the lessor of the plaintiff, in order to establish his pedigree, gave evidence of the cohabitation and reputation of marriage between his alleged father and mother. He also produced a parish register signed by them, stating the performance of a marriage ceremony at a

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(1) Print. Min. 1811, p. 655. See also 1 Car. & K. 277, n.

(2) 2 Str. 1151, Wright, J., *dissent.* See B. N. P. 233.

(3) See *infra*, *On Presumptive Evidence.* See also the summing up of Abbott, C. J., in Beer v. Ward, Report of the Second Trial, p. 294. And the case of Mr. Twisleton claiming the barony of Say and Sele; where, in proof of the marriage of his father and mother, he relied on the fact of their having been visited by Chief Justice Willes and several families of respectability; Serjt. Hill's Collection, Vol. 26, p. 169. See also Read v. Passer, 1 Esp. 213; Leader v. Barry, 1 Doug. 174; S. C., 1 Esp. 353; Hervey v. Hervey, 2 W. Bl. 877; R. v. Bromley, 6 T. R. 330; Doe d. Fleming v. Fleming, 4 Bing, 266; Evans v. Morgan, 2 C. & J. 453.

(4) Doe d. Egremont v. Grazebrook, 4 Q. B. 406.

private house, and the archbishop's fiat for a special license, with the affidavit upon which the fiat was obtained. No search had been made for the license; but it appeared that there was no regular place of custody for such documents. It was admitted by the counsel for the defendant that the marriage might have been sufficiently proved by cohabitation and reception alone, but that the other evidence was inadmissible; but the court held that the affidavit, fiat and register were admissible, without production of the license, to confirm the evidence of cohabitation and reception, and as showing that parties bearing the name of the alleged father and mother had been engaged in taking measures for contracting a marriage.

In one case(1) an entry in a baptismal register,(2) in which a child was described as illegitimate, was received as some evidence of that fact, on the ground that it might be regarded as evidence of reputation in the neighborhood.(3)

Relationship of declarant to be proved *aliunde.*

It has been decided, that before the declaration of a relative can be admitted in evidence, his relationship with the family must be proved *aliunde*, that is, must be established by extrinsic proof, and not out of the declaration itself. Thus, in the Banbury Peerage Case,(4) the judges held, upon a question put to them by the House of Lords, that a bill in Chancery, purporting to be filed by the next friend of an infant styling himself the uncle of the infant, and depositions in the same cause made by persons styling themselves relatives, servants and medical attendants of the family, were not evidence to show that the parties were in fact what they styled themselves, so as to let in the bill and depositions on the footing of declarations (supposing them in other respects admissible), in a case where legitimacy of the infant was in question. And in the Leigh Peerage Case,(5) where a witness proved that he had heard the declarant say he was a member of the family, the House of Lords ruled the evidence insufficient, holding that the relationship between the family and the party making the declaration must be first proved upon oath, and that a mere statement of the fact by the party himself was not evidence.

It would seem, however, that in proving ancient pedigrees, the rule

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(1) Cope v. Cope, 1 Mo. & R. 269, 271, 276; S. C., 5 C. & P. 604.

(2) As to which, see *post*, Vol. II, *On the Admissibility of Writings, not judicial.*

(3) See further as to this, *post*, Vol. II.

(4) 2 Selw. N. P. 754. See also by Lord Eldon, C., in the Berkeley Peerage Case, 4 Camp. 419. The Banbury and Berkeley Peerage Cases upon this point were referred to by Bayley, B., in Davies v. Morgan, 1 C. & J. 591. See also Stafford Peerage, Print. Min. p. 5; by Bayley, J., in R. v. All Saints, 7 B. & C.; Monckton v. Att. Gen., 2 Russ. & M. 156; by Best, C. J., in Doe d. Futter v. Randall, 2 M. & P. 24. See also Adamthwaite v. Synge, 1 Stark. R. 183, that the custody of records is not to be proved *ex visceribus judicii.*

(5) Print. Min. p. 307.

which these authorities appear to establish would be too exclusive, as the relationship of the declarant with the family is often a fact as old and as difficult to prove as the relationship itself, which is the subject of the declaration. Still some degree of evidence will be required, otherwise a mere stranger, by claiming alliance with a family, might assume the power of materially altering the rights of its several branches by making statements in his lifetime respecting them.(1) And where a person is connected with A. by evidence *dehors*, his declaration touching relationship between A. and B. is admissible, without connecting the declarant with B.; otherwise the declaration would be manifestly superfluous, as only proving the very fact already established.(2)

It is not necessary that hearsay evidence upon questions of pedigree should be cotemporaneous with the facts to which the evidence relates. This would prevent the evidence from ever going back beyond the lifetime of the person whose declaration is to be adduced in evidence. And the rule, if it were so limited, would not answer the exigency for which it was established.(3)

Another important qualification, under which hearsay evidence in matters of pedigree is received, is that such evidence is not receivable if the declarations, &c., have been made *post litem motam*.

The definition of what constitutes *lis mota* has already been given; it remains to show in what manner that doctrine is applicable in cases of pedigree.

Declarations *post litem motam*, not evidence.

The first case, in which the precise time of making the declarations became the subject of particular inquiry and consideration, was the Berkeley Peerage Case.(4) This case came before the House of Lords, A. D. 1811; the only matter of controversy depended on the reality of the first marriage alleged to have taken place between the parents of the claimant. A question was, on that occasion, proposed to the judges, in the following terms:(5) "Upon the trial of an ejectment respecting blackacre between

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(1) See by Best, C. J., in Doe d. Futter v. Randall, 2 M. & P. 24. See also Vowles v. Young, 13 Ves. 147. Upon other matters it is common to admit the declarations of copyholders, stewards, collectors, and persons in other capacities, upon the assumption that they stood in the situation in which, upon the face of particular instruments, they purport to stand. *Vide infra*, declarations respecting general rights; and declarations against interest.

(2) Monckton v. Att. Gen., 2 Russ. & M. 157.

(3) Monckton v. Att. Gen., Id.; where the example is put, that the declaration of a person as to the maiden name of his grandmother would be receivable.

(4) 4 Camp. 401. The earlier cases on the subject were contradictory. But the question cannot be considered as having been fully discussed before the Berkeley Peerage Case. The authorities prior to that case were Spadwell v. ———, Exeter Spring Ass. 1730; Haywood v. Firmin, Sitt. after Trin. T. 1766, cited by Lawrence, J., in the Berkeley Peerage Case, 4 Camp. 410. In Goodright d. Stevens v. Moss, Cowp. 594, Lord Camden ruled for receiving the evidence; Reynolds, C. B., and Eyre, J., for rejecting it.

(5) May 2, 1811, MS.; S. C., 4 Camp. 403.

A. and B. (in which it was necessary for A. to prove that he was the legitimate son of J. S.), A., after proving by other evidence, that J. S. was his reputed father, offered to give in evidence a deposition made by J. S. in a cause in chancery, instituted by A. against C. D., in order to perpetuate testimony to the alleged fact (disputed by C. D.), that he was the legitimate son of J. S., in which character he claimed an estate in remainder in whiteacre, which was also claimed in remainder by C. D.; B., the defendant in the ejectment, did not claim blackacre under either A. or C. D., the plaintiff and defendant in the chancery suit. According to law, could the deposition of J. S. be received in evidence upon the trial of such ejectment against B., as evidence of declarations of J. S., the alleged father, in matters of pedigree?" The judges who were present afterwards stated their opinions at length, and with only one dissentient voice, agreed in considering the deposition of J. S. to be inadmissible.

Lawrence, J., delivered his opinion in the following terms:(1) "The declarations of members of the family, in matters of pedigree, are generally admitted, from the necessity of the case; but the administration of justice would be perverted, if such declarations could be admitted, which have not a presumption in their favor, that they are consistent with truth. Where the relator had no interest to serve, and there is no ground for supposing that his mind stood otherwise than even upon the subject (which may be fairly inferred, before any dispute upon it has arisen), we may reasonably suppose, that he neither stops short, nor goes beyond the limits of truth, in his spontaneous declarations respecting his relations and the state of his family. The receiving of these declarations, therefore, though made without the sanction of an oath, and without any opportunity of cross-examination, may not be attended with such mischief as the rejection of such evidence, which in matters of pedigree would often be the rejection of all the evidence that could be offered. But mischievous indeed would be the consequences of receiving an *ex parte* statement of a deceased witness, although upon oath, procured by the party who would take advantage of it, and delivered under that bias which may naturally operate on the mind in the course of a controversy upon the subject. Notwithstanding what is said in the case of Stevens v. Moss(2), I cannot think that Lord Mansfield would have held, that declarations in matters of pedigree, made after the controversy had arisen, ought to be submitted to the jury. They stand precisely on the same footing as declarations on questions of rights of way, rights of common, and other matters depending upon usage; and although I cannot call to mind the ruling of any particular judge upon the subject, yet I know that, according to my experience of the practice (an experience of nearly forty years), whenever a witness has admitted, that what he was going to state he had heard after the begin-

(1) 4 Camp. 409.
(2) Cowp. 594.

ning of a controversy, his testimony has been uniformly rejected. If the danger of fabrication and falsehood be a reason for rejecting such evidence in the cases of prescription, that will equally apply in cases of pedigree, where the stake is generally of much greater value."

Then, after referring to the decided cases, the learned judge added: "The authorities being thus balanced, I think the point must be considered as without any decision, and we must resort to principle and the uniform practice which has obtained in questions of prescription. Hardships may arise in rejecting declarations made between the commencement of the suit and the time of trial; but such hardships are not confined to the case of pedigree. In other cases, if witnesses die before the trial of the cause, the party who relied upon their testimony must sustain the loss. For avoiding uncertainty in judicial proceedings, general rules must be laid down and adhered to, without regard to our feelings or our wishes on particular occasions. Besides, the hardship may generally be avoided by a bill to perpetuate testimony. Although the exclusion of declarations made in the course of the controversy may prejudice some individuals, it is better to submit to this inconvenience than expose courts of justice to the frauds which would be practiced upon them if a contrary rule were to prevail. That this is not an imaginary apprehension, will appear from what happened in the Douglas and Anglesea causes; in the first of which, fabricated letters were given in evidence; and in the second, false declarations. Notwithstanding the danger of incurring the penalties of the crime of perjury, there is scarce an assize or sittings in which witnesses are not produced, who swear in direct contradiction, the one to the other: and it may be feared, that persons, who have as little regard to truth, may be induced to make false declarations, when they run no risk of punishment in this world, as no use can be made of their evidence till after their death. We know that passion, prejudice, party, and even good will, tempt many who preserve a fair character with the world, to deviate from the truth in the laxity of conversation. Can it be presumed that a man stands perfectly indifferent upon an existing dispute respecting his kindred? His declarations *post litem motam*—not merely after the commencement of the lawsuit, *but after the dispute has arisen*, for that is the primary meaning of the word *lis*—are evidently more likely to mislead the jury than to direct them to a right conclusion, and therefore ought not to be received in evidence. I am likewise of opinion that no deposition can be received in evidence as a declaration, to prove a fact which it was the object of that deposition to establish. A deposition is the answer of the witness to such interrogatories as it is thought expedient to put to him to establish certain facts which the plaintiff alleges, and on which the case depends. Consequently, a deposition is considered a partial representation of facts, as to all persons who have no opportunity of bringing out the whole truth by cross-examination; and on that account all admit that, against a stranger, it cannot be received in evidence as a deposition. How

then shall it be received as a declaration? In that case the circumstance of its being upon oath cannot be regarded. To consider it a declaration on oath would be to receive it as a deposition. As a declaration it is still subject to the same vice and infirmity of being an answer to particular questions artfully put, with an interested view, by one party behind the back of another."

Lord Mansfield, C. J., in his judgment in the same case, after giving the same definition of *lis mota*, saying that the line of distinction was the *origin of the controversy* and not the *commencement* of the *suit*, expressed his opinion that all declarations are to be excluded after the controversy has originated, whether it was or was not *known to the witness;* he said, if an inquiry were to be instituted in each instance, whether the existence of the controversy were known at the time of the declaration, much time would be wasted and great confusion produced.(1)

Statement in contemplation of litigation.

In a late claim of peerage,(2) a private pedigree, compiled by the father of the claimant with a view to support a claim to certain estates, and laid before counsel for that purpose, was held inadmissible by the House of Lords, as not being a spontaneous effusion, but made for a particular object and in contemplation of litigation. The peerage in this case was claimed through the mother of the claimant, and not only were the controversies therefore different, but the father, who compiled the pedigree, never could have had an interest in the present claim. It also appeared, that when the claim was made to the estates, the descent was taken for granted on both sides; but their Lordships held that this made no difference in the cases, as it might be equally for the interest of each to admit a particular statement though contrary to truth.

Declarations are not to be rejected because made for the express purpose of preventing disputes in a family. Thus Lord Mansfield, C. J., observes:(3)—"I have known advice given to a father and mother to make attested declarations in writing under their hand, of the precise time of the birth of the bastard *eigne* and the subsequent marriage, to prevent controversy in the family touching the inheritance." And the judges, in their answer to the third query in the Berkeley Peerage Case, say that, "an entry in a Bible or any other book, or any other piece of paper, would be admissible notwithstanding it was proved that such entry was made by a parent for the express purpose of establishing the legitimacy of his son and the time of birth, in case the same should be called in question after his father's death." They add that the *particularity* of the entry

(1) 4 Camp. 417.

(2) Slane Peerage, Print. Min. 1830, part 2, p. 35, and part 3, p. 6; S. C., 5 Cl. & Fin. 23.

(3) In Goodright d. Stevens v. Moss, Cowp. 591, 594. And see Monckton v. Att. Gen., 2 Russ. & M. 164.

would be a strong circumstance of suspicion; but still it would be receivable, whatever the credit might be to which it was entitled.(1)

Upon this subject Lord Brougham, C., observes forcibly, in Monckton v. The Attorney General,(2) that Lord Mansfield's remarks in Goodright d. Stevens v. Moss sanction the doctrine, that the having a distinct object in view in making a declaration, by parol or in writing, even though the object can only be gained by afterwards using the declaration in evidence, is not sufficient to exclude the declaration. If the father or mother make a pedigree for the purpose of preventing disputes in the family, Lord Mansfield, C. J., said *in effect*, that he would admit that pedigree in evidence, even when those very disputes arise; because it was not made with a view to their own interest, but to preserve a *constat*, as it were, on record, of facts peculiarly within their knowledge (which is one of the main grounds of admitting such hearsay evidence), and that the observation—that it was made for the purpose of settling family disputes, and may not have been so spontaneous and natural as some of the *dicta* of the judges would seem to require—shall only go to its weight and credit with the jury, and shall not preclude its admission by the court.

It is not a valid objection to this kind of evidence that the party making the declaration may have stood, or thought he stood, *in pari jure* with the party tendering the declaration, and therefore might be under a bias. Although the party, if he had been living, might have stood in the very situation of the person who tenders his declaration in evidence, that circumstance is not sufficient to exclude it.(3) The reason of admitting the evidence in these cases appears to be, that since competent knowledge is required to make hearsay receivable in matters of tradition, and a probability also of the declarations having occurred naturally in the course of familiar intercourse; it would almost dry up such sources of information, to require further an absence of all bias on the subject of the declarations. It has been thought to be some safeguard, sufficient at least to warrant the admissibility of the evidence upon points where no better evidence can commonly be expected, that the declarant could derive no advantage from his own statements, and that there was at the time no exciting cause to induce him to depart from the truth.(4)

Thus the declarations of a person entitled in remainder, stating the extinction of the issue of persons standing in the line of entail between her and the then possessor of the estate, were held admissible for the

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(1) 4 Camp. 418.

(2) 2 Russ. & M. 164. In Slaney v. Wade (1 Myl. & C.), *supra*, copies of a mural inscription were held not objectionable, on the ground that, because at the time they were made, the possibility of a controversy at some future period was contemplated.

(3) By Lord Brougham, C., in Monckton v. Att. Gen., 2 Russ. & M. 159, 160.

(4) It is said by the court, in Harwood v. Sims (Wightw. 112), that the rejecting of evidence of persons *in pari jure*, would cut up entirely all evidence of reputation. And see the reasons of the Court of Exchequer in Moseley v. Davies, 11 Price, 162, and of Graham, B., 13 Price, 236.

plaintiff claiming through her.(1) And in a peerage case before the House of Lords, a widow was allowed to prove the declarations of her deceased husband in support of her son's title; though the husband, if living, would have had the right which the declaration tended to establish.(2) But in the claim of Sir Cecil Bishopp to the barony of Zouch, some private papers, purporting to be the pedigree of Lord Zouch, which had been in the possession of a deceased lady, who was a branch of the family, were held inadmissible by the House of Lords, it appearing that this lady had conceived herself entitled to the peerage which the petitioner claimed.(3) It is probable, however, that the true ground of rejection was that the pedigree was compiled in contemplation of a claim.

SECTION V.

Exceptions to the General Rule as to Hearsay, with reference to Ancient Possession.

Ancient documents, evidence of possession.

It has been seen that hearsay evidence, in matters of private interest, not affecting any public or general interest, is inadmissible, especially where the matters do not involve any prescriptive right. But the admissibility of ancient documents, purporting to constitute a part of transactions themselves (as being acts of ownership or an exercise of right), stands upon a different principle. Such documents are often the only attainable evidence of ancient acts of possession, which may be of great weight in the investigation of titles, and they naturally accompany and constitute a part of such acts.

Ancient documents, therefore, purporting to be a part of transactions, and not a mere narrative of them, are, under certain qualifications which will be noticed, receivable as evidence that those transactions really occurred. And, in this sense, the documents may be called hearsay evidence of ancient possession. Such evidence is very commonly adduced in practice to corroborate modern use or possession.

Thus, upon a question as to the right of a lord of a manor to hold certain land within the manor free from common, several counterparts of leases found among the muniments of the lord of the manor, from which it appeared that the land had been demised by the lord free from common, were held to be receivable in evidence.(4)

(1) Doe d. Tilman v. Tarver, Ry & Mo. 141.

(2) By Lord Tenterden, C. J., Ry. & Mo. 142. See the remark of Lord Brougham, C., in this case, and in Monckton v. Att. Gen., 2 Russ. & M. 160.

(3) Zouch of Haryngworth Peerage, Print. Min. 1804, p. 207.

(4) Clarkson v. Woodhouse, 5 T. R. 413, n.; S. C., 3 Doug. 189. See also Barnes v. Mawson, 1 M. & S. 78, *supra;* Leathes v. Newit, 4 Price, 355; 8 Price, 562; Fisher v. Graves, 3 Eag. & Y. 1180.

In an action of trespass(1), upon issue joined on a plea of justification by virtue of a prescriptive right of fishery appurtenant to a manor, old licenses on the court rolls, and leases granted by the lords of the manor, in consideration of certain rents, to fish in the *locus in quo*, were held to be receivable evidence. Heath, J., in this case, observed, that he could not distinguish the licenses from old leases, which were always received in evidence in favor of those claiming under the lessors. Rent rolls, where payments have been made, are good evidence to prove fee-farm rents,(2) or for other purposes.(3) Old court rolls have been admitted to prove a prescriptive right to wreck in the lord of a manor.(4)

It has been questioned, however, whether ancient leases are proper evidence against strangers, of the boundary of the property conveyed. In Clarkson v. Woodhouse,(5) Lord Mansfield, C. J., said that the case before him differed from the case of Lord Pomfret v. Smith,(6) where Lord Pomfret offered a lease by himself or his predecessor, describing the premises in dispute as lying within the limits of Lord Pomfret's estate, the question being on the boundaries. But on reference to the report of that case, it would seem that no part of the lease, upon the admissibility of which the principal question arose, applied to the place in dispute, but only the words of an exception contained in it, and therefore it was contended that the lease, not containing a demise of the lands in question, was not evidence of an act of ownership, but only showed that the lands were excepted by a description injurious to the right of a stranger, against whom that description was attempted to be used.

An old map of lands annexed to a deed seems to stand on the same footing as a description contained in the deed itself, and to be admissible in evidence, where it is part of the act by which property is to be conveyed.(7) But where a map or survey is not connected with any act of ownership, it appears to be inadmissible evidence to prove the parcels

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(1) Rogers v. Allen, 1 Camp. 309.

(2) Newburgh v. Newburgh, 12 Vin. Ab. T, b. 43.

(3) Woodnorth v. Cobham (Lord) Bunb. 180; 1 Eag. & Y. 802. In 12 Vin. Ab. A, b. 66, it is said, a rental is but weak evidence, unless payment is also proved, and not sufficient *per se*; and by Comyns, B., 12 Vin. Ab. 90, pl. 14, rentals, without money received and paid upon them, are nothing. In Lancum v. Lovell (6 C. & P. 441), an ancient counterpart of feoffment produced from corporation muniments was rejected, because no rent had been received in respect of the property.

(4) Biddulph v. Ather, 2 Wils. 23.

(5) 5 T. R. 413, n. *supra*. Parochial descriptions in leases are evidence upon questions of public right, where reputation is admissible. Plaxton v. Dare, 10 B. & C. 17.

(6) 6 Bro. B. C. 440.

(7) Gilb. Evid. (3d edit.) 78, citing Yeates v. Connop, Hil. Ass. 1702. See also 1 Stra. 95, n.; 4 N. & M. 302; 1 Lord Raym. 734; Doe d. Hughes v. Lakin, 7 C. & P. 481; Wakeman v. West, 7 C. & P. 479.

of an estate; at least so far as respects the principle of evidence under consideration.(1)

Conditions of admissibility.

Evidence of the description above mentioned can only be received subject to several qualifications.

In the first place, some act done with reference to the documents is required to be shown, if the nature of the case admits of it. Where, however, this cannot be done, from the antiquity of the document, it will be admissible without such proof. Thus, in the case of Clarkson v. Woodhouse(2), the trial of which took place A. D. 1782, several leases were produced in evidence; the oldest of which was dated in 1680; and the latest of those admitted in evidence was dated in 1702 or 1703. A lease dated in 1730 was rejected. No evidence of enjoyment under these leases was given; and as to the two older leases, the court ruled that their antiquity rendered it unnecessary to prove acts done, because it was impossible give evidence of enjoyment under such old leases. In Rogers v. Allen,(3) licenses were produced, which bore date from the year 1661 downwards to the end of the seventeenth century, and the cause was tried A. D. 1808: Heath, J., ruled that it was not necessary to prove payment under the licenses, because, as they were of such an ancient date, it could not reasonably be supposed that evidence of such payments was still preserved. So in the case of The Duke of Bedford v. Lopes,(4) which was an action brought to try the title to the bed of a river, after proof of a grant by Henry VIII, two counterparts of leases were produced from the duke's muniment room, comprehending the soil in question. No payment by a tenant was proved, nor any modern act of ownership; but the documents were ruled by Lord Denman, C. J., to be admissible. And in the recent case of Doe dem. The Earl of Egremont v. Pulman,(5) in order to prove that the land in question was part of the estate of the earl's ancestor, a counterpart of a lease, purporting to demise that land, was produced from the ancestor's muniment room: it was dated in the ancestor's lifetime, and appeared to have been executed by the person named as lessee, but by no one else; no proof was given of actual possession under the lease, and no privity appeared between the lessee and the defendant in ejectment; but the court held that the document was admissible.

There appears to be a material distinction between evidence of possession by lessees under leases, and evidence of payment of rent. This dis-

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(1) Anon., 1 Stra. 95; Bridgman v. Jennings, 1 Lord Raym. 734; B. N. P. 283; by Lord Kenyon, C. J., in Pollard v. Scott, Peake, 18. See Wakeman v. West, 7 C. & P. 479; Doe v. Seaton, 4 N. & M. 81; Donnison v. Elsley, 2 Eag. & Y. 1396, n.; 12 Vin. Ab. 90, pl. 12.

(2) 3 Doug. 189; S. C., 5 T. R. 413, n.

(3) 1 Camp. 311.

(4) Tried at Exeter, March, 1838, cit. 3 Q. B. 623.

(5) 3 Q. B. 622.

tinction is sometimes very important, where subsequent inquiries are made respecting the parcels of the lease. Thus, where leases of rectories include tithes claimed by the vicar, it seems to make an important difference, whether the lessee has enjoyed the tithes claimed by the vicar, or whether he has only paid rent generally on his lease. For it would be the interest of the lessee, as well as of the lessor, to have the parcels stated as amply as possible; and where the rights are often so intermingled as those of rector and vicar, the leases of the rectory may often, in general terms, include vicarial tithes, without any imputation of fraud, especially where common forms and precedents are often followed, as in leases of crown rectories. In tithe suits, however, ancient leases of rectories have frequently been admitted as evidence of the parcels, merely upon proof of rent being received, as appearing by the minister's accounts.(1)

Where unexceptionable evidence of possession, referrable to the document, may reasonably be expected to be found, it is required to be shown. And proof of acting with respect to the documents which are produced as evidence of acts of ownership, is always scrupulously required (even in cases where traditionary evidence is receivable), if the document purport to have been made *post litem motam*. Thus, upon a question concerning the right of the corporation of Cambridge to receive toll, an award, whereby the freemen of Northampton were discharged of toll at Cambridge, in consideration of an annual payment by the corporation of Northampton to the corporation of Cambridge, was considered to be inadmissible in evidence, on the ground that payment of the composition had not been proved.(2)

Where it cannot be expected by reason of the antiquity of the documents, that any acts cotemporaneous with them should be afforded, it is still requisite, at least as far as respects the weight, if not the admissibility of the evidence, that some acts in modern times with reference to similar documents, should be proved, or that modern possession or user should be corroborative of the ancient documents. In the case of Clarkson v. Woodhouse,(3) before mentioned, other evidence of title was given besides the leases. And in Rogers v. Allen, above stated,(4) Heath, J., observed, that to give any weight to the licenses produced in that case, it must be shown that, in latter times, payments had been made under licenses of the same kind, or that the lords of the manor had exercised other acts of ownership over the fishery, which had been acquiesced in.

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(1) Collins v. Gresley, by Park, J., Derby Sum. Ass. 1833; by Lyndhurst, C. B., on motion for a new trial.

(2) Brett v. Beales, 1 M. & M. 418.

(3) 5 T. R. 412, n.; S. C., 3 Doug. 189; *Supra*, p. 282.

(4) 1 Camp. 309; *Supra*, p. 282. As to the point that entries in ancient corporation books are not generally evidence against strangers, see Att. Gen. v. Warwick (Corporation), 4 Russ. 222; Lancum v. Lovell, 6 C. & P. 441; Marriage v. Lawrence, 3 B. & A. 142; Hill v. Manchester W. W., 5 B. & A. 875.

Custody of documents.

Another qualification, to which the admissibility of this species of evidence is subject, relates to the custody or depository of documents. This will be more properly considered in treating of the proof of written instruments.(1)

SECTION VI.

Exceptions to the General Rule as to Hearsay, in the Case of Dying Declarations.

The rule which excludes hearsay evidence has been relaxed, in certain cases, where a statement has been made by a person, since deceased, under the immediate apprehension of death. The admission of what is called a *dying declaration* is an exception to the general rule of evidence, inasmuch as it has not been made under the sanction of the judicial oath, and has not been subject to the power of cross-examination. It has been considered that such evidence is admissible on the ground that the circumstances, under which the information is given, are such a guaranty of its truth, as to make it safe for juries to act upon it.

"Dying declarations," said Eyre, C. J.,(2) "are made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth: a situation so solemn, and so awful," he observed, "is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice."

In prosecutions for murder it has been the common and ancient practice to admit as evidence the dying declarations of the person with whose murder the prisoner stands charged.

Limitations of admissibility.

It is obvious that the principle, above laid down, would apply, though with unequal force, whatever may be the subject matter of the declaration, whether of a civil or criminal nature. But according to the more recent authorities, it is established, that dying declarations are receivable only upon some particular subjects of inquiry. In a modern case,(3) in the Court of Exchequer, where it was held that proof could not be admitted of the declarations of a subscribing witness to a deed, tending to show that he had forged or fraudulently altered the deed, the authorities for admitting dying declarations, as to a similar fact, were much considered. These authorities are two only in number, and although they had been

(1) *Post*, Vol. II, and see Index, tit. *Custody.*

(2) In Woodcock's Case, 1 Leach, 502. See also Drummond's Case, Id. 338.

(3) Stobart v. Dryden, 1 M. & W. 615.

spoken of by judges occasionally with approbation, they do not appear to be supported by the deliberate judgment of any court. In one of these cases the declarations of a subscribing witness to a bond, who, in his dying moments begged pardon of Heaven for having been concerned in forging the bond, were admitted by Heath, J.,(1) as evidence of the forgery, on the authority of Wright dem. Clymer v. Littler,(2) (the other of the two cases above referred to), where similar evidence of a dying confession by a subscribing witness to a will had been received by Willes, C. J., and afterwards approved of by the Court of King's Bench. These two cases must be looked upon as at least much shaken, if not virtually overruled, by the case of Stobart v. Dyrden above mentioned; and it may be doubted whether dying declarations would be receivable in any civil case: except, perhaps, where the inquiry involved the cause of death of the declarant.(3)

In an action of ejectment,(4) it was determined that the dying declarations of a person as to relationship between the lessor of the plaintiff and

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(1) Cited by Lord Ellenborough, C. J., in Aveson v. Kinnaird (Lord), 6 East, 195; and in Durham (Bp. of) v. Beaumont, 1 Camp. 211. See also by Bayley, J., in Doe d. Sutton v. Ridgway, 4 B. & A. 55.

(2) 3 Burr. 1244; S. C., 1 W. Bl. 346. See 4 B. & A. 54.

(3) *E. g.* in an action of a policy of insurance, where the defence was that the deceased had laid violent hands upon himself.

(4) Doe d. Sutton v. Ridgway, 4 B. & A. 53.

NOTE 99.—The American cases have undergone the same fluctuations as the English, with regard to the particular question which dying declarations may be brought forward to elucidate. So long as the principle of admission was thought to rest merely upon the substitution of the fear of death, of spiritual punishment, and the absence of motive to falsehood, for the obligation of an oath, no reason could be given why the testimony should be tied up to the homicide on trial. It came in, as secondary evidence generally does, upon the broad ground that the primary is lost by an accident which should never deprive the party of what is left. Accordingly, it was put with a *quere*, whether such declarations may not be received to support a deed (Jackson ex dem. Youngs v. Vredenburgh, 1 John. Rep. 159); and they were actually received from the daughter, to support an action for her seduction, at the suit of her father. M'Farland v. Shaw, 2 N. Car. Law Repos. 102, 105.

So long as the testimony was left to stand on the broad abstract notion that it was secondary, the analogy was too imposing to be resisted in any case. It never was, however, complete. The strongest resemblance was to depositions and the *viva voce* testimony of deceased witnesses on a former trial. But here the secondary evidence was carefully restricted, in such a way as to secure to the party, against whom it was presented, the important right of cross-examination, and the prevention of all abuses in the mode of obtaining it. On the whole, it is plain that the rule as to dying declarations, is one of policy and necessity, arising in the particular case. It shall not be allowed to the offender to commit a homicide, and by the same act, put to silence the only witness at whose mouth he may be condemned.

Upon the latter view, it has now long been settled, by a series of cases, that declarations *in extremis* are restricted to the trial for the identical homicide which occasioned the death of the person who makes the declarations. They are not admissible in a civil action (Wilson v. Boerem, 15 John. R. 286; S. C., Anth. N. P. 174,; Jackson ex dem. Coe v. Kniffen, 2 John. R. 35, per Livingston, J.; Gray v. Goodrich, 7 Id. 95, 96, *per Curiam;* and see Anth. N. P. 176, n. *a*); and, as expressed in another case, they can be received "only where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the declarations."

the person last seized of the premises in question (the deceased not being a relation of the parties), could not be received. In settlement cases, dying declarations have for a long time been adjudged to be inadmissible.(1)

The admissibility of dying declarations has been limited even in criminal cases; and a rule has been laid down, that such declarations are generally admissible only where the death of the declarant is the subject of the inquiry, and where the circumstances of the death are the subject of his dying declaration.(2)

Where a prosecution was for administering drugs to a woman pregnant, but not quick with child, with intent to procure abortion, her dying declarations were held inadmissible, upon the ground that the death of the party was not the subject of inquiry, though the declaration might relate to the cause of the death.(3) So in trials for robbery, the dying declarations of the party robbed have been rejected.(4) And in a prosecution for perjury, it has been held that the dying declarations of the prosecutor (who had been shot by the defendant), could not be used in showing cause against a motion for a new trial; nor could they have been received in evidence at the trial.(5) In one case in Ireland, upon an indictment for murder, the dying declarations of another party, confessing that he had committed the crime, were rejected.(6)

The dying declarations of the deceased person in *favor* of a prisoner charged with his death, seem to be as admissible for him, as they would be against him if unfavorable.(7)

Belief of future state, implied.

Upon the ground that dying declarations are said to be receivable, as having (from the circumstances under which they are delivered) something of the sanction of an oath taken in a court of justice, the dying declarations of persons who, if living, would have been incompetent to

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Rex v. Mead, 2 Barn. & Cres. 605; S. C. cited in the text. They are not receivable on trial of an indictment for administering to a woman in order to procure an abortion, though this might have been the cause of her death, for her death was not the subject of the charge (Rex v. Hutchinson, note to the last case; S. C. cited in the text); nor on trial for a robbery, though the party robbed died of the violence exerted against him in its commission. Rex v. Lloyd, 4 Carr. & Payne, 233, and note *a* to that case, citing two cases also referred to in the text.

(On the same ground, dying declarations are not evidence of the prisoner's insanity (The State v. Spencer, 1 New Jersey, 196); nor is any statement, made by the deceased in regard to an independent fact, disconnected from the circumstances or cause of the death, admissible. Johnson v. The State, 17 Ala. 618.)

(1) R. v. Ferry Frystone, 2 East, 54; R. v. Chadderton, Id. 27; R. v. Abergwilly, Id. 63.

(2) By Abbott, C. J., in R. v. Mead, 2 B. & C. 607.

(3) R. v. Hutchinson, 2 B. & C. 608, n. *a*, by Bayley, J.

(4) By Bayley, J., on the Northern Spring Circuit, 1822; by Best, C. J., on the Midland Spring Circuit, 1822; and by Bolland, B., in R. v. Lloyd, 4 C. & P. 233.

(5) R. v. Mead, 2 B. & C. 605.

(6) R. v. Gray, Ir. Cir. Rep. 76, by Torrens, J.

(7) R. v. Scaife, 1 Mo. & R. 551.

take the judicial oath, from defect of religious principle, are not to be admitted. Thus, if it appear that the deceased had no idea of a future state, his declarations will be inadmissible; for a principal ground of the admissibility of such evidence is the supposed deep impression of having shortly to render up an account to his Maker.(1) Accordingly, the dying declaration of a child, aged four years, was rejected, because it was considered that at that age the child could not possibly have any idea of a future state.(2) But when the statement is made by a child of intelligent mind, impressed with the nature of an oath, and expecting to die, the statement may be received.(3)

Upon the same principle, the dying declarations of an attainted convict were formerly rejected, as he could not, if living, have been examined upon oath;(4) but since Lord Denman's Act,(5) this would no longer be a ground of objection to their admissibility.

The dying declarations of a woman, who took part in an act which caused her own death, were received in evidence upon an indictment for murder charging the prisoner both as principal and accessary before the fact;(6) and it was decided, that the fact of her being *particeps criminis*, in the act which caused her own death, was not a valid objection to their admissibility, for the declarations of a *particeps criminis* are admissible against a person indicted for a crime in which the declarant participated.

The case of The King agt. Baker,(7) appears not to be quite conformable with the rule above mentioned, that dying declarations are admissible only where the death of the declarant is the subject of inquiry. A prisoner was indicted for poisoning J. K. The poison was administered in a cake, immediately after eating which the deceased was taken ill. His maid servant, who was present and had made the cake, ate some of it herself, and died of the poison. Her dying declarations (made after she knew of her master's death) as to the manner in which she had made the

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(1) By Park, J., in R. v. Pike, 3 C. & P. 598.

(2) R. v. Pike, 3 C. & P. 598, by Park, J., and Parke, B.

(3) R. v. Perkins, 2 Mo. C. C. 135; S. C., 9 C. & P. 395, 397; the child was ten years old.

(A child, who has not arrived at years of discretion, is not supposed capable of understanding the nature of an oath, or of entertaining such views of a future accountability as, in the prospect of present dissolution, are deemed equivalent to an oath; and, therefore, he is not received as a competent witness on the stand, and his dying declarations are not allowed in evidence. Pennsylvania v. Stoops, Addis. 381. On the other hand, the wife being a competent witness against her husband on an indictment against him for violence to her person, her dying declarations may be received against him in like cases; as, where the husband is indicted and tried for the murder of his wife. The People v. Green, 1 Denio, 614. If her dying declarations are irrelevant, as where she admitted herself to have been guilty of adultery, they are excluded for that reason. State v. Rash, 12 Ired. 382.)

(4) Drummond's Case, 1 Leach, 337.

(5) 6 & 7 Vict. c. 85.

(6) Tinckler's Case, 1 East, 354.

(7) 2 Mo. & R. 53. This point was reserved for the consideration of the judges, but the prisoner was acquitted.

cake, and that the prisoner was present at the time she made it, were tendered in evidence on the part of the prosecution, and objected to on behalf of the prisoner, upon the ground that the inquiry related not to the death of the servant, but to that of J. K. But Coltman, J., after consultation with Parke, B., expressed himself of opinion that, *as it was all one transaction*, the declarations were admissible. Upon this decision it may be observed, that although, with respect to the *master and the maid servant* who were both poisoned, the circumstances stated in the dying declaration formed one transaction, yet with respect to the *prisoner* they consisted of two separate criminal acts, which might have been the subject matter of two prosecutions for murder: and it is with respect to the *prisoner* more especially, and to the bearing which the evidence may have against him, that the question of the admissibility of the delarations is to be considered. On a trial of the prisoner for the poisoning of the *maid servant*, her dying declarations would unquestionably be good evidence against him; but it seems doubtful whether they are admissible against him on a charge of poisoning the master, which, though involved in the same transaction with the other poisoning, must be treated, in the course of judicial inquiry, as a matter entirely distinct and unconnected.

Inquiry as to the state of the deceased.

Before dying declarations can be received in evidence, inquiry must be made, whether the deceased apprehended that he was in such a state of mortality as would inevitably oblige him soon to answer before his Maker for the truth or falsehood of his assertions, or as laid down by Lord Denman, C. J., in a late case,(1) there must be actual danger of death, and a

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(1) Sussex Peerage Case, 11 Cl. & Fin. 108, 112.

(In order to render the dying declarations of a deceased person admissible, it must be first shown that they were made under the present apprehension of impending death, or, as it is sometimes expressed, under the consciousness of almost immediate dissolution. Smith v. The State, 9 Humph. 9; Logan v. The State, Id. 24; The State v. Thawley, 4 Harring. 562. Where it is shown that the declaration of the deceased was so made, it will not be rendered inadmissible by showing a subsequent revival of strength in the dying person. The State v. Tilghman, 11 Ired. 513. The deceased's state of mind, in regard to his consciousness of impending death, is to be ascertained from the circumstances, as well as from what he said at the time, or what was said to him. McLean v. The State, 16 Ala. 672; Campbell v. The State, 11 Geo. 353. Though a man live fifty-two days after receiving a mortal wound, his declarations made three days before his death are admissible, it being shown that he had been informed by the physician, and had himself expressed the belief, that his wound was mortal. Oliver v. The State, 17 Ala. 587. If it appear clear that the deceased had given up all hopes of recovery, the circumstance that the physician gave her hopes will not exclude her dying declaration. The People v. Grunzig, 1 Parker C. R. 299; Id. 11, 302; The State v. Peace, 1 Jones's Law (N. C.), 251.)

NOTE 100.—For the general position that declarations *in articulo mortis* are admissible, see Pennsylvania v. Stoops, Addis. 381.

The deceased was robbed, and stabbed in several places, one of which was his bowels. He became so weak that he was brought into the city on a litter, where a surgeon dressed his wounds, and he died in a few days after. The surgeon deposed that one of the wounds received by the deceased was such as generally proved mortal. The expressed opinion of the deceased,

as to his expectation of death, was not in evidence; nor the opinion of his surgeon, as given to him; yet, from the palpable danger of the case, the court inferred his apprehensions of death, and received his dying declarations giving an account of the robbery. State v. Monaquas, Charlt. Rep. 16. But in another case, although the wound was quite dangerous, and plainly so, a large portion of the entrails being out, which were badly cut and wounded, the surgeon believing from the first that the deceased could not live, the court hesitated to receive the declarations of the deceased until a witness had deposed to his expression of an opinion that he should not live. King v. The Commonwealth, 2 Virg. Cas. 78, 80, 81. And in another case, where the deceased was wounded and died the next day, nothing appearing as to his opinion of his own danger before the declarations were made, they were held inadmissible. The court said: "Declarations of a dying man have sometimes been received; but then they must be the declarations of a dying man—of one so near his end that no hope of life remains; for then the solemnity of the occasion is a good security for his speaking the truth, as much so as if he were under the obligation of an oath. But if, at the time of making the declaration, he has reasonable prospects and hope of life, such declarations ought not to be received; for there is room to apprehend he may be actuated, by motive of revenge and an irritated mind, to declare what possibly may not be true." The State v. Moody, 2 Hayw. 31. In another case, the deposition of the deceased was taken immediately after he had received a dangerous wound; but he did not plainly mention, even to his most intimate friends, that he thought there was no chance for his recovery, till three days after. The court deeming it doubtful, on the testimony, whether, within the three days, he felt morally certain that he must die, refused to hear any of his declarations, except those made after that time. The People v. Anderson, N. Y. O. & T., Edwards, C. Judge, presiding, A. D. 1824; 2 Wheel. Cr. Cas. 390, 398. It is put by Evans, that the despair of the deceased may be inferred from his declarations cotemporary or previous to the statement proposed as evidence to the jury, or from his situation being such as necessarily to induce that impression. 2 Ev. Poth. 293, 294. And see Trant's Case, Macnally's Ev. 385.

Before the judge decides, he hears all the deceased said respecting the danger in which he considered himself; and he should be satisfied that the declaration was made under an impression of almost immediate dissolution. It is not enough that the deceased thinks he shall ultimately never recover. Thus, the deceased being operated upon by a quack surgeon with a rectum bougie (May 10th), by which he received an injury, took to his bed, and died in about a week (May 17th). On the evening of the 10th, he had declared to L., a regular surgeon, that he had had such an injury in the bowels that he should never recover. The surgeon endeavored to encourage him, really thinking him not in danger of dying; but he persisted in saying he felt satisfied he should never recover. Hullock, B., rejected the proposed declaration as evidence against the quack, who was indicted and on his trial for manslaughter. Rex v. Van Butchell, 3 Carr. & Payne, 629. And see Rex v. Callaghan, Macnally's Ev. 385. On the trial of an indictment for the murder of Jane White, by administering corrosive sublimate, her surgeon testified thus: "I had told the deceased she would not recover, and she was perfectly aware of her danger. I told her I understood she had taken something. She said she had, and that damned man had poisoned her. I asked her what man; and she said Crockett. She said she hoped I would do what I could for her, for the sake of her family. I told her there was no chance of her recovery." Bosanquet, J.: "This shows a degree of hope in her mind. To render a declaration of this kind admissible, she must have had the impression on her mind of an almost immediate dissolution.", Rex v. Crockett, 4 Carr. & Payne, 544. The surgeon was clear that the deceased was mortally wounded, on first seeing him; and the deceased told the surgeon he thought so, and expressed a consciousness that he should not recover to several witnesses, and was constantly at prayer in the intervals of being easier from pain. His declarations, after this proof given, were received against the prisoner, though, to the witness who heard them, the deceased made use of expres sions indicating an expectation of surviving; as that if his brother (the prisoner) would go off, where he would never more be heard of, he, the deceased, would forgive him; and the witness thought the deceased then expected to live. The declarations received against the prisoner were made a few hours after the surgeon had dressed the wound and given the deceased his opinion that he would die, and after the deceased had expressed the same opinion to another witness Gibson v. Commonwealth, 2 Virg. Cas. 111, 116, 117. Immediately and on the evening after being wounded, which was eleven days before his death, the deceased declared to his nurse that

he was robbed and killed, and could not get the better of it, and persevered in these and the like declarations to her till his death, though a surgeon was called to him the evening after the wound, who gave him hopes of life till just before his death: but he told him there was danger. He did not express a consciousness that he must die, to the surgeon. Held, that his declarations as to the facts attending the homicide, made eleven days before his death, after his declarations to the nurse, and his declarations as to the homicide made subsequently, were admissible in evidence, though they were made before the surgeon told him his state was hopeless. Rex v. Mosley, Ry. & Mood. Cr. Cas. 97. On the trial of an indictment against Poll, a domestic of S. Skinner, for poisoning him, it was in evidence that he died on Thursday; and his declarations from the Sunday previous up to his death, were offered in evidence for the state. During that interval, he was evidently sick from the effect of poison; and stated his belief that he should die, though he was occasionally better. He said he was poisoned; and, as he believed, by Poll, who gave him something in his food and drink. His declarations were held admissible, being made at times when he despaired of a recovery. State v. Poll & Lavinia, 1 Hawks, 442, 518, 519. But the court do not mean to be understood as sanctioning the declaration of *belief* as to the person poisoning, as proper evidence.

It will be perceived that most of the doctrine stated in the text is thus re-asserted in a definite form by these cases. We see that competency is a question of fact for the court, as in other cases. They are to find upon it as the jury do upon the main case, taking into view all the circumstances calculated to prove and disprove that despair of life which shall be equivalent to a sworn obligation. In determining this, it will be seen that much confidence has usually been, as indeed from the nature of the question it must be, placed in the declarations and conduct of the deceased. The surgeon and third persons may look upon the case as desperate, while the mind of the deceased is still buoyant with hope. Levity and thoughtless profanity, as in Rex v. Crockett, is contrasted with seriousness and prayer, as in Gibson v. The Commonwealth. The apprehension must be of almost immediate death, as held in Rex v. Van Butchell, not a mere despair of ultimate recovery, after lingering for a long time. One eminent writer calls it the apprehension of "impending death." 2 Ev. Poth. 293.

> "Have I not hideous death within my view,
> Retaining but a quantity of life;
> Which bleeds away, even as a form of wax
> Resolveth from his figure 'gainst the fire?
> What in the world should make me now deceive,
> Since I must lose the use of all deceit?
> Why should I then be false; since it is true
> That I must die here, and live hence by truth?"
>
> [King John, Act V, Scene IV.

The above lines from Shakspeare have been more than once quoted (see 3 M'Cord, 231), as presenting the true standard of a witness allowed to testify through his dying declarations. The supposed speaker (Count Melun) is represented as in truth mortally wounded, and shortly after dying. In the meantime he is not only certain of ultimate death—this is not enough; every valetudinarian, every person in health is conscious of that;—but he is strongly persuaded that death is rapidly approaching. It is so near that all motives to falsehood are superseded by the strongest inducements to strict veracity; and hence he urges an implicit belief of the disclosures he had made, although they pointed to a most diabolical conspiracy. See, also, Swift's Ev. 124.

Upon this question of fact, no rule can be adopted which will reach every variety of detail. The court try the competency of the deceased as the jury do his credibility; and the decision in either case, on a conflict of testimony, must be final.

In one case, the deceased, though she had not expressly intimated a word of apprehension to her aunt, who attended her, or any other person, yet detailed shocking circumstances concerning a rape which had been committed upon her; and soon after died of the injury. It appearing that she had, previous to this detail, confessed, been absolved, and received extreme unction from a priest, this was considered sufficient evidence that she had given herself up to die soon; and the declarations were received. Rex v. Minton, Macnally's Ev. 386.

These declarations, made antecedent to the stroke which caused the death, are, of course, not admissible. Maryland v. Ridgley, 2 Harr. & M'Hen. 120.

full apprehension at the time of such danger, in order to render such declarations admissible after the death of the party.

In this inquiry, as to the admissibility of the proposed evidence, it is not necessary that the deceased should have explained by any expressions, whether he thought himself likely to live or die. In Woodcock's Case,(1) it was deemed sufficient, for giving credit to the declarations, to show that the deceased had been mortally wounded, and was in a condition which rendered almost immediate death inevitable; and that she was thought by every person about her to be dying. It was considered a proper inference from these circumstances, that she must have felt the hand of death, and must have considered herself as a dying woman. The same doctrine was held in John's Case,(2) the court being of opinion, that if it might reasonably be inferred from the wound or state of illness of a dying person, that he was sensible of his danger, his declaration would be good evidence. In The King agt. Bonner,(3) Patteson, J., said, that it is not necessary to prove expressions of apprehension of immediate danger.

In the case of The King agt. Spilsbury,(4) it was proposed to give in evidence the dying declaration of a deceased person, and it was proved that, about the time of making the declaration, the deceased was asked, if he thought he should recover, and how he was; to which he answered, that he thought he should not recover, as he was so very ill. He had been previously insensible, but remained sensible for an hour, and died the next day. The evidence was rejected by Coleridge, J., on the ground that he did not feel fully convinced, that the deceased had no hope of recovering.(5)

Various other questions of competency may doubtless arise, after the court shall have determined favorably upon the witness's condition. If the statement come from the deceased as mere matter of opinion or belief (State v. Poll, *supra;* 2 Ev. Poth. 293; 4 Stark. Ev. 461; *Post*, of the text, and the note), it would be inadmissible. So if the deceased be disqualified by conviction of an infamous crime, his declarations cannot be heard. Indeed, he is to be treated, not only in respect to competency, but (as we shall see) credibility, the same as a witness proposed to be sworn upon the stand. But it has been held not an unqualified ground for excluding the declarations, that they are answers to leading questions. Where the deceased lay, the greater part of the interval between the wound and his death, unable to speak at all, and when able, only to utter a word or two, he was asked, Did P. V. (the prisoner) strike you first? to which he answered, yes, sir; Did P. V. stab you? to which he answered, yes, sir: these declarations were held admissible. Vass v. The Commonwealth, 3 Leigh, 786. He was immediately asked a fourth question, which he was unable to answer; but it not appearing that the other answers were intended to be qualified by him, in which purpose he was interrupted, they were received, though it would have been otherwise had this appeared. Id.

(1) 1 Leach, 503.

(2) 1 East, 357. See, also, Dingler's Case, 1 Leach, 504, n.

(3) 6 C. & P. 386. See, also, R. v. Van Butchell, Id. 631; R. v. Mosley, 1 Mo. C. C. 97.

(4) 7 C. & P. 187. See also R. v. Megson (9 C. & P., 418), where the statement was rejected, the abandonment of all hope of recovery not being proved satisfactorily to the judge.

(5) See also R. v. Perkins, 9 C. & P. 395; S. C., 2 Mo. C. C. 135.

Interval before death.

With respect to the interval of time which may have elapsed between the uttering of dying declarations and the moment of death, there appears to be no rule founded on this circumstance alone: nor is it consistent with the principle upon which dying declarations are received in evidence (which, as we have seen, depends upon the state of the declarant's mind), that such declarations should be excluded, if not made within any precise limits of time. It ought, however, to appear that the deceased believed his dissolution to be impending. And unquestionably the length of time may be a material consideration, in forming an inference as to the state of mind of the deceased, with respect to his expectation of death at the time of making a declaration, especially if the deceased has not expressed his sense of his own situation.

In Woodcock's Case,(1) Eyre, C. B., lays stress on the circumstance that the deceased was in a situation which rendered almost immediate death inevitable. And in The King agt. Van Butchell,(2) Hullock, B., rejected a declaration made on the 10th of May, the deceased having died on the 17th, and having stated, before making the declaration in question, that he felt satisfied he should never recover. Hullock, B., is reported to have said, that "the principle on which declarations *in articulo mortis* are admitted in evidence, is that they are under an impression of almost immediate dissolution. A man may receive an injury, from which he may think he shall *ultimately* never recover, but still that would not be sufficient to dispense with an oath."(3) In The King agt. Bonner,(4) dying declarations of a person were received, which were made on a particular day, when the deceased thought he might have died, and it was said, that the circumstance of his having lived three days longer did not alter the state of things on the day when the statement was made.

Expressions of deceased.

Upon an inquiry as to the admissibility of a dying declaration, it is necessary to hear all that the deceased has said relative to his situation, in order to ascertain whether he had that impression upon his mind, which will make his declarations admissible in evidence.(5) In The King agt. Crockett,(6) notwithstanding a surgeon told the deceased that there was no chance of her recovery, yet, as she said that she hoped the surgeon would do what he could for her for the sake of her family, the judge rejected the declarations of the deceased, saying, that her expressions

(1) 1 Leach, 502.

(2) 3 C. & P. 631.

(3) The expression, "almost immediate," is used by Bosanquet, J., in R. v. Crockett, 4 C. & P. 544.

(4) 6 C. & P. 386.

(5) By Hullock, B., 3 C. & P. 631.

(6) 4 C. & P. 544.

showed a degree of hope in her mind. In The King agt. Fagent,(1) it appeared that the deceased had expressed an opinion that she should not recover, and after that, she made a declaration, but subsequently, on the same day, she asked her nephew if he thought she would "rise again." It was considered that the declaration was not receivable, because the subsequent question showed that she entertained hopes of recovery. In Errington's Case,(2) the deceased, before making a declaration, had said he thought himself in great danger; but Patteson, J., considered this expression did not necessarily exclude the supposition, that the deceased might nevertheless have entertained some hope of recovery, and the declaration was consequently rejected.(3)

Representations to deceased.

Representations made to the deceased are often of importance, in inquiring as to the opinions he entertained of his own danger. In the case of The King agt. Welborn,(4) upon the trial of the prisoner for the murder of a woman, by inducing her to take poison, the declaration of the deceased was made to an apothecary within an hour of her death, in consequence of the apothecary telling her that he must know what she had done, and that she would not live twenty-four hours, unless proper relief was afforded. The majority of the judges were of opinion that the declaration was inadmissible, because the deceased was given to understand, that if she told what was the matter with her, she might have relief and recover. So in the case of The King agt. Christie,(5) where the deceased asked his surgeon if the wound was necessarily mortal, and was told in answer, that persons had recovered under like circumstances, but that the case was one of extreme danger: a statement made immediately after this conversation was rejected by Abbott, C. J., and Park, J., on the ground that the language of the surgeon was calculated to keep up in the mind of the deceased some expectation of recovery.

In the case of The King agt. Mosley,(6) the deceased received the injury, of which he died, on the evening of the 30th of September, and died on the evening of the 10th of October following. On the first evening, and every day until his death, he complained to the nurse who attended him, that he should never get better. But during his illness he never expressed

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(1) 7 C. & P. 238.

(2) 2 Lew. C. C. 148; S. C., 2 Russ. by Greaves, 756.

(3) See R. v. Simpson, before Bayley, J. (1 Lew. C. C. 78), where a declaration made under nearly similar circumstances was admitted. This case was cited in Errington's Case. For other instances in which declarations have been rejected upon the ground that the expressions used by the deceased did not indicate an utter abandonment of hope, see R. v. Howell, 1 Car. & K. 689; R. v. Murphy, Ir. Cir. Rep. 38.

(4) 1 East, 358.

(5) See a brief report of this point in 2 Russ. Cr. & M. by Greaves, 754. See also R. v. Perkins, 9 C. & P. 395, 397; 2 Mo. C. C. 135.

(6) 1 Mo. C. C. 27.

any opinion, either of hope or apprehension, to his surgeon. The surgeon informed him that his case was hopeless, for the first time, on the morning of the 10th of October. The surgeon did not himself consider the case quite hopeless till that day, and had always previously told the deceased that there was no danger, but there were hopes of his being better. The judges were unanimously of opinion that the declarations of the deceased, made by him after he was brought home the first evening, after he had said that he should not get better, and also at different times during his illness, and previous to the surgeon's communications to him of his hopeless state, were properly received in evidence. It may be observed, this case is distinguishable from the two preceding, on the ground that there was positive evidence that the conviction of the deceased, as to his own impending death, had not been altered by the representations of the surgeon.

In the case of The King agt. Hayward,(1) after a surgeon had examined the wound of the deceased, the deceased inquired whether he was in danger; to which the surgeon answered that he was, and that the only chance of his living was keeping himself quiet; upon which it was contended, that the declarations made by the deceased, were not made at a time when every hope in this world was gone, and when the party was aware that he must inevitably answer soon for the truth or falsehood of his statements; but that, upon the surgeon's statement, he must be taken to have had some hope of recovery. On this, Tindal, C. J., observed, that any hope of recovery, however slight, existing in the mind of the deceased at the time of making the declarations, would undoubtedly render the proof of such declarations inadmissible. But upon the further examination of the surgeon, it appeared that before the declarations were made on the following evening, the deceased knew that he must die, and that the magistrate, previously to the receiving of his declarations, desired him, as a dying man, to tell the truth; and that the deceased replied, he would. Upon this further evidence, the declarations of the deceased were held to be admissible, and were laid before the jury.(2)

Form of declaration.

With regard to the manner in which a dying declaration may become the subject of legal evidence, it may be observed, that an examination taken on oath by a magistrate, and signed by the deceased and by the magistrate, has been received in evidence, as of the same effect, in point of admissibility, as declarations not made with the same solemnity.(3)

It is no objection, in point of law, to a dying declaration, that it was

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(1) 6 C. & P. 160.

(2) See also Ashton & Thorneley's Case, 2 Lew. C. C. 147.

(3) R. v. Woodcock, 1 Leach, 502.

made in answer to questions.(1) It appears, from Woodcock's Case,(2) that the declaration is not inadmissible, though obtained by pressing and by questions. The same appears from The King agt. Reason.(3) But such solicitations must naturally weaken the effect of the evidence.

Dying declarations have been admitted in evidence, although it appeared that the deceased made a subsequent statement, which had been taken in writing before a magistrate, but which written examination was not ready to be produced at the trial. This point was much discussed on the trial of Reason and Tranter,(3) under the following circumstances. The deceased stated the particulars of the injury which occasioned his death, at three several times in the course of the same day, with an interval of about an hour between each; the first and last account had not been written; the second was reduced into writing in the presence of a magistrate by the same person to whom the former account had been given; this written statement was retained by the magistrate, but as he had removed to a distant part of the country, and it was not known to what place, the original was not produced, and an examined copy was rejected. An argument then ensued with respect to the admissibility of the first and third statements of the deceased. Pratt, C. J., was of opinion, that evidence of the first and third statements ought not to be received, considering all of them as statements to the same effect, and forming one entire narration, of which the written examination was the best proof. But the other judges were of a different opinion;(4) they held that the three accounts given by the deceased were distinct facts, and that there was no reason to exclude the evidence as to the first and third declarations, because the prosecutor was disabled from giving an account of the second. The witness was therefore directed to repeat his evidence, leaving the examination before the justices out of the case; and the first as well as the third statement was admitted.

When the declaration has been taken down in writing and signed by

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(1) R. v. Fagent, 7 C. & P. 238.

(2) R. v. Woodcock, 1 Leach, 502.

(3) 16 How. St. Tr. 31; S. C., 1 Stra. 499.

(In several of our states the organic law gives to any person accused of crime the right to confront the accusers and witnesses, and impliedly confers upon him the right to cross-examine such witnesses. Under this elementary principle of law, the question has been raised whether dying declarations can be proved against the accused, who has had no opportunity to examine the person in relation to them? And it has been adjudged that the admission of such evidence is not in conflict with the provision in question: the witness proving the dying declarations is confronted with the accused, and the declarations of the deceased, which are in many cases the only evidence of the crime, are proved as facts, like the execution of a written instrument. State v. Tilghman, 11 Ired. 513. So, also, the provision of the U. S. Constitution, declaring that "in all criminal prosecutions, the accused shall be confronted with the witnesses against him," is satisfied if the witness swearing to the declarations of the deceased is confronted with the accused. Campbell v. The State, 11 Geo. 353.)

(4) See 1 Stra. 500. The report in 16 How. St. Tr. differs in some respects upon this point.

the deceased, it has been held, that neither a copy of the writing, nor parol evidence of it, can be received.(1)

Declaration only as to facts.

The statement made by the deceased must be such as would be receivable, if he were alive and could be examined as a witness; any declaration, therefore, upon mere matters of opinion, as distinguished from facts, would not be receivable.(2)

It has been previously stated,(3) that the question, whether a dying declaration is admissible in evidence, is a question exclusively for the consideration of the judge;(4) upon the principle that the question, whether any particular piece of evidence be admissible, is always to be determined by the judge. It has been thought by some, that as the solution of this question depends on a preliminary investigation of *facts*, it would be much more within the ordinary province of juries than of judges.(5) If the jury were to decide the question, whether the statement of the deceased

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(1) R. v. Gay, 7 C. & P. 230. And see Trowter's Case, 12 Vin. Ab., 118; R. v. Reason, *ut supra*. The correctness of these decisions will be better examined after a consideration of the authorities in the chapter upon *Secondary Evidence*, to which they more properly belong.

(Where the statement of the deceased is taken down in writing, it is of course more reliable, more accurate, than the memory of most men; but it is of no higher grade than unwritten testimony. It may be received in evidence (11 Geo. 353); and where the statement is not reduced to writing, the witness may state the circumstances, and detail the exact language of the deceased; or, if he cannot do that, he may state the substance of what he said. Ward v. The State, 8 Blackf. 101. If the witness reduced the dying declarations to writing at the time, manifestly the writing should be produced and read. The State v. Cameron, 2 Chand. (Wis.) 172. If not made at the time, it is in the same case as any other memorandum made by witness to assist his memory. And when reduced to writing and signed by the deceased, it is admitted in evidence on the same principle and under the same circumstances as verbal declarations. Collier v. The State, 8 Eng. (13 Ark.) 676; Campbell v. The State, 11 Geo. 353. Though the statement of the deceased be written and signed, and sworn to *ex parte*, it is not received in evidence against the prisoner, unless it was made *in articulo mortis*. Collier v. The State, *supra*.)

(2) R. v. Sellers, Car. Cr. L. 233.

(3) *Supra*, p. 5.

(4) See by Lord Ellenborough, C. J., in R. v. Hucks, 1 Stark. R. 523; by all the judges in John's Case, 1 East, 357; and in Welborn's Case, 1 East, 366. And see R. v. Van Butchell, 3 C. & P. 631; R. v. Crockett, 4 C. & P. 544, and all the more modern cases.

(As in other cases, the question as to the admissibility of the evidence is addressed to the court. Smith v. The State, 9 Humph. 9; Lambeth v. The State, 23 Miss. (1 Cushman), 322; State v. Rash, 12 Ired. 382. Proof of an incidental fact, in dispute between the accused and the deceased, may be given (Lambeth v. The State, 23 Miss. (1 Cushman), 322); so in regard to an attempt to break jail. Fanning v. The State, 14 Mis. 386. The court decides whether the testimony is competent, is admissible; and the jury are to determine what credibility the evidence is entitled to. The State v. Arnold, 13 Ired. 184; McLean v. The State, 16 Ala. 672.)

(5) The question was left to the jury by Eyre, C. B., in Woodcock's Case, 1 Leach, 502. But the judge so far decided the point of admissibility, as to receive the evidence, directing the jury to reject it, if they came to a particular conclusion respecting certain facts. See remarks of Sir D. Evans, 2 Pothier, 293. And see Campbell's Case, cited by Parke, B., in Bartlett v. Smith, 11 M. & W. 486; *Supra*, p. 5. See also the observations of Alderson, B., in Ashton's Case, 2 Lew. C. C. 147.

be what is called a *dying declaration*, it is probable that they would most commonly decide it in the *affirmative;* there being generally a strong feeling of sympathy for the deceased, against the prisoner, excited by the circumstance of the declarations of a dying man, brought forward against the person standing before them, charged with his murder. But the judge is free from that feeling; his sympathy is engaged for the attainment of truth, and the equal administration of justice. The question, therefore, is more likely to be well and truly decided by the judge than by the jury. It is often an anxious, some feel it a painful, question, which the judge has to decide:(1) but that very feeling is favorable to a right decision, and may be used as an argument for the soundness of the existing rule.

This species of proof has been spoken of as an anomaly, and contrary to all the general rules of evidence, yet as having, where it is received, the greatest weight with juries. It is an *exception* to the general rule, inasmuch as the declaration was not made upon oath, and not subject to cross-examination. But when it is considered *against whom* it is produced as evidence, under what circumstances it must be made, and the limits as to its admission; and, further, that the unconditional exclusion of this kind of evidence would often be the exclusion of truth, it will perhaps be thought, that the exception which has been made is as sound and just as the general rule itself.

Effect of dying declarations.

With respect to the effect of dying declarations, it is to be observed, that although there may have been an utter abandonment of all hope of recovery, it will often happen that the particulars of the violence to which the deceased has spoken, were likely to have occurred under circumstances of confusion and surprise, calculated to prevent their being accurately observed. The consequences also of the violence may occa-

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(1) See by Coleridge, J., in R. v. Spilsbury, 7 C. & P. 190.

Lambeth v. The State, 1 Cushman R. 322. "The awful sense of the party making the declarations, and his belief in his immediate and impending dissolution, are considered by our law as equivalent to the sanction of an oath. If the declarant, by reason of infancy, or imbecility of mind, tender age, or a disbelief in a future state of accountability, would have been excluded as a witness while living, his dying declarations would, for like causes, be rejected by the court." 23 Mississippi, 322. In Noel Green v. The State of Missouri, this instruction, given to the jury on the trial, was held correct: "The dying declarations of a person who has been killed, if made with regard to the circumstances which produced his death, are to be received with the same degree of credit as the testimony of the deceased would be, if examined under oath as a witness." 13 Missouri, 382. It would be more accurate to say that such testimony is admissible in evidence, and that it is for the jury to weigh the testimony before them. Thus, if it be proved that the deceased said "A. B. has shot me or has killed me;" it is for the jury to find from that and the other testimony in the case, whether the deceased intended to state a fact within his own personal knowledge, or a mere inference from other facts. In the latter case the declaration should have no weight whatever with the jury. The State v. Arnold, 13 Ired. (N. C.), 184.

Ordinarily, the declarations must concern the transaction and constitute what is considered a part of the *res gestæ* to render them admissible in evidence. McLean v. The State, 16 Ala. 672 (N. S.)

sion an injury to the mind, and an indistinctness of memory as to the particular transaction. The deceased may have stated his inferences from facts, concerning which he may have drawn a wrong conclusion, or he may have omitted important particulars, from not having his attention called to them. Such evidence, therefore, is liable to be very incomplete. He may naturally also be disposed to give a partial account of the occurrence, although possibly not influenced by animosity or ill will. Nor is it to be forgotten, that animosity and resentment are not unlikely to be felt in such a situation. The passion of anger, once excited, may not have been entirely extinguished, even when all hope of life is lost. Such considerations show the necessity of caution in receiving impressions from accounts given by persons in a dying state, and the importance also of inquiring into their manner and deportment at the time.(1)

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(1) NOTE 101.—After the testimony shall have been received as competent, its credibility is yet fully open to the observations of the counsel and the court, and the consideration of the jury. An Irishman and his wife were seen riding in a wagon, he striking her with a stick. On stopping after a few miles, the wife was taken ill, and died within a few hours, having declared that her husband had, by flogging her, caused her death. She expressed a confidence that she must shortly die, and an anxiety that the husband should be pursued and punished. The declarations of the deceased were received against the husband on the trial, for the murder of his wife, and the jury convicted him. On his case being presented to the governor (Throop), and on his excellency conferring with his judicial council, the prisoner's sentence was, on a question of law, commuted for punishment in the state prison, as for manslaughter in the first degree. But the council also expressed themselves dissatisfied with the declarations, as probably indicative of a quarrel, hard feeling, and perhaps malice on the part of the deceased, and would, most likely, have recommended an absolute pardon, had it not been for other strong evidence in the cause, which was nearly able to sustain the conviction of itself. The People v. Mason, Saratoga Oyer and Terminer, Nov. 1831, Cowen, C. Judge, presiding.

In making up their minds on the credibility of these declarations, the jury have been allowed to travel over the same ground which the court had occupied in seeing whether it was competent. Trant's Case, Macnally's Ev. 385. Sir W. D. Evans (2 Ev. Poth. 294), supposes that in John's Case (1 East's P. C., c. 2, § 24), the judges meant to deny this right, when they declare that it ought not to be left to the jury to say whether the deceased thought she was dying or not. Perhaps that was said, though the expression is certainly quite general, with a view to the question of competency merely. It was very strong to say that the jury might not finally conclude, and the deceased labored under no apprehension of death, when they came to measure her credibility; and we should think with the learned commentator (2 Ev. Poth. 295), that it is without the support of analogy. Though the court should receive a witness as competent in his religious principles, yet he might, it is presumed, be so far impeached as to destroy all credibility, and warrant the jury finally in saying that he was destitute of religious principle. So should the expectation of death appear, on the whole, to have been affected for the purpose of revenging a quarrel in the pursuit of the offender, might not the jury make great deductions from credibility, though competency had before been *prima facie* made out? Other considerations are also due to this question of the declarant's credibility. "Strongly as his situation is calculated to induce the sense of obligation, it must also be recollected that it has often a tendency to obliterate the distinctness of his memory and perceptions; and, therefore, whenever the accounts received from him are introduced, the degree of his observation and recollection is a circumstance which it is of the highest importance to ascertain. Sometimes the declaration is of a matter of judgment, of inference and conclusion, which, however sincere, may be fatally erroneous; the circumstances of confusion and surprise, connected with the object of the declaration, are to

The remark before made on verbal statements, heard and reported by witnesses, applies equally to dying declarations, namely, that they are liable to be misunderstood and misreported from inattention, from misunderstanding, or from infirmity of memory.

SECTION VII.

Exceptions to the General Rule as to Hearsay, in cases where Declarations have been made by Persons, since Deceased, against their Interest.

Another exception to the rule excluding hearsay evidence has been established in modern times, in the case of certain declarations and entries made by persons since deceased. This exception applies to a description of facts, the evidence of which, being usually confined to the knowledge of a few persons, would frequently be lost, if the strict rule, which excludes hearsay evidence, were enforced. And it will be seen, that by the qualifications under which this kind of evidence is admitted, many of the general objections to hearsay evidence are obviated. This subject will be conveniently discussed, by considering, first, those declarations and entries which are receivable on the ground of their operating against the interest of the persons making them; and, secondly, those which are receivable on the ground of their being cotemporaneous entries in the ordinary course of duty or employment. The two divisions, however, are intimately connected with each other.

General rule.

It is a rule of evidence clearly established, that declarations of persons since deceased (under which term of declarations, all written statements and entries are intended to be comprehended), are admissible, where those persons are to be presumed conusant of the subject matter of the declarations, and where their declarations apparently operate against their own

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be considered with the most minute and scrupulous attention; the accordance and consistency of the fact related, with the other facts established by evidence, is to be examined with peculiar circumspection, and the awful consequences of mistake must add their weight to all the other motives for declining to allow an implicit credit to the narrative, on the sole consideration of its being free from the suspicion of willful misrepresentation." 2 Ev. Poth. 293.

Mr. Starkie, after quoting these remarks of Sir Wm. D. Evans, with approbation, adds, "that this seems to be the only instance in which evidence is admissible against a prisoner who has not had the power to cross-examine, an anomaly, which in itself calls for great caution and circumspection in the use and application of such evidence. Finally, it has never been received except in cases of murder, where if the dying person were certain as to the author of the violence; yet, in the case of a quarrel and conflict, he might be under a strong temptation to give a partial account of the transaction, although all motives of personal hostility had ceased. In other cases, it is far from improbable that he would attribute the fact to some person whom he suspected to be his enemy, when, if his grounds for supposing so could have been investigated, they might have turned out to be very unsatisfactory." 4 Stark. Ev. 461.

interest, whether pecuniary or proprietary.(1) It is presumed, where declarations are made under these circumstances, that they are entitled to

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(1) By Plumer, M. R., in Short v. Lee, 2 J. & W. 464; by Bayley, J., in Doe d. Reece v. Robson, 15 East, 34; by Parke, J., in Middleton v. Melton, 10 B. & C. 328. See also Higham v. Ridgway, 10 East, 109; The Sussex Peerage Case, 11 Cl. & Fin. 103, 114.

NOTE 102.—(And in this country; Pike v. Hayes, 14 N. Hamp. 19; Smith v. Powers, 15 Id. 546; 4 Id. 213; Highley v. Bidwell, 9 Conn. R. 447; St. Clair's Heirs v. Shale, 20 Penn. State R. 105; Pearce v. Jenkins, 10 Ired. (N. C.) 355; Thomas v. Degraffenreid, 17 Ala. (N. S.) 602, 216.)

The general principle that the entry of a deceased person, whereby he charges himself, with the extension of that principle by the courts, was considered by Baylies, J., in Chase v. Smith, 5 Verm. Rep. 558, 559.

We propose here to notice a few cases on the subject of receiving as evidence the entries of third persons, whereby they discharge demands due to them from others. Where such third persons are dead, the English authorities cited by our author are pointed and uniform that the entry shall be received; and have been, and doubtless will be, followed with equal uniformity by the American courts. Thus, in an action for money paid by the plaintiff as surety for the defendant on their joint note, it appeared that both parties had been sued on the note, and a judgment obtained in favor of the payee, by Mr. Taylor, as attorney. He having died a few days before the trial of the present action, his certificate was received, showing what part of the judgment was paid by the principal, and what by the surety. Thompson v. Stevens, 2 Nott & M'Cord, 493.

The turning point in the admission of the entry in these and the like cases is, that the person who made the entry is dead. Being dead, the entry in discharge proves not only the simple fact of payment, so as to extinguish the debt, but may be received to every incidental matter stated in the declaration. Thus, the entry in the books of the midwife, stated in the text, proved not only the payment, but the time of the birth. The entry of Mr. Taylor (in Thompson v. Stevens, *supra*), proved not only the payment, but by whom it was made, and on what account, distinguished between the principal and the surety. And see Mr. Heald's brief in note *b* to the case of Barker v. Ray, 2 Russ. Rep. 31.

Far different is this matter, where the declarant is alive. Thus, in an action by one surety against another, for contribution of money paid by the plaintiff on a bond to *West* and others, after the plaintiff had proved the payment, the defendant insisted that, before the plaintiff had paid, the principal had discharged the debt, so that the plaintiff had paid in his own wrong. To show the previous payment, the defendant proved that the principal had paid money to the obligees, and then offered to prove the admission of *West*, one of the obligees, that such payment had been made on account of the bond. It was objected that West should be called, and the objection sustained. Parke, J., remarked, that what West said at the time of the payment, might be received as a part of the *res gestæ;* but any declaration made after payment, upon what account he received the money, is no evidence against the plaintiff. His unsworn declaration cannot bind any interest of the plaintiff. Dunn v. Slee, Holt's N. P. Rep. 399. And a mere oral declaration of this character, coming from the creditor, even after his decease, would be inadmissible. In a like action for contribution, the defendant offered to prove, by the creditor's acknowledgment, she being dead, that the defendant had paid $300 of the money as surety. This was offered in order to reduce the amount of contribution. The fact of payment, or by whom, or on what account made, was not offered to be proved in any other way. The evidence was rejected as hearsay. The court said such admissions ought not to be received at all, except against the party making them, or those claiming under him. Thomas v. Thomas, 2 J. J. Marsh, 60, 64, 65. In a similar action, a receipt for the moneys, signed by the attorney on record, of the creditor who had sued and obtained judgment against the sureties, was denied as evidence between the latter, though offered merely to show the payment of the money, the attorney being still alive. Warner v. Price, 3 Wendell, 397, 398, 400. The receipt was obviously no better evidence than if made by the party instead of his attorney; it would be *prima facie* evidence against the former, but as between the sureties, or between them and their principal, was no more than a written statement, without oath. As was said on another occasion, when a

letter of the alleged receiver of goods on commission was produced against the defendant (who was sued for having fraudulently recommended the receiver as credit worthy), acknowledging the delivery of the goods, "collusions might be formed between plaintiffs and their witnesses, who might easily be induced to make declarations in letters, which they would be afraid to verify on oath in open court. Per Tilghman, C. J., in Longenecker v. Hyde, 6 Bin. 1, 2. In assumpsit, for goods sold to the defendant's wife, who was entitled to a separate maintenance, payable by the defendant to trustees, the material question was whether the maintenance had been regularly paid. To show this, the receipts of the trustees were offered in evidence by the defendant. Held inadmissible; and *per Curiam*, "A man's receipt is not evidence to prove a payment against a third person. Those who gave the receipts should have been called." Cutbush v. Gilbert, 4 Serg. & Rawle, 551, 556. In trover, for goods distrained, the plaintiff insisted that he was tenant of John Brown, and not of the defendant, Hugh Brown; and showed that the payment of rent had always been to John. To show that John had received the money as the defendant's agent, the latter offered John's account of the payments rendered by him to the defendant. Held, that John being alive, should be called; and the account was rejected. Spargo v. Brown, 9 Barnw. & Cressw. 935.

In another action, it appeared that Beaman had, with three others, signed a note to the Bank of Rutland. He insisted that he was their surety; and to prove that he paid the money, produced and offered in evidence the receipt of the cashier, indorsed on the note, stating that he (Beaman) had paid the money. The judge refused to receive this, as evidence either of payment or of the person who paid, there being no proof that the cashier was dead; indeed, it was admitted that he was living, and but a little way off. And afterwards, on motion for a new trial, the judge refused it. Beaman v. Cushman et al., Washington Circuit, June, 1833, before Cowen, Circuit Judge, who refused the motion for a new trial, at his next term, August, 1833.

The general rule, therefore, is, that certificates, receipts, or other admissions of payments, made by persons other than the party to the suit in which they are offered, cannot be received; but such payments must be proved by a witness. Cluggage's Lessee v. Swan, 4 Binn. 150. 154. Accordingly, the certificate of a living surveyor, that he had received his fees of survey, being offered to affect a party in a suit with which the surveyor had no concern, was held inadmissible. Id. And the admission of the plaintiff's agent to collect the money, that he had made the collection, is no evidence against his principal. Davis v. Whitesides, 1 Dana's Rep. 177.

It cannot be denied, however, that the rule has been avowedly departed from in one or two cases. Thus, where one Sherman authorized Crosby to settle a suit brought against the former by Bennet, and pay the money to be found due on the settlement; in a suit between the two former, wherein Crosby claimed the money as paid by him on the settlement, a receipt for the money as paid on the judgment in the cause signed by Bennet, was admitted as evidence of the settlement and payment, to charge Sherman. Sherman v. Crosby, 11 John. R. 70. The court say the receipt was *prima facie* evidence of the demand and payment; and it lay with Sherman to impeach it. Of this case it should be remarked that there was no pretence that Bennet was not alive, and within the jurisdiction of the court. He stood as creditor, and Crosby paid the money to him at the request of Sherman. The amount of the decision is, that in all actions for money paid, the receipt of the payee, though he be alive, shall be admissible to charge the defendant with the fact of payment. Bennet was not an agent, nor a joint party with Sherman, either on the record or as having a common interest; the receipt might or might not have been a part of the *res gestæ*, but the latter did not appear, for no act was shown to which the written declaration would attach. To put it on the latter ground, would, therefore, be a plain instance of the *petitio principii*. In a word, there seems to be no instance, if we except the next case *infra*, within which Sherman v. Crosby can be brought. It would operate to reverse the entire rule laid down by Tilghman, C. J., in Cluggage's Lessee v. Swan, *supra*. Receipts and certificates of private persons would become substitutes for their sworn testimony. In actions for money paid, this new kind of written evidence would be the universal, because the ready medium of proof; which may, according to Tilghman, C. J., *supra*, be collusively introduced; and, we may add, amended, like a notary's certificate to charge an indorser, or a justice's exemplification of his proceedings, till it shall be full and plain to the purpose. It would be a convenient mode of proof for fraudulent purchasers of property, under pretence of having paid large debts for the insolvent, or paying him a large consideration. Both the time and the amount of payments are

credit, because the regard which men pay to their own interest, may safely be considered as a sufficient guaranty against their prejudicing

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generally of great consequence in such cases; and the strictest rules of evidence can with difficulty guard against imposition. We make these remarks, not only because the case of Sherman v. Crosby is imposing in itself, decided as it was by a tribunal of acknowledged ability; but because we think it does not stand alone. In another case, the plaintiff sued for passage money to Europe, paid for the defendant's testator, and the captain's oral admission made about the time the testator sailed, was received as proof of the payment. The captain was dead, and the court below put it on this ground. On error, the Court of Appeals repudiated that principle, and said, whether the captain was dead or alive, the testimony was admissible, being made by one able to bind himself by a receipt or acquittance, and made too about the time of the testator's sailing. If it were to stand on the ground of the captain s death, perhaps the court would require that it should have been in writing. Holladay, Ex'r, v. Littlepage, 2 Munf. 316. This is doubtless a safer case than Sherman v. Crosby. The captain being dead, it wants only the form of a written entry to bring it within the English rule. But whether dead or living, the oath of the hearer could fix the time when the declaration was made; and prevent imposition in that particular. This case, however, fails as to any support from the declaration being a part of the *res gestæ*. Proof *aliunde*, that money was paid, and that the declaration was cotemporaneous with the payment, would alone give it that character, so as to bring it within the suggestion of Parke, J., in Dunn v. Slee, *supra*. It seems also to fail in support from any adjudged case founded on the declarant's death; for we believe not one has yet gone the length of saying that the oral declaration of a person, however much it may militate against his interest, shall be received merely upon the ground that he is dead. But see the next note. Not only must the declaration be written, but we believe its introduction has generally been accompanied with circumstances calculated, affirmatively, to repel suspicion that it may have been simulated. In the latest English case which we have seen (Spiers v. Morris), stated *post*, note 105, the executor's account appears to have been brought from what is called the proper custody (probably the clerk's office of the Ecclesiastical Court), and from the account so found, the entry was read. Such precautions are a safeguard against both collusion and forgery.

In Prather v. Johnson (3 Har. & John. 487), there is a *gratis dictum* of the court, in an opinion delivered after an *ex parte* hearing of the cause, in these words: "If A., as surety for B., pays a debt due to C., on the proof of the payment, A. could recover of B. He could recover on C.'s *saying* A. had paid, and of course, if C. *wrote* that A. had paid, surely it is evidence, whether the writing was in a book or a letter." p. 490. We shall only say that this dictum is fully sustained by the above cases of Sherman v. Crosby and Holladay v. Littlepage, which do go the length of saying that what a third person speaks or writes, if it be *prima facie* evidence of a fact against his own interest, may, provided it be relevant to the rights of another, be brought in as hearsay evidence to bind those rights, although the declarant be alive, a perfectly competent witness, within reach of process, and able to attend the court! See farther, several cases of the like import examined, *post*, in these notes.

In taking the accounts of guardians or trustees, receipts for disbursements are admissible on proving the receiptors' handwriting, without producing the persons who gave the receipts. Held in favor of guardians who sued for moneys they had received and applied, on the sales of land for their ward, the title to which had failed, and the consideration for which they were obliged to refund. The receipts were from creditors for money paid them in behalf of a spendthrift, for whom the plaintiffs were appointed guardians; and they were required by the referee to produce those receiptors as witnesses who were alive and within the commonwealth. *Sembie*, by the opinion, that even this would hardly be required. Sherman v. Akins, 4 Pick. 283, 284, and 293. This seems to be an exception in favor of trustees, in accounting before a master, auditor, &c. In an action by an agent for an administratrix, to recover for his services rendered in settling the estate of her intestate, receipts by the distributees, acknowledged according to a statute of the state of Maryland, for the dividends, were held receivable without farther proof of them, as evidence of service done. Carroll v. Tyler, 2 Harr. & Gill, 54.

themselves by any erroneous statement, and the assumed tendency of the declarations precludes the probability of any fraudulent statement. Indeed the apprehension of fraud in such cases is in a great measure removed, without reference to the fact of the declarations being against interest, when it is considered that declarations are not receivable during the lifetime of the authors of them; and that it is always competent for the party against whom they are produced, to point out any sinister motive for making them. It is true, the great tests of the fidelity, accuracy and completeness of judicial evidence are here wanting. But the inconveniences which would result from the exclusion of evidence are considered as outweighing, in the generality of cases, the inconvenience of admitting such hearsay declarations, under the limitations and securities above mentioned.

Verbal declarations.

It will be seen that the greater number of cases decided upon this subject refer to written entries, but there seems to be no reason why the admissibility of such evidence should be limited to statements in writing; and in fact, in several cases verbal declarations have been admitted without objection, when they were clearly againstthe interest of the party making them.(1)

Such verbal declarations will, of course, be entitled to less weight than written statements, as being more carelessly made, often unfaithfully reported, and less frequently connected with any course of business; but this objection will not affect their admissibility. The question whether such verbal statements are admissible, was much discussed in the case of Fursdon v. Clogg;(2) but the court do not appear to have expressed any opinion on the point, and gave their judgment upon another ground.(3)

Declarant must be deceased.

The declarations of a living person, however much against his interest, cannot be received,(4) unless in the case of a party to the suit, or of a person individually and immediately interested therein; (5) even where a person has absconded and gone abroad under apprehension of a criminal charge, and though it be altogether out of the power of the party to the suit to produce him as a witness, his declaration will not be admissible.(6)

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(1) See Ivat v. Finch, 1 Taunt. 141; Davies v. Pierce, 2 T. R. 53; Holloway v. Rakes, cited Id. 55; Strode v. Winchester, 1 Dick. 397; Sussex Peerage Case, 11 Cl. & Fin. 103, 114.

The declarations of a deceased person against his interest, such as a verbal statement that he was at a given time indebted to another, are admissible. Pearce v. Jenkins, 10 Ired. (N. C.) 355.

(2) 10 M. & W. 572.

(3) But see 1 Stark. R. 613.

(4) Spargo v. Brown, 9 B. & C. 935; Phillips v. Cole, 10 A. & E. 106, 111; Smith v. Whittingham, 6 C. & P. 78.

(5) *Vide infra*, Sect. 10, *On Admissions.*

(6) Stephen v. Gwenup, 1 Mo. & R. 120. And see Harrison v. Blades, 3 Camp. 457; Manby v. Curtis, 1 Price, 282; Cooper v. Marsden, 1 Esp. 2.

Means of knowledge in declarant, his interest.

The decisions of the judges do not seem to require any peculiar means of knowledge in the declarant,(1) or that the declarations should be connected with the facts to which they relate. Nor does it seem necessary that the declarations should have been made by persons in the course of any business or employment; or that declarations against interest should be cotemporaneous with the facts to which they relate.(2)

In many of the decisions respecting the rule under consideration, it will perhaps be thought that the interest of the party was so slight as to produce little, if any effect. And it would seem that the judges, from an apprehension of shutting out the truth by the rejection of evidence, have, in many instances, been contented with very unsatisfactory presumptions as to the fact of the party's interest being opposed to his declaration.

In some cases, the courts appear to have considered declarations to be admissible, without proof that the party making them had any actually existing interest, which could be thereby lessened or endangered.(3) Hence, a declaration, accompanied by an admission, apparently against interest, was formerly held to be receivable, although, in point of fact, the declarant did not compromise his interest at all, but only made an admission *apparently* against interest, and without any real transaction to which it could relate. In several of the cases formerly decided upon this subject, the inference, that the declarations were against interest, appears to have been on the unwarrantable assumption of the existence of real facts as a foundation for the statement; and the accuracy of the declarations has been inferred from a supposition, that the persons making an entry must have been particularly cautious in the statement of all its details, as thereby precluding themselves from afterwards attempting to set up an unfounded demand. In a few cases, indeed, where the facts admitted of it, the judges have laid stress on the circumstance that the

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Alexander v. Mahon, 11 John R. 185; Woodward v. Paine, 15 Id. 493. See also Beach v. Wise, 1 Hill, R. 612; which was an action on a negotiable note transferred to the plaintiff by the payee after it became due, where an offer to prove declarations of the payee made while he remained the owner of the note, and before it was transferred to the plaintiff, the payee being since dead, was rejected. Kent v. Walton, 7 Wend. 256. In these two last cases, the rule established in this state, that the declarations of a former owner of a chose in action cannot be shown in evidence against a person deriving title from him, was held applicable notwithstanding the death of such former owner. See Smith v. Schenck, 18 Barb. 344; Paige v. Cagwin, 7 Hill, 361; 2 Selden, 209.

(1) See by Bayley, J., in Higham v. Ridgway, 10 East, 122; by Tindal, C. J., in Marks v. Lahee, 3 N. C. 419; by Park, J., Id. 420; by Vaughan, J., Id. 421; by Lord Eldon, C., in Barker v. Ray, 2 Russ. 76. See also Crease v. Barrett, 1 C., M. & R. 925.

(2) By Parke, J., in Doe d. Patteshall v. Turford, 3 B. & A. 890; by Plumer, M. R., in Short v. Lee, 2 J. & W. 464; where it is said that is not necessary, in the case of collectors' books, to produce the very paper by which they collected.

(3) See the cases collected in Barker v. Ray, 2 Russ. 67, n.

entry was proved by extrinsic evidence to have been made against interest.(1)

It may, however, be considered as finally settled, that a declaration of this nature, in order to be receivable in evidence, must be against the interest of the party who made it, and also that such interest must be of a pecuniary or proprietary nature.(2)

In a late case(3) from sessions, a book was produced, in which a deceased person had kept minutes of his contracts with his servants, and which contained the following entries in his writing: "April 4th, W. came; and to have for the half year 40*s*. September 29th, paid this 2*l*.;" and it was held that these entries were not admissible as declarations made against the writer's interest.(4) Lord Denman, C. J., remarked: "The memorandum could only fix upon him (the master) a liability, on proof that the services referred to had been performed: and whether, on dispute, a jury would have found him liable for the sum entered, or more or less, we cannot say."

Entries as to receipt of money.

The cases in which the exception to the general rule, now under consideration, has been most commonly made, are where the proposed evidence consists of entries of the receipt of money, whereby the person who made them, has charged himself as accountable for the money received. Entries so made, are evidence of the fact of the receipt of the money. Thus the acknowledgments by deceased stewards, reeves and bailiffs, in their books, of the receipt of money for which they have been accountable, are very frequently adduced in evidence by their employers, or those claiming under them, or even by strangers.(5) Such entries often acquire additional credit from the circumstance that they would, in the ordinary course of business, be expected to be kept. And such accounts seem to be of greater credit than entries in private books, inasmuch as they are usually subjected to inspection, and are the foundation of transactions between the steward and his employer.

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(1) Higham v. Ridgway, 10 East, 109; Doe d. Gallop v. Vowles, 1 Mo. & R. 261; Crease v. Barrett, 1 C., M. & R. 919.

(2) Sussex Peerage, 11 Cl. & Fin. 103, 108, 109, 111. See also the Berkeley Peerage, Print. Min. P. 655; Davis v. Lloyd, 1 Car. & K. 276. And see *supra*, as to hearsay evidence in matters of pedigree.

(3) R. v. Worth (Inhabs.), 4 Q. B. 132.

(4) They were also held to be not admissible either as being written in the course of business, or as embodying a contract.

(5) See Barry v. Bebbington, 4 T. R. 514; Edwards v. Rees, 7 C. & P. 340; Manning v. Lechmere, 1 Atk. 453. That this is a usual mode of proving payments under old leases and licenses, see Rogers v. Allen, 1 Camp. 309. See further Wynne v. Tyrwhitt, 4 B. & A. 376; Manning v. Lechmere, 1 Atk. 453; by Lord Ellenborough, C. J., in Higham v. Ridgway, 10 East, 116; Harper v. Brooke, 3 Woodeson's Lect. 332; Vin. Ab. tit. Evidence, A, b. 15; Bullen v. Michel, 2 Price, 413; Finch v. Messing, cited in Short v. Lee, 2 J. & W. 464; Bree v. Beck, 1 Younge's Ex. Ca. 225, 239; Doe v. Tyler, 6 Bing. 562.

Entries in private books.

But entries made in a private book, kept by the receiver of the money for his own convenience, whereby he has charged himself with the receipt of sums of money, are nevertheless admissible to prove the fact of their having been received, even though there may exist no privity between the deceased and the party against whom the evidence is tendered. Thus, where an entry was made by a deceased collector of taxes, in a private book kept by him for his own convenience, whereby he charged himself with the receipt of sums of money, the entry was held to be admissible evidence to prove the fact of the receipt of the money in an action between third persons, agreeably to the general principle above stated.(1)

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(1) Middleton v. Melton, 10 B. & C. 317; overruling Goss v. Watlington, 3 B. & B. 138; and Whitnash v. George, 8 B. & C. 556; S. C., nom. Whitmarsh v. Genge, 3 M. & R. 42.

NOTE 103.—This case of Goss v. Watlington, does not decide whether the receipts, or entries, or marks of the principal were evidence against the surety, on the ground that the whole or any, were a part of the *res gestæ*, though this is plainly hinted; but the court seem to balance between that principle and the one which receives the entries of a third person against his interest, he being dead at the trial. In the former case, death would be immaterial, in the latter essential. The same doubt was left by Whitmarsh v. Genge, 3 Mann. & Ryl. 42; 8 Barn. & Cress. S. C., by the title of Whitnash v. George. That was the case of a bond for the fidelity of a clerk to the plaintiffs in paying over moneys, and all his duties. It was his duty to keep their books, which he did, and therein entered moneys received by him as their clerk; and died. Lord Tenterden, C. J., and the court, admit they were entries within the scope of his duty. Yet they lay much stress on his death, which could not be necessary if these entries were well identified as a part of his acts, and the *res gestæ*, and were received on that ground. The same matter as in Goss v. Watlington, came again to be considered in Middleton v. Melton (10 Barn. & Cress. 317), a case of a collector's private book, by which he collected and ticked off the sums paid. Several receipts, too, given by the collector to private persons, for taxes paid by them, were produced, and the whole duly proved, the private books being seen with his family at the time of his death. All the entries and receipts were shown to have been in the usual line of business of the deceased in his office of collector. The whole were received against his surety; and all the judges put the evidence on the ground of the entries being made by a deceased person against his interest. And see Plaxton v. Dare, 10 Barn. & Cress. 17.

Several of the American cases take up the idea thrown out by Dallas, C. J., in Goss v. Watlington, that the declarations of the principal may bind in the same sense that those of an agent would, both being within the scope of their business. And is there anything more plain? The words or declarations then are the acts or parts of acts; and it is for the acts of the principal that the surety is bound. In such a view, the principal need not be dead. You prove his entries or declarations the same as you do his other acts by a third person; and no matter that he can be produced as a witness. In Respublica v. Davis (3 Yeates, 128, 130), the defendant was surety for the good behavior of Cobbett, the editor. It was shown that a libel (a volume of "Porcupine") was paid for to Cobbett's common clerk, and this was admitted as the act of Cobbett. This case shows the principle. Here was the act of Cobbett by his agent. On this distinction the entries of a teller of a bank in a book kept in the bank, by which he daily stated his account, as teller, were received against him, to show his default in a suit against his surety. But his admissions, made in writing, after he was dismissed from his office, were denied, by several of the judges. The former were likened by Cheves, J., who delivered the opinion of the court, to the declarations of an agent within the scope of his authority, which are a part of the *res gestæ;* the latter to an agent's admission after he had ceased to act for his principal. State Bank v. Johnson, 1 Rep. Const. Ct. 404, 409. The court, of course, did not stop to inquire whether the teller was dead or alive. On the same principle, a jailer's receipt for a prisoner, was held receivable

against his surety. Bernard v. The Commonwealth, 4 Litt. 148, 151. So, a statement of an account with the bank by a cashier, explaining its receipts and defaults, made before his office terminated; for, *per Cur.*, the sureties "were bound, not for themselves, but for *him:* and *his acts* and sayings of course bound them; and they must stand or fall by them." Pendleton v. Bank of Kentucky, 1 Monroe, 171, 181. So, the return of a sheriff that a *fi. fa.* is satisfied, is a declaration concluding his sureties in an action on their bond. Governor v. Twitty, 1 Dev. 153. And so on the same principle the inventory of an administrator is evidence in an action against his sureties. Chairman of Wash. Co. Court v. Harramond, 4 Hawks, 339. Several of these declarations are obviously parts of the transactions for which the sureties are bound; and that is the true point of inquiry. They are like a part payment by the principal on a promissory note, which has been held to take it out of the Statute of Limitations, or to repel the presumptive bar of twenty years' delay, in respect to the surety, who is jointly bound to pay. Hunt v. Bridgham, 2 Pick. 581. The surety is bound that he shall do the very act which he is performing, to wit, payment, as the sureties were that the cashier should do his duty by passing accounts at the bank. Whereas, the mere acknowledgment of the principal with whom a surety is bound in a promissory note, has been held not to affect the latter; for such acknowledgment cannot be placed within the scope of the suretyship. The case of joint debtors, where both are principals, stands on a different footing; for they bind each other in respect to their joint interest, as *quasi* partners. Baker v. Briggs, 8 Pick. 122, 128. The same distinction was suggested in Boston Hat Manufactory v. Messinger, 2 Pick. 223, 240, per Parker, C. J. And see Longenecker v. Hyde, 6 Binn. 1. After the lapse of six years, the admission of the principal cannot be received against the surety, even to take the case out of the Statute of Limitations. Meade v. M'Dowell, 5 Binn. 195. And where the plaintiff took one Burnett in as a partner in the business of tanning, and the defendants covenanted with the plaintiff that Burnett should faithfully discharge his duty, as such partner, for two years from the 11th of January, 1833, in an action on the covenant, assigning breaches in 1823, admissions made by Burnett in 1825, that certain books offered by the plaintiff in evidence were the books of the firm, were held inadmissible against his sureties. True, says Holman, J., delivering the opinion, "That while the principal is acting, his declarations may be so interwoven with his acts as to stand in direct connection with them, and form a part of the *res gestæ;* but when he ceases to act, his subsequent declarations have no direct connection with his preceding acts, so as to bind his sureties." Hotchkiss v. Lyon, 2 Blackf. Rep. 222. So to implicate the surety of a sheriff, his acknowledgment that he had collected money, was denied as evidence; though, per Holman, J., "If this had been while he was officially acting in relation to the receipt of the money, the statement would have formed a part of the *res gestæ*. But declarations at any subsequent period are inadmissible. It is his acts, and not his admissions or declarations, for which the sureties are bound." Shelby v. Governor, 2 Blackf. Rep. 289. And see Beall v. Beck, 3 Har. & M'Hen. 242; and also the examination we have bestowed on a somewhat similar question, *ante*, note 103. In Evans v. Beattie (5 Esp. 27), in a suit against a guarantor of the sale of goods, the admissions of the principal that he had received the goods, were rejected by Lord Ellenborough, C, J., who said that the stipulation was to pay for goods received, not for goods acknowledged to have been received. The same thing was held by him in Bacon v. Chesney (1 Stark Rep. 192), where his Lordship remarked that the principal was not the general agent of the surety, so that he could bind him by subsequent acknowledgments respecting the goods furnished. And in another Nisi Prius case, *Cor.* Holroyd, J., he refused the admission of the principal against his surety in an indemnity bond, going to show the amount of damage. Cutler v. Newlin, Mann. Dig. Evidence, H, (c) pl. 253, p. 171 (Am. ed. 1822); S. C., 3 Stark. Ev. 1387.

So far, joining the English and American principles of action on this question, they seem to result in a comprehensive, and, at the same time, a rational and safe rule of evidence. The American cases admit, as will be seen, considerable latitude in defining what declarations shall be considered as a part of the *res gestæ*.

There are, however, a few American cases which have departed altogether from both of the above grounds—thus giving to the principal all the power of a joint contractor or partner, and making him more than an agent. In one case (Meade v. M'Dowell, 5 Binn. 195), before cited to another point, the defendant had written to the plaintiff, offering to stand jointly bound with Wilson for any contracts he might make. This was August 15, 1798. April 23, 1799, W. sent

a letter to the defendant, giving a statement of what he had purchased under the guaranty and; the plaintiff relied on this as evidence to prove the contract and fix the amount. It was received, though objected to; and Tilghman, C. J., lays down a very broad proposition:—"Meade having confided to Wilson the making of the contract, confided to him likewise the power of furnishing evidence of the contract. The contract having been made by parol, without witnesses, it was impossible to prove it in any other manner than by subsequent declarations of the party." (p. 197.) Had the remark been confined to the time of sale, and the cotemporaneous act of acknowledging the sale by a bill, receipt or other memorandum, it would be clearly within the principle of the *res gestæ;* but the actual contract had been made some time since. The principle had ceased to deal on the credit of the defendant; and, on the whole, the decision seems founded on such a comprehensive construction of the contract of guaranty as to render it more perilous than it has been generally esteemed. For if the vendee of goods, under a continuing guaranty, has power at any time to furnish evidence of his purchases by his declarations, why not any other principal to furnish the same kind of evidence in regard to his acts, whether at the time or after they are done? Surely the chief justice did not mean to make the competency depend on what he incidentally mentions, the probable want of legitimate proof; for this would be a still broader opening to hearsay. Yet other and very learned tribunals have certainly gone the full length of Meade v. M'Dowell; and even the wife's admissions against her surety in favor of the husband were in one case received and deliberately sanctioned. He agreed with her and the defendant that she should live separate, and that he would deliver her certain articles, in consideration whereof the defendant, her trustee, engaged, as her surety, to pay; and in an action against the surety, her admissions that she had received the articles were held evidence for the husband, the plaintiff. Fenner v. Lewis, 10 John. Rep. 38. In this case, the court use terms quite as broad, indeed broader, than those of Tilghman, C. J., *supra*. They treat the wife as the mutual agent to receive the property; and infer that therefore her confessions would be admissible. *Quere;* see *post*, as to admissions by parties and agents. "No principle," they say, "would seem to be more clear than that the person to whom performance of the act is agreed to be made is competent to acknowledge such performance. If she is competent to receive, she is competent to give a receipt for them; and if her receipt would have been good evidence of the delivery, her parol admission must be equally so." Several cases of admissions by general agents are there cited. No doubt admissions of the person entitled to receive are evidence against him. How far they are so in regard to third persons, we examined *ante*, note 103. But this case would seem to be clearly defensible, on the principle that the admission was made by the party really in interest against the nominal party, as will be mentioned in regard to the same case, *post*. For the cases supporting this last view, see our notes as to admissions by parties and others.

In South Carolina, too, the distinction advanced by some of the judges in State Bank v. Johnson (*supra*), has been reconsidered, and the acknowledgments of the principal, made at any time, indefinitely let in upon the surety. This was done in an action against the sureties of the sheriffs. Treasurers v. Bates, 2 Bail. Rep. 362, 380, *et seq.* The State Bank v. Johnson seems to be the only authority cited, and that contains no reference to any of the numerous point blank cases the other way. In Treasurers v. Bates, the court say the surety is a privy in law with the principal, and what binds the latter binds the former. In a word, they are put exactly on the ground of joint principals. In Simonton's Assignees v. Boucher and others (2 Wash. C. C. Rep. 473), acknowledgments were also received by the principal against his sureties. The nature of the acknowledgments, or the ground on which they were received, is not mentioned. It is a meagre case. These cases, which go to receive acknowledgments, are also sustained by a general dictum, which fell from the court, on the trial of Respublica v. Davis (3 Yeates, 128).

Such are the conflicting authorities upon hearsay of the principal, as evidence against the surety; the first cautiously excluding everything while the surety is alive, which does not make a part of the *res gestæ;* or, if he be dead, receiving other declarations as being in writing, and against his interest, and therefore coming in like those of any third person disconnected with the surety; the second, either placing him on the footing of a general agent, or the authoritative ground of a privy in law. Among these cases, there seems to be no doubt that those which deny to naked acknowledgments of the principal any influence whatever upon the surety, come nearest to the fundamental character of that relation—which is an obligation on the part of the surety to answer for some act of the principal, in case of his failure. Theobald's Law of Pr. and

It ought clearly to appear, that the effect of the entries was to charge the person making them. Thus, in an action for copyhold fines, the book of a deceased steward of a manor was tendered in evidence, containing entries of assessment of fines; as well those paid as those not paid; and it appeared that the steward made up a book at the end of each year, in which book he put down the fines that had been actually paid. The former book was rejected, on the ground that it did not appear to contain any evidence that the steward had charged himself.(1)

As to custody of these books.

Accounts of this nature are commonly produced from the muniments of the persons to whom the accounts were rendered: and when this is the case, they amount to proof that the person rendering them has actually put it into the power of his employer to use them against him, as evidence of money had and received to the employer's use. This circumstance appears to entitle them to much greater credit than is due to entries in private books, which have never passed into the custody of persons interested to make use of them against the makers of the entries. The custody from which receipts are produced will materially affect the question of their admissibility. When found among the papers of the party who has paid the money, they are receivable as an admission by the other party, if proved to be in his handwriting, that he received the money, and are not open to the objection that they might have been fabricated by the latter as evidence in his own favor; but if they came from the custody of the other party, they might be open to that objection, and might not therefore be receivable in evidence.(2)

The occupation of premises by a particular individual at a certain period has been allowed to be proved by entries in a land-tax collector's book, stating that individual to have been rated for the premises in question, and to have paid the rate, on the ground that the entry of payment was made against the interest of the collector.(3) Upon a question whether premises were situate in a particular parish, the accounts of

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Sur., 1, 2. The obligation being precisely commensurate with that of the principal, to place the surety within the reach of these admissions or declarations, would at least be multiplying the means of evading that strictness in the mode of inquiry, which the surety has a right to demand.

(1) Ely (Dean and Chapter) v. Caldecott, 7 Bing. 434. And see Brett v. Beales, 1 M. & M. 418.

(2) Doe d. Blayney v. Savage, 1 Carr. & K. 487, 492; by Atcherley, Sergt., before whom the cause was tried, after consulting with Tindal, C. J.

(3) Doe d. Smith v. Cartwright, R. & M. 62. A *tax gatherer's receipts*, after his death, are receivable to prove a person occupier of premises. See by Lord Ellenborough, C. J., in Harrison v. Blades, 3 Camp. 453. The principal cases respecting *tithe* receipts are Lake v. Skinner, Gwill. 1931; S. C., 3 E. & Y. 976; Jones v. Carrington, 1 C. & P. 327, 329, 497; Ekins v. Dormer, 3 Atk. 534; Chapman v. Smith, 2 Ves. 511; White v. Lisle, 4 Madd. 214; Duffield v. Orrel, 6 Price, 324; Deacle v. Hancock, M'Clel. 18; Taylor v. Fox, 4 Wood. 322; Chapman v. Smith, 2 E. & Y. 141. On discrepancies between early and late receipts, see Manby v. Lodge, 9 Price, 231; on receipts of churchwardens for a tributary modus, see Atkins v. Drake, 1 M'Clel. & Y. 217;

deceased overseers, in which there were crosses made against the sums for which the tenants of the premises had been assessed, were held to be evidence of actual payment of the rates.(1)

Declarations as to right to property.

Not only declarations of the receipt of money, but declarations of a variety of descriptions, made against interest, have been received in evidence.(2) Thus, upon a question whether A. B. died possessed of certain farming stock, it has been held, that evidence might be given of a conversation, in which A. B. stated that she had retired from business, and had given up her farming stock to her son-in-law.(3) A bill of lading signed by a master of a vessel, since deceased, for goods to be delivered to a consignee or his assigns, on payment of freight, has been held to be admissible evidence of the consignee having an insurable interest in the goods.(4)

In several cases the declarations have been made by tenants, who have stated that they paid rent to particular persons. In these cases, the declarations have been considered as made against interest, inasmuch as possession is *prima facie* evidence of a seizin in fee, and, therefore, the declaration of the possessor, that he is tenant to another, makes against his interest.(5) And the rule is, that all statements by a deceased person, while in possession of property, are in themselves original, and not merely secondary evidence, if their effect would be to cut down his interest in it.(6) Such declarations are admissible,(7) not only against

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(1) Plaxton v. Dare, 10 B. & C. 17. *Vide* Id., as to the necessity of proving payment in such a case.

(2) See the cases collected in the note to Barker v. Ray, 2 Russ. 67. See also the next section for cases respecting indorsements of payment of interest upon bonds and notes.

(3) Ivat v. Finch, 1 Taunt. 142.

(4) Haddow v. Parry, 3 Taunt. 303. In general, an invoice is only evidence against parties privy to the contents. Mendham v. Thompson, 1 Stark. R. 316; Dicken v. Lodge, Id. 226.

The master of a vessel, acting within the scope of his authority, binds the owner, as an agent binds his principal: his contracts are those of the owner, as well as his own. In other words, under certain circumstances, he has power to make contracts in relation to freight, binding the owners (Edwards on Bailm. 439, 440); and in such cases, his acts may be proved as a part of the *res gestæ*. 4 Wend. 394.

(5) By Mansfield, C. J., in Peaceable v. Watson, 4 Taunt. 16. See also Crease v. Barrett, 1 C. M. & R. 931.

(6) *Per Curiam*, 16 M. & W. 514.

(7) See Doe d. Human v. Pettett, 5 B. & A. 223; Doe d. Manten v. Austin, 9 Bing. 41; Trimleston (Lord) v. Kemmis, 9 Cl. & Fin. 780, 784, 785.

Declarations of a party in possession are evidence against those claiming under him, on the ground that the latter stand in the place of the former, having taken the estate with its burdens (St. Clair's Heirs v. Shale, 20 Penn. State R. 105; Alden v. Grove, 18 Id. 377); but are not evidence in favor of the party deriving title from him. Smith v. Powers, 15 N. Hamp. 546; Masters v. Varner, 5 Gratt. 168.

all parties claiming under the declarant, but also as evidence for or against strangers.(1)

Upon a question whether the place in dispute was parcel of a particular tenement, the declarations of deceased persons, during their occupation of the place in dispute, that they paid rent for the premises to a particular individual, were held to be receivable in evidence.(2)

In an action of ejectment,(3) brought for the recovery of a garden, where the question was, whether the ground in dispute was parcel of certain freehold property, or of a certain copyhold tenement, a paper signed by a deceased owner of the copyhold tenement (who was also in the occupation of the ground in dispute), in which paper he stated that no part of the garden was copyhold, and that he paid rent for it, was held to be admissible evidence to prove that the garden was not copyhold. Lord Ellenborough, C. J., observed, that the representation was against the interest of the maker of it, as he charged himself with the payment of rent, to which he would not have been liable, had the garden been parcel of his own tenement.

In the case of Barker v. Ray,(4) the declarations of a wife during coverture were tendered in evidence, after the death of her husband; they were to the effect that her husband was not seized in fee of certain premises in dispute, of which he was then in possession; and that upon a certain event they were to go over to another branch of the family. The declarations were rejected at Nisi Prius, and it was contended, upon appeal to the Lord Chancellor, that the declarations were against interest, as their tendency, by showing that the husband was not seized in fee, was to prejudice any claim that the wife might make to dower. The Lord Chancellor refused a new trial, not expressing any decided opinion as to the admissibility of the evidence.

Particulars of estate recognized by tenant for life.

Upon a question whether the lease of a tenant for life, having a limited power of leasing, was void, in consequence of the ancient rent not being reserved, the particulars of a certain estate were received in evidence under the following circumstances. The contents of the paper containing the particulars showed, that it had been written by a person having an intimate knowledge of the property in question, and who was in the confidential employ of the person to whom the paper was addressed. The paper was in some degree recognized as authentic by the person to whom it was addressed, by his indorsement written upon it, "a particular of my estate in Cornwall." It showed the existing rent of a particular tene-

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(1) See Doe d. Baggaley v. Jones, 1 Camp. 367; Peaceable v. Watson, 4 Taunt. 16; Carne v. Nicoll, 1 N. C. 430; Doe d. Daniel v. Coulthred, 7 A. & E. 235.

(2) Davies v. Pierce, 2 T. R. 53.

(3) Doe d. Baggaley v. Jones, 1 Camp. 367.

(4) 2 Russ. 77.

ment, the ancient rent of which was the subject in dispute. The paper was addressed to the person who was tenant for life of the property with a leasing power upon condition of reserving the ancient rent, being the like power to that under which the lease in question had been made. The paper was preserved among the muniments of the estate by the person to whom it was addressed, and from him it came to the tenant for life whose lease was in question, and upon his death it passed with the other muniments of the estate to the succeeding proprietor, who questioned the validity of the lease. Lord Ellenborough, C. J., in delivering the judgment of the court, said, the contents of the paper were adverse to the tenant for life to whom it was addressed, and who had authenticated it, and preserved it among his muniments,—for it diminished his interest in the renewal, in the same proportion as it raised the rent to be reserved,—and it could not have been evidence in his favor; he could not, therefore, have had any undue motive for preserving it: consequently it was proper evidence, to be left to the jury, of the amount of the ancient rent received.(1)

A declaration by a party in possession, that his interest was for his own life only, would be primary evidence that it ceased to exist at his death; but it would not be so, if he merely declared that he held "for life interest," that statement being consistent with one or more life interests coming into existence after his death; and it does not therefore necessarily admit, that the right of possession would immediately at his death accrue to the reversioner.(2)

Proof of occupation.

It seems necessary, in order to render admissible the declaration of a deceased person, as being an occupier of land, to prove the fact of his occupation at the time the declaration was made; it is not enough that the declaration purport to be against the interest of the maker.(3) But slight evidence (as of felling timber) has been held sufficient.(4)

The declarations of a person who has parted with his interest in land (as by executing a settlement), cannot therefore be adduced for the purpose of impairing the rights of persons acquired under the settlement, merely because they affect the title to the land.(5) "It is clear," said Lord Denman, C. J., "that a person who has parted with his interest in property is not to divest the right of another claiming under him, by any statement which he may choose to make."(6)

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(1) Roe d. Brune v. Rawlins, 7 East, 279.
(2) Doe d. Welsh v. Langfield, 16 M. & W. 497.
(3) Crease v. Barrett, 1 C., M. & R. 931.
(4) Doe d. Stansbury v. Arkwright, 5 C. & P. 575.
(5) Doe d. Sweetland v. Webber, 1 A. & E. 733.
(6) 1 A. & E. 740. See Roberts v. Justice, 1 Car. & K. 93.

In the case of Ivat v. Finch,(1) it has been seen that a declaration by a deceased party, that she had given up her stock in trade to her son-in-law,

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(1) 1 Taunt. 142; *Supra*, p. 311.

NOTE 104.—This case of Ivat v. Finch suggests another class of hearsay, admissible upon the sole ground that it emanates from the owner of property at the time, and would therefore be evidence against him, were he the immediate party to the suit. His estate or interest in the same property, afterwards coming to another, by decent, devise, right of representation, sale, or assignment, in a word, by any kind of transfer, whether it be the act of law or the act of the parties, whether the subject of the transfer be real or personal estate, corporeal or incorporeal, choses in possession or choses in action, the successor is said to claim under the former owner; and whatever he may have said affecting his own rights, before departing with his interest, is evidence equally admissible against his successor claiming from him, either immediately or remotely. And in this instance, it makes no difference whether the declarant be alive or dead; for though he be a competent witness, and present in court, his admissions are receivable. This doctrine proceeds upon the idea that the present claimant stands in the place of the person from whom his title is derived; has taken it *cum onere;* and as the predecessor might have taken a qualified right, or sold, charged, restricted or modified an absolute right, and as he might furnish all the necessary evidence to show its state in his own hands, the law will not allow third persons to be deprived of that evidence by any act of transferring the right to another. Declarations made by the predecessor are a part of the *res gestæ*, whether accompanied with acts of possession or forbearance, so much so, indeed, that, as we saw *ante* note 81, p. 188, *et seq.*, they might for many purposes be evidence in his own favor to fortify his claim; but, above all, to weaken or contract it. The extent of this doctrine will, however, be better understood by a leading English case decided in the King's Bench in 1812. The action was debt, by the executors of Earl Dartmouth against the defendant, as owner of a farm in Batley parish, for not setting out the tenth of the hay grown on the farm as the tithe belonging to the plaintiffs; and the question of course was: 1. Whether the farm was charged with the tithe; and 2. Whether it was due to the plaintiffs' testator. The defendant purchased the farm of one Leathley; and while he was in possession, and before he sold to the defendant, the vicar of Batley had claimed that the tithe of this farm was due to him, and filed a bill in equity against Leathley to enforce the claim. Leathley answered, denying that the tithe belonged to the vicar, and insisting that it was due to the plaintiffs' testator. Here the chancery cause stopped, and then Leathley sold to the defendant. On the trial of the now action against the defendant, the plaintiffs offered in evidence the confessions of Leathley in his answer. They were objected to as *res inter alios acta*, but received by Thompson, B., at the circuit, where the verdict being for the plaintiffs, a motion was made by the defendant for a new trial, mainly on the objection to the answer. The motion was denied. Lord Ellenborough said: "It appears to me that this was not *res inter alios acta*, but *inter eosdem acta*, and was not only evidence, but strong evidence against the defendant, who stood in the same place by derivation of title and by legal obligation as Leathley; and Leathley, upon his oath, in a suit against him by the vicar, has declared that the tithe is due to the rector, and not to the vicar; and now that same person, in effect, is deraigning the title of the rector in favor of the vicar. The reading of his answer, therefore, operates as a contradiction to him." Lady Dartmouth v. Roberts, 16 East, 544. The other judges expressly concurred in the same view. See a similar view of the question, a few years before, by the Supreme Court of New York in Jackson ex dem. Griswold v. Bard, stated *infra*. In a late case, Conkling, J., on deciding that such an answer made by S., the tenant in fee, admitting a resulting trust in the land, was receivable to charge such trust upon the same land in the hands of the defendant, who derived title from S., remarked: "I understand it to be a settled rule that the declarations of a tenant in possession adverse to his title, and relative to facts which may be proved by parol, are evidence, not only against himself, but also against those claiming by subsequent conveyance under him." In Bradstreet v. Huntington, U. S. C. C. North. Dist. N. Y., May term, 1834, Pamphlet, p. 21. That an answer, made by the grantor before the date of the deed, shall be evidence as an admission against the grantee, though the answer was made at the suit of one totally disconnected

with the plaintiff in the suit wherein the answer is offered, was also held in Rees v. Lawless, 4 Litt. 218, 219.

We propose to consider and exemplify this doctrine, first in its application to *real*, and secondly, to *personal* property.

First, in its application to real estate.

1. The declarations of the ancestor are evidence against the heir. This was allowed on a question of boundary. The ancestor's admissions, while in possession, that the land was limited to a certain line, were received against the heir in ejectment by him. Jackson ex dem. M'Donald v. M'Call, 10 John. Rep. 377. So on a bill filed against the heir to enforce the specific performance of a contract, alleged to have been made by his ancestor, for a sale of the land, his admissions are receivable that he made the contract. Bassler v. Niesly, 2 Serg. & Rawle, 352, 354. And the admissions of the ancestor of the defendant's landlord were held evidence against the defendant; his landlord claiming as heir of that ancestor, and having as such, demised to the defendant. Morris' Lessee v. Vanderen, 1 Dall. 64. The declarations of the ancestor were received against the heir, to show the contents of a deed given by the ancestor, conveying away the premises, the loss of the deed being first shown. Allen's Lessee v. Parish, 3 Hamm. Rep. 107, 111. And, on a question whether the plaintiff was bound by prescription to maintain a partition fence between himself and the defendants, evidence was received in behalf of the latter without objection, that fifty-six years before, the ancestor, under whom the plaintiff claimed, then being owner of the land, said that himself and his ancestors had always maintained the fence. Binney v. The Proprietors, &c., of Hull, 3 Pick. 503, 504, 505. On trial of a petition of freedom by negro, who claims emancipation, in right of and as under a free ancestor, the declarations of the ancestor, as that the petitioner was a slave, are evidence against him. Walkup v. Pratt, 5 Har. & John. 51, 58.

2. As between devisor and devisee. The latter claiming under the former, it would seem to follow that all those circumstances resting in parol, and usually examined on *viva voce* testimony, calculated to invalidate the will, might equally be shown by the declarations of the devisor at any time. Among these are mental alienation, fraud, duress, undue influence, &c. Yet, it is not to be disguised that there is a considerable weight of authority limiting such evidence to a time anterior to or at the execution of the will. If after, it is considered by several courts as contravening the statute regulating the solemnities required in the revocation of wills. A strong case for receiving such evidence came before the Supreme Court of New York, in 1806. In ejectment the lessors of the plaintiff claimed as heirs of K., and the defendant claimed under his will. The plaintiff gave evidence tending strongly to show threats and duress in obtaining the will by the defendant K.'s second wife, and offered to follow this up with the testator's declarations—some of them made *in extremis*—that threats and duress had been exerted upon him, by means of which the will was obtained. Held by three judges against two that the evidence was inadmissible. Jackson ex dem. Coe et al. v. Kniffen, 2 John. Rep. 31. Thompson, J., delivered the leading opinion, and which doubtless contains the only argument upon which the decision can be rested. "It could not," says the learned judge, "if placed in the strongest possible terms, amount to a revocation without a direct violation of the statute, which declares that no will (of land) shall be revoked or altered except by writing, executed with all the requisites of a will, or by canceling the same. If these declarations were not to operate as a revocation, I am at a loss to see in what manner they could affect the will. To say that they were proper, in order to show that the instrument in question was not duly executed, by reason of its having been signed under duress, is assuming the very point which was to be proved." Kent, C. J., and Livingston, J., concurred; the latter addressing himself mainly to the point that the declarations, being *in articulo mortis*, could add nothing to the argument for their admissibility. Spencer and Tompkins, J's, dissented; and their reasoning is very strong, both upon principle and authority. It is clear, as they insist, that the will was ambulatory till death; and the defendant had no vested right to be overreached by the proposed declaration. She claimed under the testator, and within almost all the cases was bound to abide his declarations. Waiving the inquiry whether the declaration was admissible, as being made *in extremis*, the rule that I am liable to be affected by the declaration of one who conveys to me, made before my right vests, is at this day sustained by a force of authority not to be resisted. The argument advanced, that the declaration was in the nature of testimony to establish a revocation, and so would violate the Statute

of Frauds, would preclude all evidence of duress or undue influence, which is certainly a very common head of objection against wills. The objection that such evidence contravenes the Statute of Frauds would apply equally to a deed of lands. Yet, can it be doubted that a grantor declaring, before the title to the land passes by his deed, that he shall convey (but it is to save his life, threatened by the grantee), would be evidence to affect the latter? You cannot, by parol, contradict a bond or mortgage, yet your declaration that your bond or mortgage was given on a usurious consideration, would be a most fatal one for your subsequent assignee. If the fact of duress or undue influence be provable, then every kind of proof adapted to its establishment is competent, and goes for what it is worth. Such an objection was not even thought of in Nelson v. Oldfield, 2 Vern. 76. And see Reel's Ex'r v. Reel, and Howell v. Barden, *infra.* Declarations strikingly similar were once received and acted upon in Pennsylvania, in aid of other proof, to establish the mental imbecility of the testator, and to show that this was wrought upon by his wife and father-in-law. "The declaration of the testator," says Duncan, J., "that his wife and father plagued him to go to Lebanon; that they wanted him to give her all, or he would have no rest; that he did not want to go to Lebanon—this would be evidence of a weak mind, operated upon by excessive and undue importunity. It forms no objection to it that these murmurs of a weak mind were made in the absence of the devisee. We should be surprised to hear that they were made in the presence of that devisee, an importunate and teasing wife. Rambler v. Tryon, 7 Serg. & Rawle, 90, 93, 94. The declarations of a testator are also receivable to support or repel the presumption that a will executed by him, but not found at his death, had been destroyed by him *animo revocandi.* Betts v. Jackson ex dem. Brown, 6 Wend. 173, on error, per Walworth, C. Such declarations, however, are not incompatible with Jackson v. Kniffen, *supra.* In Rambler v. Tryon they were evidently admissible, as a part of the *res gestæ*, to show the state of the testator's mind; and in Betts v. Jackson, as developing an intent from the actual or apparent destruction of the will. And such declarations have been received upon this distinction in other cases. Thus, where the testatrix had devised the greater share of her property away from her relations and friends to the Hadlyme Presbyterian Society, in order to show importunity and undue influence, her declarations, made about the time of executing the will (whether before or after did not appear), were given in evidence, viz: that the Hadlyme Society, or the Presbyterians, were about her as thick as bees, to get her property; and held that these declarations might be received between them and the heirs, as evidence to show her state of mind, as sane or insane, but not of the facts stated. Comstock v. Hadlyme, 8 Conn. Rep. 254, A. D. 1830. In another case, to show that the testator was fraudulently prevented from revoking his will, his declarations to that effect were offered in two classes: 1. Those made before and at the time of making the will, and immediately afterwards; 2. Others made afterwards, at several times during the seven last years of his life. Story, J. Those "made before and at the execution" are admissible; and so those "made after, if so near the execution as to be considered a part of the *res gestæ*, or necessarily connected with it. But I shall not admit any other subsequent declarations, because they are of the nature of hearsay, and have never been held admissible in any case within my recollection." Smith v. Fenner, 1 Gallison, 170, 171, 172, A. D. 1812. In another case, Washington and Pennington, J's, repudiated evidence to sustain the capacity of the testator, that his declarations had often expressed an intention to dispose of his property according to the will. This was offered to infer that a smaller grade of memory would be required at the time, if the disposition was consistent with a previous and long-settled purpose. Washington, J., said: If the testimony were received at all, the other party might show opposing declarations; and "thus a door would be opened to an inquiry in no respect pertinent to the main subject of investigation, but mischievously calculated to perplex and mislead the jury." He admitted that such evidence had been given in cases read by counsel, but it was without objection. Den ex dem. Stevens v. Van Cleve, 4 Wash. C. C. Rep. 262, 265, 266, A. D. 1822. The difficulty seems to lie in acting upon the distinction between declarations going to develop the operations of the mind and those containing merely the assertion of a distinct fact. The former are admissible; the latter not. The doctrine was much considered in a recent case, where the will, executed by a man of competent understanding, was sought to be impeached by his declarations, made before and after its execution, that he intended differently, but was importuned by his wife; and that the will was made through much importunity and fear of violence from her. These declarations being received in evidence, came up on error

brought. None of the above cases were cited, except Nelson v. Oldfield; but the judgment below was reversed, on the ground that it was against the spirit of the Statute of Revocations. Moritz v. Brough, 16 Serg. & Rawle, 403, A. D. 1827. This subject has also recently been somewhat examined by the C. P. in England, A. D. 1829. In a writ of entry the demandants claimed as heirs, and the defendant as devisee of H. S. The demandants gave evidence to show that the will, at the time, was executed in presence of only two witnesses, three being necessary, and that another was fraudulently added after the devisor's death. This was answered by proving the high character of the attorney who drew and witnessed the will. The demandants then offered to show the devisor's written declarations, that the defendant should not have his property, and had got him to sign a will which was not worth a farthing. Held inadmissible, as contravening the spirit of the Statute of Wills. Provis v. Reed, 5 Bing. 435. It is proper to say of Comstock v. Hadlyme (*supra*), which was decided by the Supreme Court of Connecticut, with all the other cases above cited before them, that some general expressions fell from the court to restrict this kind of evidence within narrower limits than the case itself required, and probably than that learned court would itself deem necessary on a question directly before them. As to declarations of a testator cotemporaneous with his will, to create a trust in the devisee, see 1 Watts's Rep. 163.

Such has been the course of decision against this sort of evidence. In 1821, fifteen years after Jackson ex dem. Coe v. Kniffen, and nine years after Smith v. Fenner, the question involved in these cases was presented to the Supreme Court of North Carolina, who expressly adopted the opinions of Spencer and Tompkins, J's, in the first case, thus repudiating the decisions of both the Supreme Court of New York and Judge Story. Both these cases were before them, appear to have been some time in the hands of counsel, and were followed by the judge at Nisi Prius. At the bar, great research and high forensic talent were exhibited in the discussion, both upon principle and authority, the main ground for the evidence being the admitted one of which we are treating, that declarations made by the owner, follow from him to all who claim under him, along with descents, devises or sales. The evidence proposed was of repeated declarations made after the execution of the will, and consisted in stating its contents to be materially and utterly different from what they were. They were offered in connection with conflicting testimony upon the point of testamentary capacity. The evidence was resisted as in New York, among other arguments, on the ground that it would violate the spirit of the North Carolina Statute of Revocations, which also required certain specified solemnities. On both sides, the English authorities then extant, were fully cited and applied. On the whole, the arguments were learned and useful, and must have saved the judges great labor upon this vexed controversy. The conclusion of the court is strongly expressed: "To reject the declarations of the only person having a vested interest, and who was interested to declare the truth, whose fiat gave existance to the will, and whose fiat could destroy, and in doing the one or the other, could interfere with the rights of no one, involves almost an absurdity; and (with due deference to the opinions of those who have decided the contrary, we say) not upon the ground of their being part of the *res gestæ*, for whether they accompany an act or not, whether made long before or long after making the will, is entirely immaterial as to their competency. Those circumstances only go to their weight or credit, with the tribunal which is to try the fact." After a further examination of the question, they add: "For these reasons, and those given by Judge Spencer, who, together with Judge Tompkins, dissented from the opinion of the court, and because of the doubt which rested for some time on Judge Livingston's mind, we think we are bound to disregard the opinion of a majority of the court in 2 John. 31, and also the case in 1 Gall. 170." Reel's Ex'rs v. Reel, 1 Hawks, 247, 268, 269. Again, in 1832, on trial of an issue of *devisavit vel non*, Judge Martin, at Nisi Prius, rejected the testator's declarations, made after the execution of the will, and tending to show that it was obtained by fraud and undue influence of the principal legatee. On moving for a new trial, the question was treated as open and unconcluded by Reel v. Reel, because there the testator died before the North Carolina Statute of Revocations passed, which was not till 1819. The statute being before the former decision, though after the will, was a distinction not adverted to. Provis v. Reed (which we stated above), was now cited by counsel, in addition to Jackson v. Kniffen, and Smith v. Fenner, as an authority for excluding the proof. The court declared that they had "deliberately considered the question anew;" and concluded that the object of the statute is an act of revocation, going "wholly to change the mind of the testator, and not to the

original want of the *animus disponendi.*" The proof offered was relevant to the latter point. The objection that it may mislead the mind of the jury, is applicable to all evidence submitted to them, especially if it be competent for one purpose and not for another. There is no instance in which the legitimate and illegitimate purposes of introducing evidence are more distinct or more obvious to a common understanding, than the one before us. The one is to determine whether a will was made, and fairly made: the other, whether the operation of such an instrument, not destroyed, has been recalled. The court inquire as to the application and force of Provis v. Reed, and insist that the statute, in leaving great latitude of evidence upon the point of original testamentary capacity, adopts the only practicable legislation which the nature of the subject admits; and they demonstrate the general safety there is in receiving such evidence, by presenting the ordinary tests of strength or fallacy. We refer particularly to the perspicuous and masterly opinion of Ruffin, J., with whom Henderson, C. J., concurred in more general terms. Both adhered to the opinion in Reel v. Reel. Daniel, J., dissented, mainly on the three authorities of Jackson v. Kniffen, Smith v. Fenner, and Provis v. Reed. Howell v. Barden, 3 Dev. 442, 444 to 451. A direct act of revocation, and avowedly such, of course cannot be by parol. Allen v. Huff, 1 Yerg. 404.

3. The declarations of the grantor, bargainor, vendor, &c., of real estate, such declarations being made at any time before the act of granting, bargaining, vending, &c., are admissible against the immediate grantee, bargainee, vendee, &c., and all who claim more remotely under the same title. This has been holden of the grantor's declarations tending to show that the deed was a fraud upon creditors (Bridge v. Eggleston, 14 Mass. Rep. 245); such as that he expected to be ruined, thought it best to pay as few of his debts as possible, and intimating an intention to submit to imprisoment. pp. 246, 249. So the admission of the debtor's grantee in possession, that he himself purchased with a view to defraud creditors, was received against his grantee, the admissions being made before the date of the last deed. Norton v. Pettibone, 7 Conn. Rep. 319. And per Daggett, J.: "That such declarations so made are admissible, I had supposed to have been too long and too well settled to be doubted. It has been so ruled more than twenty times within the last forty years. Declarations of a person while in possession of the premises, against his title, are always admissible, not only against him, but against those who claim under him." p. 323. And see per Gould, J., 2 Conn. Rep. 472, 473; per Buller, J., in Davies v. Pierce, 2 T. R. 55; per Richardson, C. J., in Downs v. Lyman, 3 N. H. Rep. 487; per Rogers, J., in Reed v. Dickey, 1 Watts' Rep. 154; and per Savage, C. J., in Jackson ex dem. Titus v. Myers, 11 Wend. 536. In ejectment, the defendant claimed the *locus in quo* under S., who claimed under a deed of the same premises from D., which the lessor of the plaintiff insisted was ante-dated in order to overreach his mortgage of the same premises against D. On the trial, the plaintiff was allowed to prove S.'s admissions made before he sold, and while he was in possession, that his deed had been ante-dated; and other expressions tending to show that. This was allowed, though it was objected that they were the unsworn declarations of a third person. The court said, on motion for a new trial: "These declarations would have been good against S., and are also competent evidence against all who claim under him. This principle has been repeatedly recognized both in our own and the English courts." Jackson ex dem. Griswold v. Bard, 4 John. Rep. 230. So a confession by the grantor that his warrant and survey did not cover the land in question, made before he conveyed, was received against the grantee. Weidman v. Kohr, 4 Serg. & Rawle, 174. So, where in an action for obstructing water by a dam, the defendant, who obtained his title from Carr, who built the dam, set up an adverse possession for fifteen years (the Conn. Stat. of Limitations), as his defence, the plaintiff was allowed to show the declaration of Carr, before he conveyed, that his holding was not adverse. Betts v. Davenport, 3 Conn. Rep. 286. So the plaintiff in ejectment was allowed to prove that the defendant's grantor, before he conveyed, showed a certain maple tree as his place of beginning. Townsend v. Johnson, 2 Penningt. Rep. 706. At Nisi Prius, in ejectment, the defendant claimed by a deed from Hughey. A serious question was made upon the evidence, whether this deed had ever been delivered to the defendant; and, among other evidence, the plaintiff offered to prove that Hughey acknowledged, before he conveyed to the defendant, that he had not paid the purchase money; and had no title. Judge Hall rejected the evidence, because it would affect a third person. But the reporter thought this a hasty decision. He says: "An admission made relative to the land in question, by one who afterwards sells to another, is certainly as much evidence against the pur-

chaser as it was against the vendor before the sale. Otherwise the person who was entitled to the evidence (which might be decisive evidence too) might be wholly deprived of it by the alienation of the owner." He puts several instances by way of illustration. He says: "Nothing is more common in our practice, than to give evidence (with respect to the extent of boundaries) of what the former owner said, if it operates against him." Clark v. Arnold, 3 Hayw. 287, 288. Accordingly, where, in ejectment, the lessors of the plaintiff claimed under Van Schaick, and a person under whom the defendant claimed, through a number of successive purchasers by deed in fee, had acknowledged, while in possession, and before he had conveyed, that he held by lease from Van Schaick, the court said that the defendant was as much affected by the acts and acknowledgments of his predecessors, as if they were his own; and the acknowledgment was received as available against him in that view. Jackson ex dem. Van Schaick v. Davis, 5 Cowen's Rep. 123, 129. And see Simmons v. Parsons, 1 Bail. Rep. 62. So where the person under whom the defendant claimed had acknowledged that he went into possession under the lessors of the plaintiff (Jackson ex dem. Van Duzen v. Scissam, 3 John. Rep. 499); or admitted the plaintiff's title; and requested leave to remain. Andrews's Lessee v. Fleming, 2 Dall. 93. In chancery a bill was filed by a *cestui que trust* to set aside a sale of his lands by his trustee to one Godman, who took a deed, as was alleged, for his, the trustee's benefit. He afterwards conveyed to the trustee. Held that Godman's declarations that he purchased for the trustee's benefit, made before the deed was executed from Godman to the trustee, were admissible against the latter. The court say, by Buchanan, J., the declarations would have been good against him (Godman) "as admissions respecting his title, and are competent evidence against those claiming under him, who stand in his place, and hold the land subject to any imperfection of title which attended it in his hands." Dorsey v. Dorsey, 3 Harr. & John. Rep. 410, 426. In a late case, the declaration of one holding the legal estate by a deed in fee, that he was in truth a mere trustee for another, who had paid the purchase money, the declaration being made before such holder of the legal estate had conveyed to a third, was offered in evidence against his grantee, the legal owner being in full life and capable of being examined as a witness, and within the reach of process. The question was very fully discussed whether he must not be produced and sworn; but held not; that his declarations were admissible on the general principle that the admissions of the grantor are equally admissible against the grantee as they would be against himself. Gibblehouse v. Strong, 3 Rawle, 437. And see M'Pheake v. Hutchinson, 5 Serg. & Rawle, 295. See also Sims v. Meachum, 1 Bail. Rep. 101, and Patton v. Goldsborough, 9 Serg. & Rawle, 47, 53, 54, 55. So recitals in a deed to A., are evidence against a subsequent purchaser from A.'s grantor. Carver v. Jackson ex dem Astor, 4 Pet. 1; Crane v. Morris' Lessee, 6 Id. 598. The declarations of a landlord, while in possession, are evidence against his tenant who comes in after the declarations made. Jackson ex dem. Titus v. Myers, 11 Wend. 533, 536. And so, if before, it appearing that the landlord had placed him under a bond of indemnity against the claim of a third person. Marley v. Rogers, 5 Yerg, 217, 220.

It is sometimes a matter of nicety to determine whether the declarant and the party shall be said to hold the relation of predecessor and successor, so as to make the admissions of the former evidence against the latter. This difficulty has arisen mainly under the registry acts. In a writ of entry for White farm, both parties claiming under a deed from S., the deed by which the demandant claimed being the oldest, but not recorded. The tenant (defendant), however, purchased with actual notice of the first deed. This being shown, and that the grantor had fraudulently obtained and suppressed the first deed, held that his declarations were admissible to prove its existence and contents, as coming from one under whom the tenant claimed. Davis v. Spooner, 3 Pick. 284. In ejectment the plaintiff claimed the *locus in quo* under G., by deed, in which G. acknowledged payment of the consideration in the usual form. Before this, G. had given V. a mortgage of the same premises; but it was not registered when G. conveyed, nor had his grantee any notice. It being material to show that G.'s grantee paid the full consideration, held that the acknowledgment in the deed was evidence of this in favor of G.'s grantee, and all claiming under him, and that too, as against V., the holder of the unregistered mortgage. Jackson ex dem. Rounds v. M'Chestney, 7 Cowen's Rep. 360. Minor and Wright each had a separate mortgage from the same mortgagor on the same premises, Minor's being recorded a few minutes before Wright's. Minor then admitted in writing that this was a mistake, and that

neither mortgage had preference. Then the plaintiff acquired Minor's interest. Held that Minor's admission was evidence against the plaintiff. Beers v. Hawley, 2 Conn. R. 467.

To warrant an exclusion of these declarations as evidence against the successor, the transfer must appear to have been complete before they were made; and accordingly, though the declarations were made after the date and signing of the deed, yet, being before the grantee's acceptance of it, they were received to affect him with fraud against creditors. Denton v. Perry, 5 Verm. Rep. 382.

In Louisiana the vendor's admissions are received, even after the sale is fully consummated, to affect him with the fraud, though it is held they shall not be extended to show fraud in the vendee. The courts proceed on the ground that an intention to defraud must be fixed on both, in order to make out such a case as shall nullify the transfer, and that the vendor's declarations are pertinent to the scienter or intention in himself, though not in the purchaser; or, as Porter, J., expresses it, "the acts and declarations of the first are surely as good and as high evidence as any other that can be given, to prove fraud in him. They are of course not sufficient to show that the vendee acted from the same motive." Guidry v. Grivot, 2 Mart. Lou. Rep. (N. S.) 13, 15, A. D. 1823. The same learned court which made this decision had several years before, rejected an offer to prove such declarations of the debtor, even to show that he was in debt and insolvent. And they would not allow this, though the vendor had remained in possession of the property, up to the time of the declarations; thus being more strict, as we shall see by Willies v. Farley, and other cases cited *infra*, than even the English or other American courts. Highlander v. Fluke, 5 M. L. (1st S.), 442, 449, A. D. 1812. The court thus apparently standing in conflict with itself, on a similar question afterwards coming before them, in 1824, the year after the decision in Guidry v. Grivot, and the case of Highlander v. Fluke, being cited, Martin, J., delivering the opinion of the court, remarked, that what was said in the latter case must be taken with the qualification that the debtor's admissions of insolvency were not to be taken as showing fraud in his vendee; not as denying that they were receivable to prove fraud in the vendor who made them. The case of 1824 was a suit by the vendee of land, against a purchaser under a sheriff's sale, upon a *fi. fa.* against the vendor. The defendant set up the common defence of fraud against creditors, in the first sale; and the acts and declarations of the vendors, after sale, were received against the plaintiff. The court said, "There cannot be fraud in the vendee unless there be fraud in the vendor. The defendants have, therefore, to establish the fraud of the latter. For this purpose they gave evidence of the vendor's continued possession and contract of the premises, his hiring and selling part of the property conveyed; his acting and holding himself out as the real owner of the premises. Fraud is seldom established by direct evidence. The proof of it, in most cases, results from numerous grave and concordant presumptions. For this purpose, the conduct of one of the parties and his declarations are part *rerum gestarum;* all proper evidence to establish fraud in him. They are not, however, evidence of fraud in the vendee. The existence of creditors to be defrauded may, and in many cases must be established by the admission of the vendor, or by judgments obtained against him, which are *prima facie*, though not conclusive evidence against the vendee." Martin v. Reeves, 3 Mart. Lou. Rep. (N. S.) 22. These cases in Louisiana should be considered in connection with Willies v. Farley and others, cited *infra*. The Louisiana cases are given here, because they mainly relate to fraudulent sales of real estate. But two of them (Highlander v. Fluke and Martin v. Reeves) present the very case in which such declarations are receivable by the other courts as evidence directly against both vendor and vendee. That is to say, they are plain cases of possession by the vendor after sale, and up to the time when his declarations were made. These declarations are thus adducible as a part of the *res gestæ*, as Martin, J., himself remarks in the decision of 1824. How it may have been with Guidry v. Grivot, in respect to the vendor's possession, the case does not state. If there was none, it certainly goes farther against the vendee than any other adjudication. If fraud in the vendor were essential, as Porter, J., observes, to avoid the conveyance, the vendee stands protected until that fact is proved; as completely so as if nothing were made out. He cannot be touched, except by the declarations of a third person, who cares nothing for his rights. That person may come into court, and, without oath, admit a fact which takes away the vendee's farm. But, with deference, is it not a confounding of distinctions, to call such a declaration proof even of intention in the vendor? A concurrence of intention on his part would be equally necessary to make out the sale. Would it therefore be competent for him to declare that he had

sold? If such *ex post facto* declarations be admissible, two concurring admissions of vendor and vendee would be sufficient to overreach the rights of creditors or any third persons. In Watson v. Williams (1 Harp. Rep. 447), the defendant offered a letter from one Smith, admitting a sale; but the judge said Smith might as well have been brought into open court, to sign certificates, as the exigencies of the defence might require. 1 Harp. 450. And see Robertson v. Crockett, 1 Yerg. 203. To hold the contrary would seem to be the substituting a naked declaration for the fact which it declares to have existed. It may as well be false in stating a previous intention, as in stating any other particular fact. It is not made before the sale, so as to affect the vendee under the notion of privity; nor at the sale, nor during possession, so as to make a part of the *res gestæ;* nor do we perceive how it can be taken from the category of mere naked hearsay.

Another distinction has recently been held in favor of creditors; that the recital in a post-nuptial settlement, setting forth the consideration of the deed, though evidence against others claiming under the settler, is not so against a creditor of the settler contesting the fairness and validity of the deed. Blow v. Maynard, 2 Leigh, 29. See also Dwight v. Brown, 9 Conn. Rep. 83.

That the declarations of the grantor remaining in possession at the time, even though after sale, are evidence against his vendee, especially to establish fraud in favor of his creditors, we shall see *infra*, in connection with the same rule as applied to personal property. Before such declarations can be received, however, it must appear distinctly that the declarant is an occupier at the time. Den ex dem Pickett v. Pickett, 3 Dev. 6.

Very few cases conflict with the general doctrine which we have been considering. In one it was held that the admission of usury by a mortgagee, though made before the assignment, should not affect the assignee; but the point passed very hastily, and has evidently been since given up by the court who decided it, as will be seen by several decisions *supra*. Appleton v. Boyd, 7 Mass. Rep. 131. And see Brindle v. M'Ilvaine, 10 Sergeant & Rawle, 282, 284, and Scott v. Coleman, 5 Litt. Rep. 349, that the admissions of the assignor before assignment shall bind the assignee; and *post*, in these notes, that an admission, even after assignment, will affect the assignee, if made before notice to the debtor, and, by some strong authorities, even after notice. Clarke v. Waite (12 Mass. Rep. 439), which *semb.* denies admissions even before the deed, to affect the grantee, was reconsidered and qualified in 14 Mass. Rep. 251. In ejectment, the plaintiff claimed that a mortgage given to the defendant by his father was a fraud on creditors, because the father was not indebted to his son. Held, that the declarations of the father, though before the mortgage given, that he was a debtor, were inadmissible evidence for the mortgagee, though such declarations, at the time of a settlement and striking a balance between them, would be admissible as a part of the *res gestæ*. The plaintiff claimed by an attachment against the father and a sale of the premises in question, both being subsequent to the mortgage. Cook v. Swan, 5 Conn. Rep. 140. Here, both claiming under the father and the plaintiff by a junior title, the case, in order to be consistent with other authorities, should have received any of the father's declarations made before the attachment levied. In another case, the creditors of an insolvent offered to impeach his deed to the defendant, on the ground that just before the execution of the deed, the insolvent had proposed to another to make a fraudulent conveyance of the same premises to him, who directed the insolvent to apply to the defendant. This was rejected as being *res inter alios acta*. Beach v. Catlin, 4 Day, 284. The learned reader will perceive, that according to acknowledged authority, even in the courts of the same state where this case was decided, the declaration was *res inter eosdem acta*. In ejectment, the plaintiffs and defendants both claimed under Anna French, a *feme covert;* the former as heirs, the latter under a deed executed by her and her husband. The plaintiffs offered to prove, by repeated declarations of hers, both before and after the execution of the deed, but which were made in the absence of her husband, that she was coerced to execute by the threats and maltreatment of her husband. The court say: "It has been uniformly decided that the declarations of the grantor, made when the grantee is not present, *prior* or subsequent to the execution of the deed, cannot be admitted in evidence to invalidate the deed." Barrett v. French, 1 Conn. Rep. 354, 365. This was in 1815. A judge of the same court, fourteen years after, we have seen *supra*, in Norton v. Pettibone, on Barrett v. French, and some other of the above cases being cited to him, spoke of the opposite rule as too well settled to admit of question. It will be seen, before we

get through with real and personal property, that he was more than borne out in saying the contrary had been ruled twenty times within the last forty years.

The following case is treated as an exception to the rule. In an action of debt, to recover the statute penalty for maintenance in buying land of D. and his wife, while they were out of possession, it was held that their admissions that they were so out of possession, though made before sale to the defendant, they being alive and capable of being produced, were inadmissible. The court admitted the rule, that the confessions of a man are evidence in many cases against those who claim under him, but thought this case did not come within the rule. Nichols v. Hotchkiss, 2 Day, 121. But *quere*. For their admission of claimer or disclaimer before the sale, might form a material ingredient in the question of possession. The admission seems, therefore, to have been a part of the *res gestæ*.

All the cases agree that declarations, made by the person under whom the party claims, after the declarant has departed with his right, are utterly inadmissible to affect any one claiming under him. Gray v. Harrison, 2 Hayw. 292; Weidman v. Kohr, 4 Serg. & Rawle, 174; Patton v. Goldsborough, 9 Serg. & Rawle, 47, 53, 54, 55; Jackson ex dem. Watson v. Cris, 11 John. Rep. 437; Chess v. Chess, 1 Pennsylv. Rep. 32. Thus declarations by the grantor, that he had not made the deed, were rejected. Bartlett v. Delprat, 4 Mass. Rep. 702. So the admission of a mortgagor that the money is unpaid, made after he has assigned the equity of redemption, cannot be received against the assignee (Copp v. Upham, 3 N. H. Rep. 159); nor the admissions of the grantor that he had not taken the incipient steps necessary to his title, the admissions being after he had conveyed to the grantee (Packer's Lessee v. Gonsalus, 1 Serg. & Rawle, 526, 536, 539); nor to show in what character the grantor held the land (Brindle v. M'Ilvaine, 9 Serg. & Rawle, 74, 77); nor to show fraud in the deed as to creditors (Alexander v. Gould, 1 Mass. Rep. 165; Clarke v. Waite, 12 Id. 439; Phœnix v. Ingraham's Assignees, 5 John Rep. 412, 415, 426); even though they be sworn admissions in answer to a bill in chancery. Doyle v. Sleeper, 1 Dana's Rep. 531. The propriety of the testimony depends upon two matters: first, that the declarations were made while the declarant has an interest; and secondly, that the party to be affected claims under him. Per Rogers, J., in Reed v. Dickey, 1 Watts' Rep. 152, 154. Even if it be doubtful whether the declaration was before or after the deed, they cannot be received. Stockett v. Watkins' Adm'rs, 2 Gill & John. 326, 343, 344. An exception is, as in case of a will *supra*, where the subsequent declarations are resorted to purely as indicative of the sanity or insanity of the grantor, the grant being impeached on the ground of insanity. Here, the declarations being relevant, though after the deed, may be received. Chess v. Chess, 1 Penn. Rep. 32.

Secondly. The same rule, which we have considered in its application to real estate, extends to personal property, whether in possession or in action. The admissions or declarations of the assignor, vendor or holder of personal property, made before the sale, assignment, or other departure with his interest, are evidence against his vendee, assignee, or other persons claiming under him, immediately or remotely, either by act and operation of law or by the acts of the parties. And his declarations with regard to his rights and liabilities are, in like manner, evidence against any one coming, after such declarations made, into his place, or representing him in respect to such rights and liabilities.

1. By act and operation of law. The defendant claimed the goods by his marriage with N. In trover for goods the plaintiff was allowed to prove that, before the marriage, N. admitted the goods belonged to him, the plaintiff. This was received against the defendant, on the express ground that he claimed the goods under N. Waring v. Warren, 1 John. Rep. 340. The admission was assimilated, by Spencer, J., to one made by the vendor of real estate, which might be used against the vendee in ejectment. So, where the defendant attached goods which had before been attached by the plaintiff, to satisfy a note given him by the debtor, the defendant insisted that the note was given to defraud him and other creditors. Held, that the debtor's admissions, that the note was on a fair consideration, should be received against the defendant. And in this case, on the construction of the statute which allowed the defence, such admissions were received, though made after the defendant had commenced his suit by a levy. Strong v. Wheeler, 5 Pick. 410. So, the acknowledgments of a bankrupt, made before he becomes such, are evidence against his assignees. Marks v. Barker, 1 Wash. C. C. Rep. 185, note *a*. But in trover by the sheriff, for goods of Churchill, against the defendant who had distrained the same goods, the latter offering Churchill's admissions to prove the demise upon which the defendant distrained,

the sheriff objected, and the court allowed the objection, because Churchill was a competent witness. Alexander v. Mahon, 11 John. Rep. 185. The case is defective, in not stating whether the admission was made before or after the levy, though the reasoning of the court certainly leaves it to be implied that whether prior or subsequent would make no difference. Kennedy, J., in speaking of this case (Gibblehouse v. Strong, 3 Rawle, 451), thinks the admission must have been made after the levy by which the sheriff's rights attached; and a majority of the court agree in repudiating the competency of Churchill as any objection to the testimony. Id. 438, 451. According to this last view of the case, in trover for goods, founded on an assignment of them to the plaintiffs by one Judson, in trust to pay the plaintiffs' debt and others, the defendant having attached them on the ground that Judson did not owe the plaintiff as he pretended, and that the assignment was therefore fraudulent, to prove the debt, entries in Judson's shop-book, made before the assignment, were received against the defendant, he claiming under Judson by his attachment. And per Swift, Ch. J. (with whom the other judges concurred): "The shop-book of Judson would have been proper evidence between the plaintiff and Judson to prove the state of their accounts; and, of course, was proper evidence in this action to show the indebtedness of Judson to the plaintiff." De Forest v. Bacon, 2 Conn. Rep. 633, 638. It is observable that this case of personal property is put on the same ground as Lady Dartmouth v. Roberts, the case of vendor and vendee of real estate mentioned at the beginning of this note. Both assume, as the premises, that the declaration would be evidence against the declarant himself. It is then made to follow that it is *therefore* so against the party claiming in his right. In Lord Ellenborough's phrase, the admission is *res inter eosdem acta*. In neither case is it put on the ground that the declarant is dead or an incompetent witness. The rights and liabilities of an executor are subject to be affected by the declarations of his testators. Cox v. Baird, 5 Greenl. 105. And so are those of the executor of an executor by the declarations (*e. g.*, the inventory) of the first executor as to goods which he held, both as executor and guardian. Green v. Johnson, 3 Gill & John. 389. Otherwise as to the assets which he held as executor merely; for the last executor is in law the immediate representative of the first testator, and so cannot be said to claim under, or represent the second, in respect to the rights or obligations of the first. Knapp v. Hanford, 6 Conn. Rep. 170, 174, 175, and note. The law that the executor of an executor shall administer on the estate of the first testator is now abolished in New York, and letters of administration, *cum testamento annexo*, are substituted. 2 R. S. 71, 72, § 17. In assumpsit, for use and occupation by an executor, his testator's admission that the defendant was to pay no rent, and the reason, were received against the executor. Cox v. Baird, 5 Greenl. 105. And the acknowledgment of a debt, made by the debtor even after his arrest, if before his escape, is evidence against the marshal in an action for the escape. Per Bailey, J., in Rogers v. Jones, 7 Barn. & Cress. 86. So the admissions of an absconding debtor, made before suit brought, are evidence in favor of the garnishee, and against the plaintiff, in a proceeding by foreign attachment. This is on the ground that the plaintiff stands in the absconding debtor's right. De Witt v. Baldwin, 1 Root, 138. And per Hosmer, Ch. J., in Enos v. Tuttle, 3 Conn. Rep. 250, the plaintiff, "to use an expressive phrase, *stands in his own shoes*." But the reverse of this is not true. The declarations of the absconding debtor are not evidence for the plaintiff, for the very reason that they are evidence against him. Enos v. Tuttle, 3 Conn. Rep. 247, 250. By the civil law, in case of an insolvent, neither his acts, writings, books, nor declarations, whether before or after his assignment, are evidence to prove a debt due from him, either in a litigation between creditors or between them and the assignees. The reason is, because the law presumes fraud in every bankrupt, and that his acts, writings, entries or declarations, going to prove a debt, are done or made with intention to give a fraudulent preference. Menendez v. Larionda's Syndics, 3 Lou. Rep. 707; The Planter's Bank v. Lanusse, 12 Mart. Lou. Rep. 157; Canfield v. Maher, 4 Mart. Lou. Rep. (N. S.) 174.

2. The same rule holds where the transfer is by the act of the parties. The more usual and familiar instance is that of sale. In this case, such declarations of the vendor, made before sale, as would be evidence against himself, are also admissible against his vendee. And this, without regard to the question whether the vendor be a competent witness, alive, capable of attending court, and within reach of a subpœna, or not. The case is exactly *in pari ratione* with that of land, or other real estate. This we have, in part, seen by Waring v. Warren (*supra*), decided by the Supreme Court of New York. Let us pursue the argument from that case a little farther.

The defendant there claimed the goods as those of Mrs. Nocus, with whom he had intermarried. She was his *quasi* vendor; and the court below received her admissions, made before the marriage, that the goods belonged to the plaintiff, but rejected her admissions made after the marriage had been solemnized. Mr. Everston, arguing in support of that distinction, says, "Mrs. Nocus had married Waring" (the defendant), "who thus derived title to the goods from her, and which he held adversely to Warren" (the plaintiff), "from whom Mrs. Nocus derived her right. It is precisely the same as if the action was against Mrs. Nocus." He then argues against the admission of her subsequent declarations, and adds, "The declarations of a party holding adversely, are never received to support the title under which he claims; though they may be received when against it." Spencer, J.: "In actions of ejectment, that rule is constantly adopted." And when the whole court came to speak, they adopted the same distinction. 1 John. Rep. 342, 343. We cite so far to show the analogy between the doctrine, as applied either to real or personal property. In the elaborate case of Gibblehouse v. Strong (3 Rawle, 437), none of the judges thought of making a distinction, but although it was a question of ejectment, they drew their arguments mainly from cases of the like declarations, as they affected the rights to personal property. There David Johnson, before he sold the land, had acknowledged that though he had taken a deed in his own name, E. J. had paid the purchase money, thus charging the land with a resulting trust, in favor of E. J. David Johnson then conveyed; and though he was alive, and attainable as a witness, yet his declaration was admitted. The only objection made was David Johnson being alive. The general rule, that the party must abide the declarations of the person under whom he claims, was admitted; but it was insisted that if the person making the declarations were alive, this was an exception. Rogers, J., says: "I have examined all the cases, and I cannot perceive a trace of any such exception. In most cases, it is true, the party was dead; and this is usually the case in fact; for it is the declarations of an ancestor, that are most commonly offered in evidence. It has in no case, however, been made a subject of inquiry whether the person was dead or alive, a competent witness or otherwise; and this surely would have been the case, had any such qualification of the general rule existed. The reason of the rule is at war with the exception. The point falls within the well-established principle, that although a man's declarations are not evidence for him, they are strong evidence against him. Suppose this declaration had been in writing, can David Johnson, by a subsequent conveyance, prevent the party in whose favor the declarations were made, from giving it in evidence against the party who claims under him? And where is the difference between written or parol testimony, except in the certainty; and particularly *in cases of personal property, which may pass by parol, and to which the principle also applies?*" Id. 438, 439. Kennedy, J., said, the testimony "is not of that character which, in a technical and legal sense, comes under the denomination of hearsay. It comes under what is considered the declarations or admissions of the party to the suit, or his privies; that is, those under whom he claims; in respect to which the general rule of law is just as well settled that they shall be received in evidence, as that hearsay shall not. The rule admitting the confessions or declarations of the party, extends not only to the admission of them against himself, but against all who claim or derive their title from him, in other words, between whom and himself there is a *privity*." And he considers the privity between vendor and vendee, assignor and assignee, &c., as within the definitions of Coke. Co. Litt. 271, 4 Rep. 123, 124. The learned judge then proceeds to a commentary on Ivat v. Finch, stated in the text, and upon which we are now annotating. There "the declarations of Mrs. Watson, a former owner of the property, which consisted of three mares, made by her while in possession of the mares, were held to be admissible evidence to show that she had transferred and parted with her right to them. It is true that she was dead, and, therefore, could not be produced as a witness; but from the opinion of the court, it is evident that that circumstance formed even no part of the ground upon which her declarations were decided to be competent evidence. For the court say, 'the admission supposed to have been made by Mrs. Watson, was against her own interest, and had the action been between Mrs. Watson and the plaintiff, then her acknowledgment that the property belonged to him might clearly have been given in evidence, and *therefore it ought to have been received in that instance;* because the right of the lord of the manor depends upon her title.' The defendant, in this case, claimed under her, as being the owner of the property, at the time of her death; but her declarations were held to be admissible evidence, to show that she had parted with her right to it before." 3 Rawle, 446, 447. We have just now (*supra*), compared the lan-

guage of Lord Ellenborough and Swift, C. J.; let us now connect them with the views of the judges in the above cases of Ivat v. Finch, Waring v. Warren, and Gibblehouse v. Strong; and we shall find ourselves justified in the remark we have made, that the admissibility of these declarations, whether in respect to real or personal property, stand *in pari ratione.* We may repeat, in respect to all of them, they are not *inter alios* but *inter eosdem.*

We now, therefore, shall proceed more directly to show with what degree of uniformity this rule has been acted upon, in respect to choses in possession. The defendant purchased of the mortgagee of a slave. In detinue for the slave, the declaration of the defendant's vendor, that the mortgage was paid in full, made before the sale (though nothing said of the vendor's death), was held admissible against the vendee. Walthol v. Johnson, 2 Call, 275, A. D. 1800. In another case, the defendant claimed a horse, by sale from Bailey. In trover, the plaintiff claimed that Bailey had merely hired the horse of him, and therefore could not make title to the defendant. Bailey swore for the defendant, that he had got the horse of the plaintiff on exchange. And the plaintiff was then allowed to show that before Bailey sold to the defendant, he had admitted the hiring; and this not only to contradict Bailey, but more especially *as the declaration of a vendor in possession, made before the sale, against the title.* Johnson v. Patterson, 2 Hawks, 183, 185, A. D. 1822. In trover for a heifer purchased by the plaintiff, of B., the court denied declarations of B. to affect the plaintiff, which were made after the sale; but those made before were received without objection. Woodruff v. Whittlesey, Kirby, 60. In trover for slaves, the plaintiff claimed them by bill of sale from D. of the 10th of April, 1812; but D. continued in possession for a long time after, and finally manumitted the slaves by a deed executed in 1821. The defendant interfered, to assert their freedom, and for this the action was brought. The plaintiff was allowed to prove that intermediate the date of the bill of sale and the deed of manumission, D., the vendor of the plaintiff, had often admitted the plaintiff's right, under the bill of sale; and this, though D. was alive. Coale v. Harrington, 7 Harr. & John. 147. See Sprigg v. Negro Presley, 3 Harr. & John. 493. The plaintiff claiming slaves by purchase, from the son-in-law, as given by his father-in-law to him, the declarations of the latter, before parting with the slaves to the son-in-law, that he did not intend them as a gift, were received in evidence against the plaintiff. Stewart v. Cheatam, 3 Serg. 60. In detinue, for slaves, the plaintiffs claimed them as a gift by the defendant to his daughter, at her marriage, in whose right they claimed; and the defendant was allowed to prove his own declaration, before his daughter's marriage, that he would never give any slaves to his after-married daughters during his life. Smith v. Montgomery's Adm'rs, 5 Monroe, 502 In a like action the defendant purchased the slave of the father. In trover, by the daughter, she was allowed to prove, that before the sale to the defendant, her father had, by a writing, declared that the slave was a present to the daughter, from her grandfather; besides having often admitted this by parol. The whole was objected to by the defendant as *res inter alios acta;* but the court decided that it was admissible. They remark as to the parol acknowledgments, that they were proper; and the defendant claiming under the father, was bound by his acts and acknowledgments before the sale. Forsyth v. Kreakbaum, 7 Monroe, 97, 100, A. D. 1828. And see Martin v. Curtis, 3 Mart. Lou. Rep. (N. S.) 105.

The rule, as laid down in the case of Forsyth v. Kreakbaum, was very thoroughly discussed by the Supreme Court of North Carolina in 1819. The action was trover, to recover the value of a negro, both parties claiming under one Hall, the plaintiff by a bill of sale, dated December 15, 1817, and the defendant by a like bill, dated the 5th of the same month. The plaintiff, to obtain priority over the bill of the 5th, then offered in evidence Hall's declarations made before that day, that he had in truth already sold the slave to the plaintiff; and that the sale was to be consummated between them by a bill of sale on the 15th. Hall was in full life, and his attendance might have been obtained by a subpœna. On this ground, he being a competent witness, the testimony was objected to, and rejected at Nisi Prius. The verdict being for the defendant, the plaintiff moved for a new trial on this as the sole ground of his application. Henderson, J., delivered the opinion of the court:—"The declarations or confessions of the person making them are evidence against such person, and all claiming under him by a subsequent title, and for the plainest reasons. Truth is the object of all trials, and a person interested to declare the contrary is not supposed to make a statement less favorable to himself than the truth will warrant: at least there is no danger of overleaping the bounds of truth, as against the party making the declarations. It is, therefore, evidence against him; and his subsequent purchaser stands in his

situation; for he cannot better his title by transferring it to another, or thereby affect the rights of those who have an interest in his confessions. But it is said that the person whose declarations are offered is entirely disinterested, and within the process of the court, and therefore should himself be sworn. There would be some weight in this objection, if they were offered as the declarations of a disinterested individual, in those cases where such declarations are admissible, to wit: in cases of pedigree and boundary; for then the declarations would be inadmissible if the higher evidence, the oath of the party, could be had. In all cases, except those of pedigree and boundary, the declarations of disinterested individuals are inadmissible—for they are nothing but hearsay. In this case, they are offered as coming from a *privy in estate*, and therefore, *in law*, from the party himself; for the privy completely represents him, so that the question whether the person be now disinterested to declare the truth, and is amenable to the process of the court, does not affect the point now under consideration. It is asked, why not swear him? The answer is, the party likes his declarations better. He may, from some motive, vary his statement; and the party offering this evidence is alone to judge. It is true, if he be now disinterested, either party may, *if he choose*, call him as a witness. The evidence was improperly rejected; and the rule for a new trial must be made absolute." Guy v. Hall, 3 Murph. 150, 151, 152. We have had occasion before to notice how distinguished jurists have fallen, not only into the same channels of thought, but almost of expression, on this subject. In Lady Dartmouth v. Roberts, Lord Ellenborough considered the vendor and vendee of land so completely identical, as to say of the latter, when he denied the right which the former had acknowledged, now that *same person* is, *in effect*, deraigning the title, &c.; and in Guy v. Hall, per Henderson, J., the declarations are offered as coming from a *privy in estate*, and therefore *in law*, from *the party himself*. The English courts have been for years removing the difficulties which lie in the way of an unreserved application of this doctrine. In Hart v. Horn (2 Campb. 92), Heath, J., was of opinion that the declarations of a person under whom the defendant made cognizance in replevin were not evidence against him, and in favor of the plaintiff; and that case was said, *arguendo* by counsel (7 Moore, 307), to have been afterwards acted upon at Nisi Prius, in Trinder v. Wilson. But in trover for a deed, which the defendant had received of W. R., and held for his benefit, it was decided that W. R.'s declaration might be received against the defendant. Harrison v. Vallance, 7 Moore, 304; S. C., 1 Bing. 45. On Hart v. Horn being cited as *contra*, Park, J., said that case was a mere Nisi Prius decision, and had never been considered as an authority. Id. 310. In Jackson ex dem. Titus v. Myers (11 Wendell, 237), Savage, C. J., refused to recognize the objection that the vendor may be called, as a reason why his declarations are not receivable to impeach his sale. "A party," says the chief justice, "is not compelled to call a party in interest, merely because he may do so."

The cases which have arisen upon this question in the state of New York, Hurd v. West, and others, will be considered *infra*, in connection with those in the same state, relative to the admissibility of the declarations of the holders of bills and notes against their indorsees.

Where a case of doubt is made by the evidence, whether the party has established a gift, &c., to himself from the alleged donor, a party claiming adversely by a plain article of sale from the same donor may give evidence of the donor's declarations calculated to negative the gift, though they be made subsequent to the time alleged, and claimed by the donee as the true date of the gift. It would be otherwise, if the gift were clearly made out to have been at the time; but, so long as that remains open, the declarations of the alleged donor shall be let in to oppose the gift Sims v. Saunders, 1 Harp. Rep. 374, A. D. 1824; M'Kane's Ex'rs v. Bonner, 1 Bail. Rep. 113, 116. To affect a vendee, clearly shown to be such, the vendor's declarations must appear, affirmatively, to have been made before the sale. Bullard v. Billings, 2 Verm. Rep. 309, 312.

But it will have been seen, as part of the rule, that it must appear, before such declarations of a vendor can be let in, that the party against whom they are offered does in truth claim under him. And where the plaintiff claimed a negro, Jim, by possession, the defendant would have made out a sale to himself by a letter from one Smith, admitting that he, Smith, had sold Jim to the defendant. But this was denied, inasmuch as the plaintiff had not deduced his title from Smith. The letter was written after the suit was brought: and the court said Smith might as well have been brought into open court, to sign certificates as the exigencies of the defence might require successive expedients. Watson v. Williams, 1 Harp. Rep. 447, 449, 450.

It will also have been seen as implied in all the cases to which we have adverted, that the same rule which receives these declarations of the vendor, donor, assignor, &c., when made before the declarant has departed with his right, shuts them out, as we noticed in respect to real estate, where they appear to have been made afterwards. To this the cases are numerous, and almost every one of them, while standing to prove that branch of the rule which operates exclusively, may be adduced as establishing the first or inclusive clause. Otherwise the cases would stop by saying unqualifiedly the vendor's declarations are inadmissible. They do not say so; but almost every one of them give as the reason, that such declarations being made after the declarant has parted with his interest, cannot operate *ex post facto* in the divestment of a right which he himself has created, or at least a right over which he held no control and could not touch at the time. Phœnix v. The Assignees of Ingraham, 5 John. Rep. 412; per Spencer, J., p. 426; Perry v. Smith, 4 Yerg. 323, 325; Elbank's Ex'rs v. Burt, 2 Hayw. 330; Robinson's Adm'rs v. Devone, Id. 154; Arnold v. Bell, 1 Hayw. 396, and 397, 398, note; Babb v. Clemson, 12 Serg. & Rawle, 328, 329; Dismukes v. Musgrove, 8 Mart. Lou. Rep. (N. S.) 375; M'Kane's Ex'rs v. Bonner, 1 Bail. Rep. 113, 115; per Savage, C. J., in Sprague v. Kneeland, 12 Wend. 164; Woodruff v. Whittlesey, Kirby, 60. See also Wolf v. Carothers, 3 Serg. & Rawle, 240, 245; and Whiting v. Johnson, 11 Id. 328, 329.

But to bring himself within the last clause of the rule, the vendee, donee, assignee, &c., must see that the sale, gift, or assignment is consummated, and plainly so by a delivery of possession. Mere words or writings will not do; and it has been repeatedly held, as we have before noticed, *ante*, note 81, and as will be seen in the subsequent notes in the chapter, that a vendor or former owner remaining in possession after a bargain and sale, or other transfer, absolute in its terms, will, where creditors are concerned, either be deemed such evidence of a conspiracy to affect their rights, that the judge will let in the vendor's declarations as a co-conspirator, with the person pretending to claim under him, and this too where he is in colorably as a servant; or at least it will be deemed such a connection with the property, as to warrant the receipt of the declarations as a part of the *res gestæ*. Babb v. Clemson, 10 Serg. & Rawle, 419, 426, 427; S. C., 12 Id. 328, 329, 330; Willies v. Farley, 3 Carr. & Payne, 395; per Carr & Green J's, in Clayton v. Anthony, 6 Rand. 285; Wilbur v. Stickland, 1 Rawle, 458; Martin v. Reeves, 3 Mart. Lou. (N. S.) 22, 24. But see Talcott v. Wilcox, 9 Conn. Rep. 134, 139. But in these cases it should appear affirmatively that the possession continues in the vendor at the time of the declarations before they can be received. Den ex dem. Pickett v. Pickett, 3 Dev. 6.

We considered the cases in Louisiana to the last point, when speaking of the declarations of the vendor of real property. See *supra*. To these we shall not again recur particularly. Suffice it to say, they will be seen in the main practically to agree with Willies v. Farley, and the corresponding cases just cited. We also noticed the difficulty of going on any principle other than those recognized in these last citations.

In one case, it was held that the declarations of the vendor, though made after sale and delivery, were admissible against the vendee, if they accorded with his own declarations previously made. But this seems to have been the acknowledgment of facts, which the vendee admitted he had full notice of from the vendor at the time of the purchase, and a mere repetition of such facts by the vendor. They appear to have been undisputed by the parties, except as to their legal construction. Hunter v. Jones, 6 Rand. 541.

2. As to choses in action. The admissions or declarations of the assignor of a chose in action made while he is the holdor, are evidence against his assignee and all claiming under him. With what qualifications these admissions are to be taken, when made after assignment by a previous holder, will be very fully considered in the subsequent notes. When made before assignment, the rule is universal; and the only qualification lies in bills of exchange or promissory notes, which pass from the hands of the declarant before due to a *bona fide* holder in the course of trade.

Accordingly, on a feigned issue to try whether a judgment assigned to the plaintiff was a valid lien on the debtor's land, the admissions of the assignor before he had assigned, going to show that the judgment was paid, were received for the debtor. Kellogg v. Krauser, 14 Serg. & Rawle, 137, 141; Scott v. Coleman, 5 Litt. Rep. 349. But we forbear to cite cases to a point so clearly settled in respect to all choses in action, that the only doubt entertained and difference among the cases are, whether such admissions shall not be received against the assignee even after the assignment was made, and notice to the debtor. Upon this strongest possible case against the

assignor's admission, two such tribunals as the Supreme Courts of New York and Connecticut are directly at issue. The former holds that admissions after notice are not, the latter that they are still admissible. Frear v. Evertson, 20 John. Rep. 142; Bulkley v. Landon, 3 Conn. Rep. 76. And see also Thomas's Ex'x v. Denning, 3 Har. & John. 242, which is directly the reverse of Frear v. Evertson.

The same rule applies, with all its rigor, to admissions made by the holders of bills of exchange and promissory notes, which are overdue or dishonored in their hands, or where the plaintiff is not an innocent holder in the fair course of trade. For, in Shaw v. Broom (4 Dowl. & Ryl. 730): the court seem to concede that, in such a case, the bill stands upon the footing of any other chose in action, and that the declarations of the indorser, though made even after indorsement, are evidence against the indorsee. Ry. & Mood. 213, note to Smith v. De Wruitz. Be that as it may, the almost unbroken drift of the case is, that all admissions made before are admissible. The declarant must, however, be the holder of the bill at the very time of the declaration made. Pocock v. Billing, 2 Bing. 269. When this case of Pocock v. Billing was on trial, which was before Ch. J. Best, he likened it to that of declarations made by the owner of the estate during his possession. Pocock v. Billing, Ry. & Mood. N. P. Rep. 127. Thus, in Peckham v. Potter (1 Carr. & Payne, 232), which was an action by indorsee against acceptor, it appearing that the plaintiff had notice of the fraud between the drawer and the defendant, the indorser's declarations, acknowledging the fraud, were received by Lord Gifford, Ch. J. Again, in Coster v. Symons (1 Carr. & Payne, 148), the action was against the acceptor on a bill indorsed by Shaw to Akers, and by Akers to the plaintiff. The defence was that the bill had been accepted without consideration, and had, besides, been satisfied by a substituted arrangement while Akers held it, to show which Akers' letter to Shaw was offered. Gazelee, for the plaintiff, objected, "Akers is in existence, and may be called. I admit we are bound by any act of Akers, but not by what he says." Abbott, Ch. J.: "I think, in a case at the last sittings, I admitted evidence of a similar description; and I believe the question is now before the court on a motion for a new trial. I will take a note of the objection." The letter was then read, when Abbott, Ch. J., said in conclusion: "I think I ought to receive this evidence. *It is a declaration of the party under whom the plaintiff claims title, showing that he had no title at all.*" Verdict for defendant. This case, it will be perceived, and the principle upon which it goes, harmonizes with the whole doctrine that the declaration of the owner shall be received against one in privity with and coming after him, as we have seen it applied to real and personal property in all its variety, in all the relations of privity, whether of blood, of legal representation, estate or contract; and it has again and again been recognized in respect to bills and notes. In Haddan v. Mills (4 Carr. & Payne, 486), it appeared that one Rigby had indorsed the bill to Mills when overdue, and it was proposed to show Rigby's declarations against his indorsee, made while the former was in possession, going to establish the want of consideration. Storks, sergeant, objected. Tindal, Ch. J.: "You derive title under this party, and what he says is evidence against you." And the testimony was received. Crayton v. Collins, 2 M'Cord, 457, S. P. These are cases, too, in which the declarant was alive and capable of being produced; and, in Coster v. Symons, he was in the end actually produced, and failed to explain away his admissions. In Barough v. White (6 Dowl. & Ryl. 379), the action was on a promissory note, payable to Arnett and indorsed by him to the plaintiff. It was payable on demand. Arnett's declarations, while holder, being offered by the defendant at Nisi Prius, were excluded, because the note had not lain long enough in his hands to be dishonored. On motion for a new trial, per Bailey, J.: "Had the plaintiff been identified with Arnett," who was alive, "by showing that he had taken the note without consideration, or after it was due—when it might be deemed or treated as a dishonored note—the case would stand upon a very different footing" (p. 381, 382). He then goes on to show that it was not to be deemed overdue. Holroyd, J., was of the same opinion, "there being nothing to identify Arnett with the plaintiff." Littledale also agreed that such identity would have authorized the proof (p. 383). The court denied a new trial, on the ground that the note could not be deemed to have been overdue when Arnett parted with it. The same point was presented and ruled the same way in Beauchamp v. Parry (1 Barnw. & Adolph, 89), though, per Lord Tenterden, Ch. J., "if the indorsement had been made to the plaintiff after the note had become due, the case would have been different." And Bailey, J., said: "To make the declaration of the payee evidence, the indorsee must be identified in interest with the

payee, as by taking the note without consideration or after it was due." Accordingly, in Snelgrove v. Martin (2 M'Cord, 241), which was an action by the indorsee against the maker of a note, the defendant proved the declarations of the payee (though he was alive), while holder, that the note was on a gaming consideration. On motion for a new trial the court denied the motion, saying, by Richardson, J.: "At common law the acts, declarations and confessions of a party to a suit have been always received as the highest evidence against such party; and, in like manner, the declarations, acts, &c., relating to the matter in dispute, made by a person while he is interested, are good evidence against a party claiming subsequently under such person. Were this not the rule, a debtor could not be safe in taking the receipt of his creditor. For instance, the obligee of a bond might give loose receipts, or acknowledge the bond paid in full; but, if he afterwards assigned, the assignee would hold, independent of the receipts. I take the general rule of the common law to be, that wherever the act or declaration of a party then interested would be evidence against himself, such will be evidence against his subsequent assignee, or party claiming under him." The learned judge prefaced these remarks by saying that, as a gaming consideration made the note void in the hands even of an innocent indorsee, the question was governed by the general rules of evidence, and not by any doctrine peculiar to notes, &c. It was on this latter principle that the letters of the payee were received against the indorsee in Kent v. Lowen (1 Campb. 177), going to show that the note stood upon an usurious consideration; for, in that case also, it would be void; and hence, both of the last cases seem to proceed in disregard of the inquiry whether the notes passed in the fair course of trade or not. In Coster v. Mersey (7 Moore, 90), Park, J., says of Kent v. Lowen, that it was more than a Nisi Prius authority, for he had moved for a new trial, which was denied because it appeared that the letters were cotemporaneous with the note. Indeed, Coster v. Mersey itself appears to sanction the case of Kent v. Lowen. Again, in Collenridge v. Farquharson (1 Stark. Rep. 259), the bill having fallen due while the indorser P. held it, an entry in his book was offered in evidence by the defendant against the plaintiff, a subsequent indorsee of P. It was not denied that any entry or declaration made by P., accompanying an act, while in possession of the note, would be receivable; but the entry was rejected on the sole ground that the time when it was made was not shown. Lord Ellenborough said the entry might have been made for the very purpose of being used in evidence. In Kimball v. Huntington (10 Wend. 675, 681), the admissions of an assignor, made before he had given a release to the debtor, were received to defeat that release, on the usual ground. Nelson, J., said they were binding on the assignor (the releasor), and hence he inferred that, being before the release, they equally bound the releasee, who claimed under the former.

There are certainly several decisions which have been made without any regard to these distinctions. The admissions of the holder have been rejected, when offered against the subsequent indorsee or bearer, without its being looked to that they were made before or after the indorsement or delivery; in some cases, because the declarant could not be heard to impeach his own paper, within Walton and Shelly (Butler v. Damen, 15 Mass. Rep. 223, 225); in other cases, because he was a competent witness, and his declarations, those of a mere third person, naked hearsay. Ross v. Knight, 4 N. H. Rep. 236; Bristol v. Dann, 12 Wend. 142; Whitaker v. Brown, 8 Wend. 490; Hedger v. Horton, 3 Carr. & Payne, 179, *Cor.* Gaselee, J.; per Parker, Ch. J., in Barker v. Briggs, 8 Pick. 127. And this was held in Duckham v. Wallis (5 Esp. 251), though the declarations were made while the bill lay dishonored in the hands of the holder, and before the indorsement. Lord Ellenborough said he must be produced. His declarations were those of a third person, and not the best evidence. If this be so, the Supreme Court of New York were certainly right in deciding as they did in Kent v. Walton (7 Wend. 256), in a similar case, that the declaration would not be admissible, even though the declarant be dead at the time of the trial.

The only doubt lies in the principle. Is the purchaser in privity with the rights of the seller? Does the vendee take subject to the vendor's defect of title? Does the donee take subject to the donor's acts? While the vendor is in possession, are his declarations the same as his acts? See *ante*, note 81. Does the indorsee stand in privity with the indorser, or is his claim paramount as an innocent holder? If the latter, his indorser's previous declarations do not affect him, for he claims a right, not under, but superior to his indorser, directly from the law merchant. Mr. Justice Gaselee was much staggered for want of adverting to this latter distinction in Hedger v.

Horton, *supra.* He at first inclined to receive the indorser's declarations, without regard to the innocence of the plaintiff. The marginal abstract of Barough v. White being produced, he did not think even that case in the way; but he finally withheld the testimony upon the ground taken by Lord Ellenborough in Duckham v. Wallis, that the declarant was alive, and a competent witness; and even goes so far as to suggest that this rule was universal in regard to real as well as personal estate. 3 Carr. & Payne, 179. But we believe the great principle which lets in these declarations, wherever a strict privity has been made out, has never been broken in upon by the English courts, except at Nisi Prius. The Supreme Court of the state of New York has pursued a divided course; sometimes letting in these declarations on the ground of privity, and sometimes rejecting them as mere naked, independent hearsay. In Waring v. Warren (1 John. Rep. 340, also stated *supra*, A. D. 1806), they received the declarations on the ground of privity. In Alexander v. Mahon, A. D. 1814 (11 John. Rep. 185), they rejected them as naked hearsay. In a subsequent case (A. D. 1827), trespass for taking the plaintiff's sheep, which he had bought of Dayton, the court below received evidence of Dayton's admissions while in possession and before the sale, that the sheep were the property of the defendant. Indeed they were not objected to. But on error, the Supreme Court said they were inadmissible, and could not be taken into the account as proof, citing Alexander v. Mahon; and taking the ground that Dayton was a competent witness. Hurd v. West, 7 Cowen's Rep. 752, 759. In a subsequent case (A. D. 1828), they resume the ground of privity. The case was this: Austin brought trespass against Sawyer for taking away the plaintiff's growing crop of wheat. In October, 1825, Austin had given a quit-claim deed of his land, where the wheat was growing, to one Wilcox, without any written reservation; so that the wheat passed by the deed to Wilcox. Some time afterwards, but before the wheat was ripe, Wilcox stated to the defendant that the wheat had been reserved to Austin, and belonged to him. This was at a time when Wilcox contracted by parol to convey the same land to the defendant. Wilcox shortly after conveyed, telling the defendant, then again, that the wheat was reserved and belonged to the plaintiff. But the defendant cut and carried it away. The Supreme Court held that any oral reservation of the wheat by the plaintiff, when he conveyed it to Wilcox, was unavailable as contradicting the deed, which carried the wheat on the face of it; but that the declarations of Wilcox that the wheat was reserved and belonged to the plaintiff, might be viewed by the jury in the light of an admission that he had sold the wheat to the plaintiff intermediate his conveyance to Wilcox and that of the latter to the defendant. The verdict, which was for the plaintiff, was in this way sustained. Austin v. Sawyer, 9 Cowen's Rep. 39. In a subsequent case (A. D. 1832), Sutherland, J., re-asserts and strongly advocates the doctrine of Hurd v. West (*supra*). Whitaker v. Brown, 8 Wend. 490, 491, 492. And on the authority of this last case, Savage, C. J., in Bristol v. Dann (12 Wend. 142), lays down the rule as settled, "that a party who can call a witness shall not be permitted to prove his declarations." And see per Parker, C. J., 8 Pick. 127. Nor does he even concede fully, that one claiming real estate under another can be affected by his declarations, though he admits that this is *said to be* an exception. Id. 143. And indeed there can be no doubt, that if we take the principle of Alexander v. Mahon, Hurd v. West, and Whitaker v. Brown, that because a man is a competent witness, his declaration is to be excluded, the conclusion, and more than the conclusion of the chief justice, must flow from it. Declarations admissible from privity must all go—the vendor's to affect his vendee in respect to land as well as everything else; for the former is competent; the agent's declarations, made within the scope of his authority; for they are no more a part of the *res gestæ* than those of the vendor in possession; and the agent is always a competent witness. Co-conspirators are equally competent, and all those who participate in riots or other offences, have a common object, &c. The same learned court had but a few days before decided that, on a question of fraud in the sale of property, the declarations of all the actors engaged in the common object are evidence against the immediate parties. Crary v. Sprague, 12 Wend. 41. That case is not law within the rule; for no one will pretend that they are not competent witnesses. In that very case, too, the declarations of M'Gregory, and others under whom the defendants claimed, were received in evidence against the latter, although M'Gregory was alive and was afterwards actually introduced as a witness by the defendants themselves. Full effect was allowed to these declarations in the opinion of the court. Yet that opinion cannot be law in this respect, if the rule be that the declarations of a man shall be shut out because he is a competent witness. It cannot be denied that such a rule must dis-

place several of the best settled and most comprehensive principles of evidence, overturn large and ancient superstructures, if it do not subvert the most important rights. Taken in its fullest extent, the declarations of all that class of floating population who intrude into our wild lands as naked possessors, quit claim to others and emigrate towards the Rocky Mountains, are no longer evidence for the lawful claimant, to destroy the apparently adverse character of their possession. They too are competent witnesses. Indeed the consequences of the rule suggested in Bristol v. Dann, appeared to be so general, that only a few days after, when a like question arose in Sprague v. Kneeland (12 Wend. 161, 164), the chief justice lays down the rule more cautiously, and as it is recognized by the strong current of authority. At the conclusion of that case, his words are: "That the declarations of the former owner of personal property cannot be given in evidence to affect the title of the succeeding owner, where such declarations are *made after he had parted with his interest in the chattel*, has been decided in several cases."

That we have not enlarged the dimensions of the rule of Hurd v. West beyond its necessary import, is evident from the course of Gibblehouse v. Strong (3 Rawle, 437). An effort was there made to shut out an acknowledgment of the legal owner in fee that he held subject to a resulting trust; an acknowledgment made while he was in possession, and before he had conveyed. This was attempted mainly on the rule of Hurd v. West. All the judges saw at once that it comprehended land as well as chattels; and that the only alternative was an exclusion of the evidence, or a dissent from the rule. A point blank authority, emanating from such a high source, when added to the countenance which the same rule had derived from English judges, was calculated to stagger any tribunal upon a question which remained at all unconcluded by a long and unbroken line of adjudication. Nor were the Supreme Court of Pennsylvania unanimous. A majority, Rogers and Kennedy, Judges, against Huston, J., expressed their dissent from the New York case.

The distinction, that although the party who acquires a bill or note by indorsement, delivery or otherwise, after it is due or dishonored, or with notice or without consideration, or in any other manner which deprives him of the character of a *bona fide* holder, is so far identified with the previous owner that his declarations, while owner, may be received against such party; yet, that where the latter is a *bona fide* holder in the course of trade, he cannot be touched by such declarations, not only harmonizes with various other legal consequences growing out of that character, but the cases all speak directly and uniformly upon this branch of hearsay evidence. The principle is, that the *bona fide* holder is not a mere privy in title or estate with the preceding owner, except with regard to certain grounds of defence which we have noticed. Among them are usury or gaming, or the like vice, which nullifies the bill or note absolutely in the hands of the holder, whether *bona fide* or *mala fide*. Even this now is qualified by statute in several countries. And, independent of statute, the declarations do not seem admissible, unless made at the time of creating the paper, so as to constitute a part of the vicious act itself. Beauchamp v. Parry, 1 Barnw. & Adolph. 89. But in other cases, the *bona fide* holder by his purchase of the bill or note, stands, in a great measure, independent of the former holder, who indorsed or delivered the paper to him. The law disconnects him with the previous title, and takes him into its own charge, as deriving a right from itself. And hence, among other privileges, while it cuts him clear of all the previous hostile acts of his predecessor, it forbids that his declarations shall be used in derogation of those rights which he professed to confer. To the latter point, we shall merely cite the cases, among which there is nothing like discordance. Barough v. White, 6 Dowl. & Ryl. 379; S. C., 4 Barn. & Cress. 325; Smith v. De Wruitz, Ry. & Mood. N. P. Rep. 212; Beauchamp v. Parry, 1 Barn. & Adolph. 89. Above all, the declarations should appear to have been made previous to the transfer. Shaw v. Broom, 4 Dowl. & Ryl. 730; Collenridge v. Farquharson, 1 Stark. Rep. 259; Anon., K. B. Tr. T. 1824, 2 Stark. Ev. 42; Lightner v. Martin, 2 M'Cord, 414; Turpin's Adm'rs v. Marksberry, 3 J. J. Marsh. 622, 627; Crayton v. Collins, 2 M'Cord, 457. An admission by an indorser that the indorsement on the paper is in his handwriting, is, of course, no evidence against the maker. Robertson v. Crockett, 1 Yerg. 203.

It will have been obvious, upon the principles we have been considering, and we also add, is plain upon authority, that in no case are the declarations of the grantor, vendor, &c., as declarations, evidence for those claiming under him. Den ex dem. Sasser v. Herring, 3 Dev. 340, 342; Waring v. Warren, 1 John. Rep. 340, 343; Enos v. Tuttle, 3 Conn. Rep. 247, 250. Our previous note, 81, will show the distinction between naked declarations and those making a part of the

was held to be admissible in evidence; but there, the party against whom the declaration was admitted, claimed adversely to the declarant.(1) That was an action of trespass for taking three mares. The defendant justified as lord of the manor under a heriot custom, and the only question was, whether the deceased tenant was possessed of the mares at the time of her

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res gestæ, when offered as evidence for the party. These latter declarations, like those against interest, do, in the same manner as a covenant real, if we may be allowed the expression, *run with the land*, or other property, into the hands of all persons coming in as privies to the former owner. One instance arose in an action of dower, where the widow was allowed to show her husband's declarations, while in possession, to prove the extent of his claim. Forrest v. Trammell, 1 Bail. Rep. 77.

(Declarations by the assignor or vendor of an account or of property, made after the transfer, are not admissible. The State v. Jennings, 5 Eng. 428; Beal v. Barclay, 10 B. Mon. 261; Settle v. Alison, 8 Geo. 201; Price v. Branch Bank at Decatur, 17 Ala. 374; Kittles v. Kittles, 4 Rich. 422; Stewart v. Reddit, 3 Md. 67; Garland v. Harrison, 17 Mis. (2 Bennett), 282; Simpkins v. Rogers, 15 Ill. 397.

Such declarations are admissible, if made before the transfer, and calculated to affect or qualify the title (Maxwell v. Harrison, 8 Geo. 61); or to impeach the transfer for fraud (Harshaw v. Moore, 12 Ired. 247; Head v. Halford, 5 Rich. Eq. 128); or to disparage the title. Parker v. Marston, 34 Maine, 386; Darling v. Bryant, 17 Ala. 10, 314; Strong v. Brewer, 17 Ala. 706; Crawley v. Tucker, 4 Rich. 560; Jennings v. Blocker, 25 Ala. 415.

The declarations of the obligee in a bond made while he was the owner of it, showing it to have been given for an illegal consideration, may be shown in evidence against his assignee (Murray v. Oliver, 18 Miss. (3 Bennett), 405); but are not admissible when made after he has transferred his interest in the bond. Bailey v. Clayton, 20 Penn. (8 Harris) 295. The same rule applies in the case of a note not negotiable (Abbott v. Muir, 5 Ind. 444); and to a negotiable note or bill after the same has been dishonored, when it passes to the indorsee, subject to all the equities. Shirley v. Todd, 9 Greenl. (Me.) 83; or where the indorsee takes an illegal note with notice. Sharp v. Smith, 7 Rich. (S. C.) 3. To render the declarations of a former owner admissible, it is first necessary to show that the plaintiff acquired the negotiable note or bill under such circumstances that he holds it subject to all the prior equities. Phillips v. Cole, 10 Adol. & Ellis, 325; Barough v. White, 4 B. & C. 325; Peabody v. Peters et al., 5 Pick. 2; Sargent et al. v. Southgate, 5 Pick. 312. In the common course of business, the purchaser of negotiable paper, taking it before due and for value, does not stand in the place of the previous holder; the law, on the contrary, clothes him with a new right, and frequently vests him with a better title than his indorser possessed. But this is not the case after the paper has been dishonored, or where the purchaser takes it chargeable with notice of the invalidity of the instrument or the infirmity of his title to it.

In this state, the declarations of the payee of a negotiable note cannot be shown in evidence against a subsequent holder, though made after it was due, and before it was transferred to the plaintiff: and the rule is the same, though the payee be since deceased. Kent v. Walton, 7 Wend, 256; Beach v. Wise, 1 Hill, 612; Smith v. Schenck, 18 Barb. 344. In Paige v. Cagwin (7 Hill R. 361), the question was much discussed, and Senator Lott, who delivered the prevailing opinion of the court, maintains the doctrine that the declarations of a prior holder are not admissible against the plaintiff where his title or interest is not identical with that of the declarant; and that the identity of interest, spoken of in the books, is found to exist only where the rights of the assignor or indorser continue, and are represented by the assignee or indorsee; so that, in the ordinary case of a sale or transfer for value, the declarations of a former owner cannot be shown in evidence in prejudice of the purchaser's rights. Brown v. Mailler, 2 Kernan R. 118. So, in a late case, it was held, that where a sale of personal property is shown, the prior declarations of the vendor cannot be proved to show a previous sale of the same property. Coit v. Howd, 1 Gray, 547.)

(1) See by Wightman, J., in Roberts v. Justice, 1 Car. & K. 94.

death. At the trial at Nisi Prius, Lord Ellenborough, C. J., rejected the evidence of her declaration that she had parted with the mares, on the ground that the declaration was not accompanied by any act relative to the management of the farm. Upon this it may be remarked, that although declarations accompanying acts may be explanatory of such acts, they do not derive additional credit from that circumstance as to matters totally unconnected with the acts which they accompany, except so far as they may be thought more deliberate. The Court of Common Pleas held that the declaration was admissible, as being made against interest; and Lord Mansfield, C. J., concluded his judgment by saying, "it ought therefore to have been received, because the right of the lord of the manor depended upon her title." This case may perhaps, therefore, in some measure, be considered as resting on the doctrine of admissions on account of the privity between the lord of the manor and the tenant.

Declarations of persons alive.

In the case of Walker v. Broadstock,(1) it was stated by Lord Kenyon, C. J., that the declarations of occupiers were evidence against their own rights. This case may be supported on the ground of the declarations of occupiers being admissible as explanatory of the fact of possession, or perhaps, more satisfactorily, on the ground of the admissions being made by privies in estate.(2) It seems difficult to support it on the broad principle stated by Lord Kenyon; for one of the declarants was alive.(3) The question was concerning the existence of a prescriptive right of common, and a deceased occupier of the plaintiff's property had, during his occupation, said that his cattle had been impounded on the place in dispute; and a living occupier had, during his enjoyment, declared he believed that no right of common belonged to the property. In a late case,(4) Lord Denman, C. J., in delivering the judgment of the court, says: "It is clear that declarations of third persons alive, in the absence of any community of interest, are not to be received to affect the title or interests of other persons, merely because they are against the interest of those who make them."

Such declarations, derogatory to the declarant's title, are admissible, whether made verbally,(5) or in writing,(6) or by deed,(7) or in an answer to a bill in chancery(8); but they must appear to relate to matters which are within the declarant's own knowledge, or at least upon which he has

(1) 1 Esp. 458.
(2) *Vide infra.*
(3) As was the case also in Doe d. Hindley v. Rickarby, 5 Esp. 4.
(4) Phillips v. Cole, 10 A. & E. 111.
(5) Carne v. Nicoll, 1 N. C. 430.
(6) Doe d. Baggaley v. Jones, 1 Camp. 367.
(7) Doe d. Daniel v. Coulthred, 7 A. & E. 235.
(8) Trimleston (Ld.) v. Kemmis, 9 Cl. & Fin. 779, 780.

formed an opinion of his own. Where, therefore, a defendant, in his answer to a bill in chancery, set forth what he had heard from another person with respect to his title, without adding that he believed such statement to be true, it was held by the House of Lords, confirming the unanimous opinion of the judges, that the statement was inadmissible.(1)

In Peaceable v. Watson,(2) it was held, that in order to prove seizin of certain premises in a particular individual, it was competent to ask a witness, whether a deceased person, in occupation of the premises, had been heard to say of whom he rented them.(3)

Declarations tending to incumber estate.

There is another important distinction to be borne in mind between those declarations which cut down the title of the declarant, as in the instance of a party in possession stating that he occupied as tenant, and those which would tend merely to incumber the estate, such as the declaration of an occupier that the land was subject to a particular easement. In the latter case, the declaration would not be evidence against the owner;(4) upon the same principle that the acquiescence of a tenant in an easement enjoyed by another party, without the knowledge of the landlord, would not be evidence against the latter;(5) and it might be that the particular easement would be beneficial to the occupier during his term, as in the case of a disputed right of way, if the tenant kept a public house to which it led.(6)

It seems not to be sufficient that a declaration, in one or more points of view, may be against interest, if it appear upon the whole that the interest of the declarant would be rather promoted than prejudiced by the

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(1) Id. 780, 784, 786.

(2) 4 Taunt. 16.

(3) See, also, Holloway v. Rakes, cit. by Buller, J., 2 T. R. 55; Doe v. Green, 1 Gow. 227; Carne v. Nicoll, 1 N. C. 430.

(4) Scholes v. Chadwick, 2 Mo. & R. 507. And see by Patteson, J., in Tickle v. Brown, 4 A. & E. 378.

(5) See Daniel v. North, 11 East, 372; by Le Blanc, J., Id. 375. See, also, Wood v. Veal, 5 B. & A. 454.

(6) By Lord Denman, C. J., in R. v. Bliss, 7 A. & E. 551.

So, in regard to a question of dedication, the acts of a previous owner may be shown to establish the fact of dedication; and the use made of the premises may be shown to limit and qualify the public right or easement acquired over the premises. Hunter v. Trustees of Sandy Hill, 6 Hill R. 407; 18 Barb. 222; 19 Id. 179, 428; 19 Penn. 64; 7 Rich. 435; 2 Ohio (N. S.), 107. In the case of a lost deed, parol evidence may be given to establish its existence, its contents, and the character of the possession claimed under it; but its existence and execution must be clearly proved before such parol evidence can be received, and before it will be allowed to override a well established written title. Metcalf v. Van Benthuysen, 3 Comst. 424. So in the case of a lost will; its execution having been proved, it is competent for the party claiming under it to prove its contents by parol, and show that it was read at a meeting of the heirs on the death of the testator, and acquiesced in by the plaintiff's ancestor as a valid will. Fatherly v. Waggoner, 11 Wend. 599. See, also, Dwight v. Brown, 9 Conn. 91–98.

declaration. Thus, in Outram v. Morewood,(1) which was an action of trespass for breaking and entering a particular close, it became material to identify the close (in which the dispute concerning the right of digging coals arose), as being parcel of an estate, out of which certain rents had been reserved in an ancient conveyance. The party who sought to do this, produced the books of a person under whom he derived title to those ancient rents, in which that person acknowledged the receipt of rents from the person who had conveyed the close to the plaintiffs, which last-mentioned rents corresponded with the rents that had been anciently reserved. This evidence was held to be inadmissible by the Court of King's Bench. It may be observed, even supposing, according to the authorities, that there was reasonable probability of the entry being used against the maker, for the purpose of proving the payment, still if it could be used by the representative of the maker to prove title to the land, the entry might, upon the whole, be in favor of the maker's interest.

Debtor and creditor account.

But it is no objection to the admissibility of a book containing an account, in which a deceased party has entered the sums received by him, that on the opposite side he has entered payments made by him,(2) even though it should appear that the balance of the account is in his favor,(3) for if the party who made the entries had been alive, those entries in which he charged himself with receipts would have been evidence against him, while those by which he discharged himself, though as a portion of the whole account they could not have been altogether rejected, would have been entitled to very little weight; upon the same principle that in a bill of particulars delivered by a plaintiff in a cause, the items in which he gives credit are evidence against him, while the items he puts forward as the ground of his claim do not at all operate in his favor.

In the case of Clark v. Wilmot,(4) entries in the books of the deceased

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(1) 5 T. R. 121.

(2) Rowe v. Brenton, 3 M. & R. 268.

(3) Williams v. Graves, 8 C. & P. 592. See, also, Doe d. Teynham (Ld.) v. Tyler, 4 M. & P. 377.

(4) 1 Y. & C. 53.

NOTE 105.—The written receipt for money due on a judgment, signed by the deceased attorney on record, was received between third persons (Thompson v. Stevens, 2 Nott & M'Cord, 493); and to prove a party's diligence in collecting bonds, receipts for them, signed by a deceased counselor at law, were held admissible. Alston v. Taylor, 1 Hayw. 381, 395; Hair v. Glover, 14 Ala. 500. We shall see, *post*, note 107, that this rule, confining the receipt of entries to the ground of their being against interest, is, except in South Carolina and some few other states, swallowed up in the broader ground, letting in any entry made in the usual course of the deceased's business.

But a mere charge for services in the book of the deceased, though a long time may have since elapsed, cannot be used as evidence of payment. It seems that the evidence of payment must be an actual entry; and cannot, for the purposes of this kind of evidence, be inferred from the lapse

solicitor of the defendant were admitted as evidence for the plaintiff in a bill of foreclosure, the entries being to the effect that he had received the mortgage money and paid it over to the defendant. It appeared that by taking these items into the account between the defendant and his solicitor, the latter would be to a slight amount a creditor of the former; by rejecting them, he was a debtor.(1)

Entries of receipt of rent, made by a deceased executor, who had an interest in land, have been held admissible evidence for a person claiming the land under him, where the rent has been received and accounted for by the deceased in his capacity of executor, the entries not having been made by him in his character of landlord.(2)

Where certain entries of receipt of money, made by proctors, who were members of an ecclesiastical corporation, were adduced in evidence by that corporation, in a suit commenced by them for tithes, it was held that the proctors were interested against the entries, because they charged themselves with the whole amount, whereas, as members of the corporation, they had only an interest in a proportionate share of the moneys receivable.(3)

There is a very remarkable class of cases, according to which entries made by a deceased parson, of the receipt of ecclesiastical dues, have been

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of time. Star v. Bradford, 2 Pennsylv. Rep. 384, 396, 397; Richardson v. Kimball, 28 Maine, 463.

(The entries of a deceased agent, made in the usual course of business as required by his duty, his handwriting in the book being proved, and the book appearing, to the court, on inspection, to have been fairly kept, are evidence of the facts stated. Dow v. Sawyer, 29 Maine, 117. So, entries made by a clerk, since deceased, are admissible in evidence in proof of the facts as stated; they are received from the necessity of the case, and are, consequently, not admissible where that necessity does not exist. Brewster v. Doane, 2 Hill, 537; Bank of Monroe v. Culver, Id. 531. Preliminary proof must, of course, be given to establish the necessity. Brown v. Harrison, 17 Ala. 774. The entries must be shown to have been made in the course of his employment. Lockey v. Schreiber, 17 Mis. (2 Bennett) 146. And they must appear to be proper matters of a book account: they are not evidence of a loan of money. Cole v. Dial, 8 Texas, 547; Inslee v. Prall, 3 Zabr. 457. Nor of three months' service, charged as one item. Henshaw v. Davis, 5 Cush. 145. See, also, Earle v. Sawyer, 6 Cush. 142. And the books must appear to have been properly kept. Kent v. Garvin, 1 Gray (Mass.), 148. Such preliminary proof is necessary to render the evidence competent. See Den ex dem. Blair v. Miller, 3 Dev. 261.)

(1) In the marginal note to the case, it is stated that the entries were admitted as being made in course of business, though not against the interest of the solicitor: but in Moore v. Deardee (2 Y. & C. 259, n.), Knight Bruce, V. C., said, that he had received the evidence of the entries, on the ground that, upon the whole, they were against the interest of the party who made them, and that the mere circumstance of some portion of them being in the party's favor, would not render the evidence inadmissible.

(2) Spiers v. Morris, 9 Bing. 687.

(3) Short v. Lee, 2 J. & W. 464, and a MS. ruling of Lord Ellenborough, C. J., there cited. Bursars' books have been received: Anon., Lord Raym. 745; by Holt, C. J., in Smart v. Williams, Comb. 249; 12 Vin. Abr. 88. The general rule is, that corporation books are not evidence for the corporation. Marriage v. Lawrence, 3 B. & A. 142 (which related to an entry of payment). See also R. v. Debenham (Inhabs.), 2 B. & A. 185. See Brett v. Beales, M. & M. 416; *supra*, as to where corporation deeds are receivable as evidence of reputation.

received in favor of parties claiming the same interest which the maker of the entries had. Thus, the books of a deceased rector or vicar have been frequently admitted as evidence for his successor.(1) After it had been determined that evidence might be admitted of receipts of payment, entered in private books by persons not obliged to keep such books, nor to account to any one for the sums received, it does not seem to have been contrary to principle to admit evidence of rectors' or vicars' books. For the entries cannot be used by the parsons themselves, and there is no legal privity of interest between them and their successors. Still there is, in point of fact, commonly a strong leaning in favor of the rights of the church, and often a disposition to state those rights most favorably for themselves (as indeed may be said of all declarants) in their own books. It is rare, for example, to find a payment set down as for a modus, in the books of incumbents. In Parsons v. Bellamy,(2) the chief baron said, "As to vicars making evidence for their successors, that is what I cannot listen to. This court knows they do not do so, and the books of a vicar are as good evidence as the books of a steward." In Robinson v. Williamson,(3) it was said by Wood, B., that vicars' books, which are made by and remain in the power of the party himself, are liable to a suspicion, which cannot attach to receipts made by the person against whom they are to be used. Although there be no privity between an incumbent and his successor, yet they stand *in pari jure;* and in the case of admissions and judgments, which are only evidence against parties and privies, successive incumbents are, as far as concerns the admissibility of the evidence (though not for the purpose of estoppel) regarded as privies.(4) The admission, however, of the books of rectors and vicars, has been thought an anomaly in the law of evidence, and various grounds have been assigned for it—such as, the peculiar nature of tithes, the protection due to the clergy, and the *cursus scaccarii*:(5) and one learned judge has intimated an opinion, that

(1) Armstrong v. Hewitt, 4 Price, 216: entries of payments for tithe hay: the books are spoken of by the court as strong evidence. Parsons v. Bellamy, 4 Price, 190; where the memorandum contained a long detail of facts incident to a receipt of payment of a demand with costs, and the court said that the memorandum was admissible, because it had the effect of making the vicar charge himself with the receipt of money. Walker v. Holman, 2 Price, 171; where the receipts showed that the money payments were regulated by the poor's rate. Perigal v. Nicholson, Wightw. 63; where a rector's entry in a parish register was received. The entry was not of the receipt of money, but it was considered as abridging the vicar's rights, being a statement of moduses due. Lord Arundel's Case, 12 Vin. Abr. 255, pl. 3; Drake v. Smith, 5 Price, 369; receipts of tithe money signed by a vicar, in an entry purporting to be a terrier, contained in a book kept in the parish chest. The evidence appears to have been admitted principally on the ground of the credit due to public books.

(2) 4 Price, 190.

(3) 9 Price, 136.

(4) See by Tindal, C. J., in Madison v. Nuttal, 6 Bing. 226.

(5) See by Plumer, M. R., in Short v. Lee, 2 J. & W. 464; by Lord Kenyon, C. J., in Outram v. Morewood, 5 T. R. 123; by Wood, B., in Perigal v. Nicholson, Wightw. 63; by Price, B., in Woodnorth v. Cobham (Lord), 2 Gwill. 653; by King, C. J., Vin. Abr. tit. Evidence, T, b. 73

this species of evidence falls within the rule by which old leases, rent-rolls, surveys, &c., were admitted.(1) General observations have been occasionally used respecting the admission of rectors' or vicars' books, which might be supposed to authorize the admission of any kind of statement contained in them. But such books are not admissible, except where the entries contain receipts of money or ecclesiastical dues, or where they are in other respects apparently adverse to the interests of the makers, in like manner as entries are so considered in analogous cases.(2)

The entry of a deceased lessee of an impropriate rectory, whose interest had expired, has been held to be receivable in evidence.(3) And it is manifest, that the entries of collectors of tithes stand upon the same footing as those of other receivers and bailiffs.(4)

According to some authorities, though not of very great weight, the doctrine, according to which entries in rectors' or vicars' books have been held to be admissible in evidence, has been extended, by a supposed analogy, to the case of the books of a lay impropriator.(5) The analogy, however, entirely fails, so far as the doctrine in question may be considered as depending on the circumstance that the entries are against interest; inasmuch as they are available for the representatives of the party making them.(6) In the case of Short v. Lee,(7) the master of the rolls was of opinion, that entries in the books of an ecclesiastical corporation aggregate, entitled to a rectory, were admissible evidence for the corporation in suits for tithes brought by them.(8)

Entries against interest need not be cotemporaneous with facts.

Entries of this description, namely, such as are against the interest of the party making them, are not necessarily required to be made cotempo-

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in the first trial of the case of Le Gros v. Levemore, Gwill. 59; 1 E. & Y. 521. Lord Ellenborough, C. J., in Roe d. Brune v. Rawlins (7 East, 290), puts the admissibility of vicars' books simply on the ground of absence of interest. In Short v. Lee (2 J. & W. 464), the master of the rolls refers to the analogous decisions respecting prescriptions *in non decimando*, when set up against lay impropriators. See also by Lord Hardwicke, in Glynn v. The Bank of England, 2 Ves. 43.

(1) By Parke, B., in Stobart v. Dryden, 1 M. & W. 617. As to the admissibility of these last-mentioned documents, *vide supra*.

(2) See Ward v. Pomfret, 5 Sim. 475.

(3) Illingworth v. Leigh, Gwill. 1615; 3 E. & Y. 1385.

(4) Jones v. Waller, Gwill. 847; Short v. Lee, 2 J. & W. 490; Woodnorth v. Cobham (Lord), Bunb. 180; Bullen v. Michel, 2 Price, 399; Morgan v. Tyler, cited in Short v. Lee, 2 J. & W. 464; Finch v. Messing, cited Id.

(5) Anon., Bunb. 46; Anon., Vin. Ab. tit. Evidence T, b. 73, T, b. 117. See observations on these cases by Plumer, M. R., in Short v. Lee, 2 J. & W. 464. It has been suggested, Id., that the cases in Bunbury and Viner relate to the same suit,—that the case in Bunbury is the report of the trial at Nisi Prius,—and the case in Viner a note of the hearing in the Exchequer.

(6) They fall precisely within the rule laid down in Outram v. Morewood, *supra*, p. 335.

(7) 2 J. & W. 464.

(8) The master of the rolls expressed himself strongly in favor of another ground, which was sufficient for the admission of the evidence.

raneously with the fact of which the entry is made; but they are admissible though made at a subsequent period.(1) And in this respect it will be seen they differ from those entries which are admissible as having been made in the course of any duty or employment.(2)

It is a question of considerable importance, how far declarations against interest are receivable in respect of matters forming a part of the declarations and connected therewith, but not in themselves affecting the interest of the declarant.

Where declarations of deceased persons, acknowledging the receipt of money, have been admitted, it appears that they have often been admitted as evidence, not merely of the fact of the deceased having received the money, but also of the circumstances stated as the occasion of the payment.(3)

In Warren v. Greenville,(4) upon a question whether a surrender to a recovery could be presumed, the book of a deceased attorney was produced, which contained a charge of a sum for suffering a recovery, two items of which related to the drawing of a surrender; and it appeared by the book that the bill was paid. The court held that the entries were admissible evidence, and material upon the inquiry into the reasonableness of presuming a surrender.

In Stead v. Heaton,(5) the principle of the admissibility of declarations against interest, for the purpose of proving everything contained in them, was carried still further, and it has been said, to the extreme verge of the law.(6) In that case, which respected the existence of a customary payment for the reparation of a parish church, churchwardens' accounts were produced, in which were the following entries: "Received of Haworth, who this year disputed this our ancient custom, but after we had sued him, paid it accordingly; 8*l.* and 1*l.* costs;" and, at the head of the same page, was written: "It is an ancient custom thus to proportion church-lay; 1st. The chapelry of Haworth pay one-fifth, Bradford a third of the remainder, and the rest to be legally divided according to the churchwardens of the several other townships in the parish." The court were of opinion, that the entry of payment was clearly admissible, because the officers thereby charged themselves with the receipt; and that the

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(1) By Parke, B., in Doe d. Patteshall v. Turford, 3 B. & A. 898; by Plumer, M. R., in Short v. Lee, 2 J. & W. 475.

(2) *Vide infra.*

(3) See the cases collected in the note to Barker v. Ray, 2 Russ. 67.

(4) 2 Str. 1129. Independently of the credit due to the collateral statement, there was a presumption that the surrender must have been made before the money was paid. See observations on this case by Lord Mansfield, C. J., in Goodtitle v. Chandos (Duke), 2 Burr. 1071; and remarks of Lord Ellenborough, C. J., upon both cases, in Higham v. Ridgway, 10 East, 117.

(5) 4 T. R. 669. See further, concerning entries in churchwardens' books, Cooke v. Banks, 2 C. & P. 481.

(6) By Alderson, B., in Knight v. Waterford, 4 Y. & C., Exch. 294.

other entry was admissible, because immediately referred to; and that both of them, being written on the same page and on the same subject, must be taken into consideration together; that they were both parts of one and the same transaction, each explaining the other.(1)

In Barry v. Bebbington,(2) upon a question of the soil and freehold of the defendant, entries by a deceased steward, of a person under whom the plaintiff claimed, acknowledging the receipt of moneys on account of trespasses committed on the place in dispute, were held to be admissible evidence to disprove the defendant's title, and to establish that of the plaintiff.

In Higham v. Ridgway,(3), which is considered as a leading case upon this subject,(4) upon a question respecting the age of a person, an entry, made by a deceased accoucheur in his book, of having delivered a woman of a child on a certain day, referring to his ledger, in which he had made a charge for his attendance, and marked the charge as *paid*, was held admissible evidence of the time of the child's birth. Lord Ellenborough, C. J., said: "It was idle that the word *paid* only should be admitted in evidence, without the context, which explains to what it refers. We must, therefore, look to the rest of the entry, to see what the demand was, which he thereby admitted to have discharged. By the reference to the ledger, the entry there is virtually incorporated with, and made a part of the other entry, of which it is explanatory." Lord Kenyon, C. J., in another case,(5) in speaking of the evidence of stewards' books, observes, that "such books may be read, not only to charge the steward with the amount, but to show, on behalf of the tenants, that rents have been received, and also to show, in cases where it might become a question, what kind of rents were payable out of particular estates."

In Doe d. Reece v. Robson,(6) on a question whether a lease had really been granted in possession, and not in reversion, entry of charges in an attorney's book, showing the time when a certain lease was prepared, and which charges were shown (as it would seem by the same book) to have been paid, were held to be evidence, after the attorney's death, that the lease was prepared subsequently to the time when it bore date, and at a period when it would have been a lease in possession. It has been observed, that in such cases of entries in the books of deceased attorneys, the entries do not deserve much additional credit from the circumstance of the fact of payment being added. For it would not be probable that

(1) See also Exeter (Mayor, &c.) v. Warren, 5 Q. B. 773; Musgrave v. Emerson, L. J. (N. S.) Q. B. 175.

(2) 4 T. R. 514.

(3) 10 East, 109. For other instances, see Roe d. Brune v. Rawlins, 7 East, 291; Doe d. Powell v. Hill (cited by Taunton, J., in Chambers v. Bernasconi, 1 C., M. & R. 347).

(4) See 2 Smith Lea. Ca. 194.

(5) Calvert v. Canterbury (Abp.), 2 Esp. 646.

(6) 15 East, 32.

fictitious instructions would, without an assignable motive, be inserted in the attorney's book: or if such a motive existed, the adding of the fact of payment would not remove the suspicion attached to the entry. In Shipwith v. Shirley,(1) where an attorney's book was adduced, along with other evidence, in proof of a lost deed, it does not appear that the charges were entered as paid.(2)

In the case of Marks v. Lahee,(3) an entry of tender and refusal of money, made by a deceased clerk of an attorney, in a day-book, kept for the purpose of entering his daily transactions, was held to be admissible evidence to prove the tender; its admissibility was rested on the ground of its showing that the clerk had received the money and had not disposed of it according to his instructions,—so that it rendered him subject to a pecuniary demand.

In the later case of Davies v. Humphreys,(4) E. H., W. D. and J. H. had given their joint and several promissory note to J. E. for 300*l.* W. D. having afterwards paid J. E. 280*l.* on account of the note, the latter made the following indorsement upon it:—"Received of W. D. the sum of 280*l.*, on account of the within note, *the* 300*l. having been originally advanced to E. H.*" An action having been brought by W. D., who had paid the whole amount due, against J. H., to recover contribution from him "as a co-surety," it was held that the indorsement was admissible in evidence, to prove not only the payment of the 280*l.*, but also that the money was advanced to E. H. as principal. Parke, B., in giving the judgment of the court, said: "Certainly, if this point were now for the first time to be decided, it would seem more reasonable to hold that the memorandum of a receipt of payment was admissible only to the extent of proving that a payment had been made, and that it would have the same effect that proof by parol of like payment would have had. In the case of stewards' books, the receipts of money as rent would be equivalent to the proof of payment of money as rent, and establish the title of the person receiving it, and the like. But the authorities have gone beyond that limit, and the entry of a payment, against the interest of the party making it, has been held to have the effect of proving the truth of other statements, contained in the same entry and connected with it." His Lordship, after referring to Higham v. Ridgway, Doe d. Reece v. Robson,(5) and other cases, continued: "Without overruling those cases (and we do not feel ourselves authorized to do so), we could not hold the memorandum in question not to be admissible evidence of the truth of the whole statement in it, and consequently to be evidence, not merely that 280*l.* were paid by the plain-

(1) 11 Ves. 65.
(2) See also Blackelor v. Crofts, Comb. 348; 12 Vin. Abr. 85.
(3) 3 N. C. 408.
(4) 6 M. & W. 153.
(5) *Ut supra*, p. 340.

tiff (W. D.) to the payee (J. E.), as for a debt due from E. H. as principal, but also of the fact that the debt was due from E. H. to him.(1)

It has been held also, that an entry made by a parish sexton in a book, which, under a private act of Parliament, he was required to keep, for the purpose of entering burials and the burial fees, was admissible in evidence in order to prove the residence of a party at the time of his decease.(2)

There are two Nisi Prius cases, however, which appear to be in opposition to this current of authorities. In Doe d. Gallop v. Vowles,(3) Littledale, J., refused to admit a deceased tradesman's bill for repairs, with his receipt thereon, as evidence of the work having been done for the person charged, though the document was found among the other papers of the latter. His Lordship said the cases had gone quite far enough, and there would be no limit, if such a paper as the one under discussion were admitted. And in Doe d. Haden v. Burton,(4) Gurney, B., rejected entries in the books of a deceased tradesman, containing charges for building a cottage, and showing that they had been paid by the lord of the manor.

On the other hand, Lord Denman, C. J.,(5) and Parke, B.,(6) on two different occasions, appear to have admitted similar entries; and the latter learned judge is reported to have said, that he considered the case of Doe d. Gallop v. Vowles(7) to be contrary in principle to Higham v. Ridgway.(8) It may also be remarked, that receipts appear to be much less objectionable testimonies than entries in private books, from the circumstance of their having been given to persons interested to preserve them as evidence against the makers. With regard to the case of Higham v. Ridgway, however, it is to be observed, that the work done, for which the entry of charges was marked "paid," was proved by other evidence than the entries, and that this fact is relied on by Lord Ellenborough, C. J., in giving judgment.(9)

Entry, whether evidence of collateral facts.

But there is a distinction between cases where the admission against interest is part of one entire transaction with the rest of the declaration (as in the instance of stewards' entries, where the entry would have no meaning, unless the whole of it were read), and cases where declarations embrace matters perfectly collateral. This point was discussed in the case of Cham-

(1) 6 M. & W. 166.
(2) Lloyd v. Wait, 1 Phill. 65.
(3) 1 Mo. & R. 261.
(4) 9 C. & P. 254.
(5) In R. v. Hendon (Inhabs.), cited 9 C. & P. 255.
(6) In R. v. Lower Heyford (Inhabs.), cited 2 Smith Lea. Ca. 194, n.
(7) *Ut supra.*
(8) *Ut supra*, p. 340.
(9) See 1 Mo. & R. 262, n.

bers v. Bernasconi,(1) where one of the questions was, whether the certificate of a capture by a sheriff's officer, stating the *place* of arrest, was evidence that the plaintiff had been arrested at the place stated. Bayley, B., expressed an opinion, that supposing the certificate was admissible for any purpose (as being a declaration against interest, or rather as made in the course of official duty), it was not admissible to prove the *place* of arrest.

In the case of Rudd v. Wright,(2) a survey was tendered in evidence, which had been made for the use of Trinity College, Cambridge, the impropriators of a living, of which the plaintiff was vicar, and in this survey certain closes were stated as being titheable to the vicar. Lord Lyndhurst, C. B., observed, that although this document would be evidence against the college in a suit between them and the vicar, it would admit of some consideration whether it was admissible in evidence against a third person; but that it was unnecessary to decide that question, because the object of producing the survey in evidence arose out of a marginal note to the survey. He thought the marginal note could not be received in evidence, inasmuch as it was in the nature of a collateral and incidental observation, made by the person who framed the survey; and that it did not follow, because a document is received in evidence, in which there are entries against the interest of a party, that therefore collateral and inde-

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(1) 1 C. & J. 456. See the decision on the same case in the Court of Error, *infra*. See also Manning v. Clement, 7 Bing. 362; Willis v. Bernard, 8 Bing. 376. And the cases of confessions of prisoners put by Park, J., 8 Bing. 484; Salte v. Thomas, 3 B. & P. 188; where a prison-book was held admissible to prove the period of commitment and discharge of the prisoner, but not the cause of the commitment.

(Though entries be admissible in evidence, as to prove a book account, they do not supersede the necessity of proving such collateral facts as will render them sufficient to establish the disputed allegations. Thompson v. Porter, 4 Strobh. Eq. 58. In ejectment, surveys are admissible to prove the extent of possession (Brugin v. Chevanet, 9 B. Mon. 285); but a memorandum indorsed on a field-book by the surveyor, it not being made by him in the discharge of his duty, is not admissible to prove the death of a third person at a given time. Ridgeley v. Johnson, 11 Barb. 527. Nor are the minutes of a surveyor of lumber, who is under no obligation to keep a record of his surveys, evidence of the facts stated in them (Ayer v. Sawyer, 32 Maine, 162); though such minutes may be used by him in establishing his claim for the services. Witherell v. Swan, 32 Maine, 247. But the account-books of a party cannot be used by the party producing them to prove collateral facts (Batchelder v. Sanborn, 2 Foster (N. H.), 325; though they may be used by the opposite party to prove payment and other collateral matters. Lewin v. Dille, 17 Mis. (2 Bennett) 64; 15 Mis. 105; Winants v. Sherman, 3 Hill, 74; 7 Barb. 107; Low v. Payne, 4 Comst. 247.

In the case of a negotiable note, we have seen that the declarations of a prior holder cannot in this state be shown in evidence against a party taking the same after its maturity (Paige v. Cagwin, 7 Hill, 384); but where a bank is the holder of a note payable at its counter, the maker being a customer of the bank, and having on deposit a sum more than sufficient to meet the note, and the note is actually charged to the maker when it becomes due, and charged against him on writing up his pass-book, these entries of acts done may be shown in evidence against a person taking the note after it became due. Jermain v. Worth, 5 Denio, 342; S. C., 2 Selden R. 276.)

(2) 4 Y. & C., Exch. 294.

pendent matter, which is not a necessary part of such entries, ought to be received.

In the case of Knight v. The Marquis of Waterford,(1) the accounts of a deceased steward were tendered in evidence, for the purpose of showing the liability of former lords of the manor to pay poor-rates on the tithes. On one side of these accounts, the steward had acknowledged the receipt from a tenant of rent for tithes; on the other side was an entry in discharge of the former item, by allowing the tenant a certain sum for poor-rates on the tithes. This second entry was rejected, on the ground that it was not directly connected with the first; but Alderson, B., added, that if the amount charged had been stated to be a sum less the deduction of the sum on the opposite side of the account, it might then possibly have been admissible, on the authority of Stead v. Heaton.(2)

In order to render declarations against interest available, it is not essential that the deceased person, who made the entries, should have been a competent witness, whilst living, to prove the facts contained in the declaration.(3) This was expressly ruled in the case of Short v. Lee,(4) where the entries of a deceased member of an ecclesiastical corporation were admitted on behalf of that corporation in a suit brought by them for tithes. In that case the person who made the entries would (before Lord Denman's Act) have been incompetent to have been examined in favor of the corporation, on the ground of being a party to the suit.

The declarations of deceased persons against their own interest are not the less admissible in evidence, because the facts to which the declarations

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(1) 4 Y. & C. 283.

(2) *Ut supra*, p. 339. See also Doe d. Kinglake v. Beviss, 18 L. J. (N. S.) C. P. 128.

(3) In Warren v. Greenville (2 Str. 1129, cited *supra*, p. 339), it was said by the court, as a reason for receiving an attorney's books, that he might have been examined if living, and his books were, after his decease, the best evidence. A similar qualification of the rule is reported to have been laid down by Bayley, B., in Higham v. Ridgway (10 East, 109); but none of the other judges advert to it. And in Gleadow v. Atkin (1 C. & M. 423), Bayley, J., repudiates the doctrinethat declarations cannot be received, except where the declarant might have been examined in his fetime, and doubts whether he ever used the expressions attributed to him in Higham v. Ridgway. His Lordship refers to Searle v. Barrington (Lord), 2 Stra. 826; S. C., 8 Mod. 279; 2 Lord Raym. 1370; Bosworth v. Cotchett, *infra;* Doe d. Reece v. Robson, 15 East, 32; and Middleton v. Melton, 10 B. & C. 326, as showing that no such qualification exists. See the observations of the master of the rolls in Short v. Lee, 2 J. & W. 464. See also an argument relative to this point in Barker v. Ray, 2 Russ. 71.

(4) 2 J. & W. 464.

The rule admitting entries in evidence is not founded upon the ground that the party making them would, if living, be a competent witness to prove the facts so entered; for such entries are often admitted, as in proving an account where the party making them was not a competent witness. And such entries have been admitted where the person making them has become insane. Holbrook v. Gay, 6 Cush. 215. In case of death. Rembert v. Brown, 14 Ala. 360. See, also, Bradley v. James, 22 Eng. Law & Eq. 14. But a list of debts, made by deceased, and purporting to contain them all, is not evidence to show that he did not owe a particular debt not named. Harrison v. Cordle, 22 Ala. (N. S.) 457.

relate, may be proved by evidence of another kind—as, for instance, by a living witness. This rule may be founded, partly on the great credit due to declarations against interest, and partly on the inconvenience of proving the failure of other evidence. It was held, in Middleton v. Melton,(1) that the entry made by a deceased collector was proof of the fact of the money having been paid, without calling the persons who paid it, or showing that they were dead. And it appears, from the facts of earlier cases, that the same understanding of the courts as to this point is to be implied from them.(2)

In order to use in evidence entries made by agents for others, on the ground of having been made against interest, it will, in general, be necessary to show, by testimony *dehors* the entries, that the person making the entry was in the situation in which he purports to be. The character of the party making the entry must be established before the entry is read.(3) But there is a distinction where the office of the party making the entry is of a *public* character—in which case the law will presume that a party acting in that capacity has been properly appointed(4)—and where the entry is made by an agent of a *private* individual; in this case, proof of the agency will be required before the entry can be admitted.

Thus, in the case of Short v. Lee,(5) account-books from the possession of a corporation entitled to an impropriate rectory, purporting to be accounts of their collector of tithes, were received, without proof *aliunde*, that the accounting party was really the collector; on the ground that, by the charter of the corporation, it was their duty to appoint proctors to receive the tithes, and a corporation could not have received the tithes themselves. The point was said to be dissimilar to that decided in regard to collectors of incumbents in general, they being persons whose character depends on the pleasure of a private individual, who might or might not appoint. But in the same case, where the accounts of a tithe collector to

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(1) 10 B. & C. 317. And see Poole v. Dicas, 1 N. C. 653, *infra*.

Where a clerk and agent dictates a letter to accompany a consignment of goods, the letter may be shown in evidence without calling the clerk, though he be present in court. Wollenweber v. Ketterlinus, 17 Penn. State R. 389. It is a part of the transaction. Van Rensselaer v. Morris, 11 Paige, 13.

(2) See observations of Parke, J., in Middleton v. Melton, 10 B. & C. 328. In the case of Barry v. Bebbington (4 T. R. 514), which was tried in 1791, one of the memoranda was a receipt of a sum of money in 1785.

(3) See by Lord Lyndhurst, C., and Bayley, B., in Davies v. Morgan, 1 C. & J. 590.

NOTE 106.—So, where the receipt, entry, &c., is given in evidence as part of the *res gestæ*, by the principal, to charge the surety, it must be proved to be genuine, in the usual mode of proving papers. Bernard v. Commonwealth, 4 Litt. 148, 151. See Hagaman v. Stafford, 2 Blackf. Rep. 351; Den ex dem. Blair v. Miller; Snavely v. M'Pherson, 5 Har. & John. 150, 151, 154.

(The agency must be first shown, and after that, the acts of the agent in the execution of the business intrusted to him are the acts of the principal. 2 Hill, 531. But the acts must appear to be a part of the transaction. Bailey v. Wakeman, 2 Denio, 220; S. C., 2 Hill, 279.)

(4) *Vide post*, ch. 9, § 1.

(5) 2 J & W. 464.

an incumbent were produced in evidence, it was held to be necessary to prove *aliunde*, that the person whose book was produced was authorized to collect the tithes.(1) And it seems that the mere antiquity of the book in which the entry is made will not dispense with the necessity for this preliminary proof of agency,(2) although where an account-book is produced from the proper custody, very slight proof, that the party filled the alleged character, will be sufficient, and where the internal evidence is very strong, such proof may be altogether dispensed with.(3)

In Doe d. Webber v. Lord George Thynne,(4) upon a question whether certain ancient books, produced from the archives of the Dean and Chapter of Exeter, were the books of receivers debiting themselves with the receipt of money, and on that account admissible in evidence, it was held, that the similitude which the entries bore to the books of receivers of the same body in modern times, was not a safe and adequate ground for presuming that the ancient books were kept by persons of the same character and description, and accounted upon as such. But, on its appearing that some of the entries in the ancient books (not relating to the matter in question) imported that one A. B. was therein accounting to the dean and chapter for money paid to himself, with the receipt of which he therein debited himself in such forms as *solvit mihi, solvit per me*, the court thought that this was strong internal evidence that the books were actually receivers' books.(5)

Entries, when sufficient.

It will be no objection to the admissibility of an account in which a deceased person charges himself with the receipt of money, that such account does not show for whom the money was received, provided that fact can be established by other proof.(6)

Entries against interest will be admissible if written wholly or in part by the party charged, though not signed by him;(7) so if they are signed by him, though written by another person,(8) or even if they were neither written nor signed by the party himself, provided it can be proved that they were made by his authorized agent, or were adopted by himself, as in the case of accounts delivered by a steward at an audit.(9) And even

(1) See also Carrington v. Jones, 2 Sim. & Stu. 135, 140; Perigal v. Nicholson, Wightw. 63.

(2) Manby v. Curtis, 1 Price, 225; Davies v. Morgan, 1 C. & J. 590; Short v. Lee, 2 J. & W. 464, 466.

(3) See Brune v. Thompson, C. & Marsh. 34.

(4) 10 East, 208.

(5) See also Exeter (Mayor) v. Warren, 5 Q. B. 773.

(6) Rowe v. Brenton, 3 M. & R. 268, 270.

(7) Barry v. Bebbington, 4 T. R. 514; Rowe v. Brenton, 3 M. & R. 267, 269; Doe d. Bodenham v. Colcombe, C. & Marsh. 155.

(8) Doe d. Litchfield (Earl) v. Stacey, 6 C. & P. 139.

(9) Doe d. Graham v. Hawkins, 2 Q. B. 212; Exeter (Mayor) v. Warren, 5 Q. B. 773: Doe d. Sturt v. Mobbs, C. & Marsh. 1.

if the party who actually made out the accounts be alive, it is not necessary that he should be called as a witness, though his non-production may be matter of observation to the jury.(1)

But in the absence of some proof of agency, entries charging a deceased party will not be receivable. Thus, in the case of De Rutzen v. Farr,(2) it was held, that accounts of rent, signed by a person styling himself clerk to a steward, but not shown to have been employed by such steward, otherwise than by the accounts themselves, were not evidence to prove that the rent had been received.

The handwriting of a deceased party, charging himself, need not, however, be proved, after a lapse of thirty years, provided the book containing the entries be produced from the proper custody.(3)

SECTION VIII.

Exception to the General Rule as to Hearsay, in Cases where Declarations or Entries have been made in the Course of Office or Business.

From the observations of several judges on various occasions, it might seem that where there is a competency of knowledge, or at least peculiar means of knowledge in an individual making a declaration, and a total absence of interest to pervert the facts to which he has spoken, his declarations would be admissible evidence after his death, even though the declaration did not operate against his interest.(4) But these observations are too loose, and too much at variance with the principle of the cases which have been just considered, to be regarded as establishing any rule less rigid than that above laid down, which requires the declaration to be against the interest of the person making it, before it can be received in evidence.

Declarations, entries, &c., made in the ordinary course of business.

There can be no doubt, however, that a rule exists, which allows of written entries made by deceased persons being received in evidence, even though not made against their interest, provided that, in addition to a peculiar and personal knowledge of the facts, and the absence of all

(1) See by Patteson, J., in Doe d. Graham v. Hawkins, 2 Q. B. 217.

(2) 4 A. & E. 53.

(3) Wynne v. Tyrwhitt, 4 B. & A. 376. See also Exeter (Mayor) v. Warren, 5 Q. B. 773.

(4) See by Lord Ellenborough, C. J., in speaking of vicars' books, in Roe d. Brune v. Rawlins, 7 East, 290; by Bayley, B., on the principle of this case, in Gleadow v. Atkin, 1 C. & M. 420. See also by Lord Ellenborough, C. J., in Doe d. Reece v. Robson, 15 East, 34; by Le Blanc, J., in Higham v. Ridgway, 10 East, 120. But subsequent authorities have treated the case of Higham v. Ridgway, as decided on the ground of interest; by Littledale, J., and Park J., 10 B. & C. 326, 327; by Lord Lyndhurst, C. B., and Bayley, B., 1 C. & J. 456, 457; by Bayley, B., 1 C. & M. 420.

interest to pervert them, the entries appear to have been made in the ordinary course of official, professional, or other business or duty, and to have been immediately connected with the transacting or discharging of such business or duty, and to be cotemporaneous with the transaction to which they relate; and it appears that upon general principle there is no sound distinction between written entries and verbal declarations made under such circumstances.(1)

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(1) *Vide supra*, p. 304. And see by Lord Campbell, C., in the Sussex Peerage Case, 11 Cl. & Fin. 113.

NOTE 107.—We have seen, by various cases in note 78, *ante*, and in other places, and may see farther, by cases which we shall here cite, that all memoranda, entries, *ex parte* affidavits, certificates, receipts, accounts stated, or other papers framed by private persons, are of themselves mere naked hearsay. They are, therefore, never allowed to possess any intrinsic force, as proof against third persons (Steel v. Duncan, 2 Yeates, 113; Den ex dem. Bickham v. Pissant, 1 Coxe, 220; Newson's Adm'r v. Douglas, 7 Harr. & John. 417, 423; Treat v. Barber, 7 Conn. Rep. 274, 278; Philadelphia Bank v. Officer, 12 Serg. & Rawle, 49; Ridgway v. Farmers' Bank of Bucks Co., 12 Serg. & Rawle, 256; Chase v. Smith, 5 Verm. Rep. 556); though we have also often had occasion to see that these, or any other declarations, may be made evidence by the intervention of some extrinsic circumstance. We come now to consider how far the written declarations of third persons, who are merely indifferent and totally disconnected with the party, may be received to affect him upon the mere circumstance that the writer is dead at the time when the declaration is offered. Heretofore we have seen that the receipt of such papers turned much upon the notion that the entry was at the time against the interest of the party making it. And the last case stated in the text, takes the distinct ground that the entry would not charge the servant; and therefore it was not within Lord Torrington's Case. With how much propriety that ground can be retained by the English courts, as being consistent with Lord Torrington's Case, will be seen by the remarks of our author, as well as by Evans v. Lake, and some other kindred cases stated in the text. One of them (Hagedorn v. Reid), surely maintains no such principle: and this is not the only English case allowing the entry of a deceased person as evidence, merely because it was done in the usual course of his business. In Doe ex dem. Patteshall v. Turford (3 Barnw. & Adolph. 890), the indorsement of a memorandum of service upon the tenant, on the duplicate of a notice to quit, appeared to be in the handwriting of a deceased attorney. And, it being proved that such indorsement was in conformity to the usual practice of his office; that he prepared it himself, and took it with him on going out with two similar notices prepared at the same time, and returned, having indorsed the two other corresponding duplicates in the same way; and that the other two notices were served on the same occasion; although such services were usually performed by his clerks, the memorandum on the duplicate of the notice in question was allowed, with the other circumstances, as sufficient proof that it had been also served. See also per Parker, C. J., in Welch v. Barrett, 15 Mass. Rep. 384; and the remerks of the Lord Chancellor in Barker v. Ray, 2 Russ. 63.

But however Lord Torrington's Case may have been considered by the English courts, it has generally been treated by our own according to its more obvious principle; not only as letting in all books of account kept by a deceased clerk, but all other entries or memoranda made in the course of business or duty, by any one who would at the time have been a competent witness to the fact which he registers. Welch v. Barrett, 15 Mass. Rep. 380; Nicholls v. Webb, 8 Wheat. 326; per Duncan, J., in Farmers' Bank of Lancaster v. Whitehill, 16 Serg. & Rawle, 90. Accordingly, it has been held in a series of cases that, in the common action by a merchant for goods sold, the entries of his deceased clerk in the shop-books are admissible for the plaintiff. Lewis' Ex'r v. Norton, 1 Wash. Rep. 76; Hunter v. Smith, 6 Mart. Lou. Rep. (N. S.) 351, 352; Herring v. Levy, 4 Mart. Lou. Rep. (N. S.) 383; Clarke v. Magruder, 2 Har. & John. 77; King v. Maddux's Ex'rs, 7 Id. 467; per Parker, C. J., in Welch v. Barrett, 15 Mass. Rep. 386. And see per Baylies, J., in Chase v. Smith, 5 Verm. Rep. 559. So of a like entry by the deceased

clerk of an administratrix, to prove the payment of money by her (Brown v. Brown's Adm'x, 2 Wash. Rep. 151); or of a deceased bank clerk, to show that a depositor has overdrawn. Union Bank v. Knapp, 3 Pick. 96; Patton's Adm'rs v. Craig's Adm'rs, 7 Serg. & Rawle, 126. And a surviving clerk may be sworn to explain the meaning of an entry of a deceased fellow clerk. Hood v. Reeve, 3 Carr. & Payne, 532. On the same general ground, the memorandum of a re-survey, made by a deceased surveyor and indorsed on the original survey, is receivable. Snavely v. M'Pherson, 5 Har. & John, 150, 151, 154; Ringgold v. Galloway, 3 Id. 451, 455, 456, 457, *contra.* But, to be admissible, it must be particular, definite, and certain. Where it was made up of opinions and loose statements, it was rejected. Stoddard v. Manning, 2 Har. & Gill. 147, 156, 157. The field notes of Lord Halifax's surveyor (he being dead) were received. Richardson v. Carey, 2 Rand. 87. The entry of a deceased commissioner to take acknowledgments of deeds, charging for certain acknowledgments, were received in evidence, on a question upon the genuineness of certain deeds. Nourse v. M'Cay, 2 Rawle, 70.

It should be observed that, in the two last cited Maryland cases, the notes of deceased surveyors, in proper form, are distinctly recognized as within the general principle. Thus, this highly useful and important class of entries come in by a double title; that of boundary, noticed *ante*, note 87, added to the one we are now upon, which is evidently the most comprehensive of the two.

The entries of surveyors, engineers and commercial agents, are obviously destined to very great variety and importance, as a branch of documental testimony.

The most common application of this principle has been made to the entries of notaries and others, intended as memoranda of what they have done in demanding payment, and giving notice of non-payment upon promissory notes, in order to fix indorsers. In these cases, as we shall see at large in our second volume, time and other circumstances being objects of minute attention, often demanding a variety of conduct, nicely, skillfully and promptly adapted to particular exigencies, prudence always dictates a full and careful entry of every step; and such is the usual course. A great majority of this kind of paper, with which the United States is almost literally flooded, is payable at incorporated banks. There its notarial management is generally confided to particular persons, who keep regular registers of what they have done upon each note. Sometimes they act personally, and sometimes through their clerks; and hence, the death of either leaves a good many instances of this kind of secondary proof. Sometimes the notary acts himself, and the entry is made by a clerk or amanuensis, retained for the occasion. But in whatever form, it is now settled that these entries are admissible in evidence on the death of the person who is alone able personally to speak. The leading case on this question is that of Welch v. Barrett (15 Mass. Rep. 380, A. D. 1819), in which the court ground themselves expressly upon Lord Torrington's Case, and advance the general rule with which we began this note, as the true ground of that case. Welch v. Barrett was followed by the Supreme Court of the United States, in Nicholls v. Webb (8 Wheat. 326, A. D. 1823), by the Supreme Court of New York, in Halliday v. Martinet (20 John. Rep. 168, A. D. 1822), by the Supreme Court of Tennessee, in Bell v Perkins (Peck's Rep. 261), and M'Neill v. Elam (Id. 268), both A. D. 1823, and it has since been treated as the settled law. Per Duncan, J., in Farmers' Bank of Lancaster v. Whitehill, 16 Serg. & Rawle, 89, 90; Wilbur v. Selden, 6 Cowen's Rep. 162; Butler v. Wright, 2 Wend. Rep. 369, 370, 375; Hart v. Wilson, Id. 513; Nichols v. Goldsmith, 7 Wend. 160. Finally, several states have passed statutes regulating this notarial evidence. How many we know not. As to New York, see 2 R. S. 283, § 46; Id. 284, § 47; sess. 56, p. 395, 396, act of 1833, § 8. Our information, as to the statutes of other states, is derived incidentally through their reports, from which we find there is something in Kentucky (7 Monroe, 555, 557), something in Tennessee, (Peck, 261), and as to South Carolina, see *infra.*

The principle is, of course, not confined to official acts by notaries; but extends to any other, acting in the line of the same business. If the notarial business and entry be done by a runner or messenger of the bank, it is the same thing (Welch v. Barrett, 15 Mass. Rep. 380), or by a cashier. Nichols v. Goldsmith, 7 Wend. 160. So, if the duty be done by the deceased notary, and the entry made by another, as by his daughter, under his direction. M'Neill v. Elam, Peck's Rep. 268. But in such case, though the person doing the service be dead, the clerk or amanuensis must be produced, if alive. It is not enough that he be out of the jurisdiction of the court. Wilbur v. Selden, 6 Cowen's Rep. 162.

The forms of these entries are as various as the modes which may strike the fancy of the person who does the business. But if significant and certain to a common intent, they are receivable. They have been considered under different modifications in several cases. Nicholls v. Webb, 8 Wheat. 326; Halliday v. Martinet, 20 John. Rep. 168; Bell v. Perkins, 1 Peck's Rep. 261; M'Neill v. Elam, Id. 268; Butler v. Wright, 2 Wend. 369; Hart v. Wilson, Id. 513; Nichols v. Goldsmith, 7 Id. 160. In Bell v. Perkins, the entry was quite general: "duly notified in writing, 9th July, 1819, the last day of grace being Sunday, the 18th;" and so it will be seen of Nicholls v. Webb and several other cases.

The courts in South Carolina seem not to have gone so far as to receive such entries in evidence. Thus, a deceased jailor's original entry in his prison-book, offered to prove the time during which a prisoner was in custody, was denied. Walker v. M'Mahen, 4 Const. Rep. 129. So, the usual entry of a deceased notary to prove demand and notice upon a promissory note. Williamson v. Patterson, 2 M'Cord, 132. Though this has been remedied by statute. Id. note *a*. And see Dobson v. Laval, 4 M'Cord, 57, and Bank of S. Car. v. Green, 2 Bail. 230; in which cases this statute is referred to, and the extent of a notary's territorial jurisdiction, and the form of his certificate under the statute, considered. Some of our courts seem to have been embarrassed with the restricted notion of entry *against interest*, which is still often imputed by the English courts as the principle of Lord Torrington's Case. We think it will be seen by the remarks of our author, and the examination bestowed upon the question in Nicholls v. Webb, not only that no such principle is to be found in Lord Torrington's Case, but that the English courts themselves, especially at Nisi Prius, have several times acted upon the more liberal construction of that case. Indeed, in receiving one kind of this evidence, the learned court of South Carolina have been more liberal than the courts of our other states. The former receive evidence of mercantile accounts between vendor and vendee, not only by proving the entries of a deceased clerk, but those of one absent from the state. Elms v. Cheevis, 2 M'Cord, 359.

In general, the cases agree that the entry, or other memorandum of the deceased, must appear to have been made at or about the time, as a memorandum of the transaction, and not be a mere subsequent declaration of what had been done, in the past tense. Farmers' Bank of Lancaster v. Whitehill, 16 Serg. & Rawle, 89. Accordingly, the letters of a deceased agent or friend, stating what he had done as such, are not receivable. The court say, "such evidence is not like entries in the usual and accustomed mode of business and dealing like Price v. Lord Torrington (1 Salk. 285), or in the ordinary course of official duty, as in the case of Nicholls v. Webb (8 Wheaton); nor within the principles or analogies of any of the intermediate cases, where the books or copies from books regularly kept by deceased persons in the usual course of business, have been admitted upon proof of the death, handwriting and usual course of dealing and transactions by them. It is no part of the *res gestæ*, but a mere *ex parte* statement, not on oath, *res inter alios acta*. Morton's Adm'r v. Smith, 4 Monroe, 313, 314. So on a question of the defendant's diligence, the letters of his deceased agent, who resided abroad, were denied as evidence against the plaintiff. Farmingham Manufacturing Co. v. Barnard, 2 Pick. 532. The court take about the same range of remark as we have given from Morton's Adm'r v. Smith. On the same principle, and accompanied by the same distinctions, the *ex parte* affidavit of a notary's deceased clerk was rejected as evidence, to prove a notice of non-payment. Farmers' Bank of Lancaster v. Whitehill, 16 Serg. & Rawle, 89. In an action on a policy, the protest of the deceased captain was held inadmissible to prove the loss. Patterson v. Maryland Ins. Co., 3 Har. & John. 71, 74, 77. Chase, J., dissenting. Yet an extreme case was allowed to furnish an exception. And letters from an agent, who afterwards died, to prove a demand made of a debtor on a distant barbarous coast, were received, the court putting their admissibility on the ground of a necessity arising from the peculiar and extraordinary circumstances. Greenwood v. Curtis, 6 Mass. Rep. 358. And a still more extraordinary piece of testimony has been recently acted upon in England. A merchant had made a voluntary assignment to his confidential clerk. On his death, a letter or written declaration was found with his will, showing the assignment to have been obtained by undue influence on the part of the clerk. This was received, in connection with other circumstances, as evidence sufficient to set the assignment aside. Collins v. Hare, 3 Dow & Clark, 139, 145, 149, on appeal from the Irish chancery to the House of Lords. In Doe ex dem. Davy v. Haddon (3 Doug. 310), the oral declaration of a judicial officer (since dead), tending to show that he had been guilty of corruption in making an adjudication, was received as evidence

to impeach his act. But whether the usage of the sessions to receive the declarations of a deceased husband as to his place of settlement, could be sustained, was doubted; though Willes, J., thought that it might. Rex v. St. Sepulchre, 4 Doug. 336, 338.

The rule does not extend to mere oral declarations of the deceased. Per Parker, Ch. J., in Farmingham Manufacturing Co. v. Barnard, 2 Pick. 534. But see what was said by the Lord Chancellor in Barker v. Ray, 2 Russ. 63.

In no case, where, owing to some extrinsic circumstance, such as the death of the person making the entry, memorandum or other paper, or his being alive, and able to swear that it accords with the truth, it may be received in connection with that circumstance, is this any ground for the exclusion of oral evidence, as inferior in degree. Thus, though the deceased father may have registered his child's age in his family Bible, this does not preclude testimony on the same point from any one having the requisite knowledge; nor is it necessary to account for the absence of the memorandum. Berry v. Waring, 2 Har. & Gill. 103; Taylor v. Hawkins, 1 M'Cord, 164, *ante*, note 92. And a memorandum of a prisoner's confession, made by a district attorney, need not be produced. He may give oral evidence of the admission. Patton v. Freeman, Coxe's Rep. 113. The use of memoranda made by a witness, and from which he testifies in court, and the extent to which it becomes evidence, we have already partially seen, and shall have occasion to consider more at large, when we come to the title of the examination of witnesses. But the serious question, when the degree of this kind of testimony is looked to is, whether it be not itself inferior and secondary, so long as the ordinary oral proof appears to remain within the power of the party; not whether the latter shall give way to the former. And accordingly the original entries of the deceased clerk of auctioneers, were denied as evidence of sales by him, made for the plaintiffs to the defendants. The point was contended, and seems to have been holden, on the ground that the auctioneers were alive, and competent witnesses, and their evidence, therefore, the best. Chase, Ch. J., and Nicholson, J., dissented, holding the testimony admissible. They thought it was not inferior in degree to that of the auctioneers. Walsh v. Gilmore, 3 Har. & John. 383. The learned judges, who dissented, will find themselves fully sustained, by a late case in the King's Bench, which we stated for another purpose, *ante*, note 103, Middleton v. Melton, 10 Barnw. & Cressw. 317. That court held, unanimously, that difference in degree is not predicable between testimony coming from a personal observer of the matter, and an entry of the same matter by a deceased observer. It will be seen, that there, the proof was of entries, showing money paid to, and ticked off by a deceased collector of taxes made by him, and accompanied with various receipts for the money, in order to charge his sureties; both the ticked and receipted payments, of course, being provable by those who made them. The objection was distinctly raised, that their testimony would be higher in degree, and as distinctly overruled. Here, too, secondary evidence was given of the book itself, containing the entries which the defendant had refused to produce, on notice; yet held equal in degree with the testimony of an eye-witness. In looking over the cases relating to this kind of testimony, it will be perceived that the courts must, in a great variety of cases, have acted in total disregard of this distinction; uniformly allowing the party to make his election between an entry and a living witness of the fact.

But if you seek to prove the contents of the paper, it must be produced, or its absence accounted for. Curtis v. Patton, 6 Serg. & Rawle, 135; Middleton v. Melton, *supra*. And in all cases the handwriting of the person making the entry must be proved in the usual way. Snavely v. M'Pherson, 5 Har. & John. 150, *ante*, note 106.

Before the entry, &c., is entitled to be used, the person who made it must be first shown to have died. Kenedy v. Fairman, 1 Hayw. 458; Whitefield v. Walk, 2 Hayw. 24; Wilbur v. Selden, 6 Cowen's Rep. 162. It is not enough that he be beyond the jurisdiction of the court, or beyond the reach of process. Kenedy v. Fairman, 1 Hayw. 458; Whitefield v. Walk, 2 Hayw. 24; Wilbur v. Selden, 6 Cowen's Rep. 162; Cummings v. Fisher, Anth. N. P. Rep. 1. *A fortiori*, if he be within reach of process (Tunno v. Rogers, 1 Bay, 380; Philadelphia Bank v. Officer, 12 Serg. & Rawle, 49; Smith v. Lane, 12 Serg. & Rawle, 80, 87); and present in court. Weem's Lessee v. Disney, 4 Har. & M'Hen. 156; per Marcy, J., in Leggett v. Boyd, 3 Wendell, 376, 379. But insanity has been holden an excuse equivalent to that of death. Union Bank v. Knapp, 3 Pick. 96. See *ante*, note 92. And several cases have holden that permanent absence from the state is the same thing. Elms v. Cheevis, 2 M'Cord, 350; Tunno v. Rogers, 1 Bay, 480.

It appears to be a legitimate ground for admitting such entries or declarations in evidence, that it would be contrary to the experience of mankind, if, in the generality of instances at least, they were not exempt from the suspicion of fraud or carelessness: it is of course presumed that no temptation to deceive can be suggested; and it is no unimportant guaranty against fraud, that the declarations cannot be available for the author of them during his lifetime. By the restriction which requires that the declarations should have been made in the course of ordinary business, and not only connected with the transactions to which they relate, but also cotemporaneous with them, a reasonable ground is laid for presuming that they are accurate. An additional reason for the admissibility of such evidence is, that the weight attached to the evidence is not founded merely on the presumption of the credit due, under the circumstances, to the authors of the declarations, but also on the presumption, that in the ordinary course of business such declarations would have been made, if the principal fact to be proved had really taken place. Further, it may be thought, that as transactions in business are frequently confined to the knowledge of a few persons, there is some reason, on the ground of general convenience, for enlarging the rule, as far as can safely be done, and for adapting it to the exigencies of the community.(1)

In the case of Price v. Lord Torrington,(2) which was one of the earliest reported upon this subject, the plaintiff, who was a brewer, brought an action for beer sold and delivered; the evidence given to charge the defendant was, that, according to the usual course of the plaintiff's dealing, the draymen came every night to the clerk of the brew-house, and gave him an account of the beer they had delivered out, which he set down in a book kept for that purpose, to which the draymen signed their names in the presence of the clerk;(3) the drayman, whose name appeared to be signed to an entry stating the delivery of the beer in question, was dead; and the signature was proved to be his. It was ruled, that this was good evidence of a delivery.

In Pitman v. Maddox,(4) in an action on a tradesman's bill, a shop-book was admitted by Holt, C. J., as evidence to prove the delivery of goods, it being proved that the servant who kept the book was dead,(5) that the

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(1) See by Tindal, C. J., in Poole v. Dicas, 1 N. C. 653.

(2) 1 Salk. 285; S. C., 2 Lord Raym. 873; Holt, 300. See, also, 1 Smith Lea. Ca. 139.

In Massachusetts, an account-book that appears to have been copied every Saturday night by a clerk from the delivery-book of the drayman, accompanied by the oath of the clerk that the entries were correctly made and compared by him and the drayman, is not receivable in evidence; the drayman living must be called. Kent v. Garvin, 1 Gray, 148.

(3) See by Lord Raymond, C. J., in Clerk v. Bedford, B. N. P. 282, *infra*.

(4) 2 Salk. 690; S. C., Lord Raym. 732.

(5) See, also, Cooper v. Marsden, 1 Esp. 1.

The rule in most of the states allows the parties' own entries and account books to be received in evidence in his favor, under certain circumstances: as to which see subsequent note.

entries were in his handwriting, and that he was accustomed to make the entries.

In Smartle v. Williams,(1) where the question was, whether mortgage money had been really paid, the book of accounts of a deceased scrivener was held to be good evidence of payment. In this case it does not appear that the scrivener charged himself by the entry.

In the case of Evans v. Lake,(2) upon an issue out of chancery to try whether eight parcels of Hudson's Bay stock, bought in the name of Lake, were in trust for Sir Stephen Evans, the plaintiffs (the assignees of Sir Stephen Evans) showed, first, that there was no entry in the books of Lake relating to the transaction; secondly, six of the receipts were in the hands of Sir Stephen Evans, and there was a reference on the back of them, by a deceased bookkeeper of Sir Stephen Evans, to a certain shop-book of Sir Stephen, in which there was an entry for the payment of money for the whole of the goods. The question, upon the trial at bar, was, whether entries of the payment of the money, contained in the book referred to, should be read. The Court of King's Bench admitted entries from the book in question to be read, as well such as related to the above-mentioned six receipts, as also some which related to two other receipts in the possession of the son of Lake.

In Pritt v. Fairclough,(3) an entry by a deceased clerk, in a letter-book, professing to be the copy of a letter of the same date, made according to the course of business, was received in evidence.

In Hagedorn v. Reid,(4) a memorandum of a deceased clerk, written on a copy of a license, stating that the original had been sent to a particular person, was held to be evidence of that fact, upon proof of the course of business followed by the clerks in the office.

In Champneys v. Peck,(5) upon a question whether an attorney's bill had been delivered within a month before the commencement of the action, an indorsement upon the bill, in the handwriting of a deceased clerk, was received in evidence. The indorsement was in these terms: "March 4th, 1815, delivered a copy to Mr. Peck." Upon this indorsement being produced, and evidence being given that it was the duty of the particular clerk to deliver the bill, and that such an indorsement was usually made in the common course of business upon the copy kept, Lord Ellenborough ruled, that the indorsement was *prima facie* evidence of the delivery of the bill.

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(1) B. N. P. 283. The case appears to be the same as that of Smart v. Williams (Comb. 257), of which a note is given in 12 Vin. Abr. 88, A, b. 15.

(2) B. N. P. 282, referred to by Lord Hardwicke, C., in Glynn v. Bank of England, 2 Ves. 43; and in Lefebure v. Warden, 2 Ves. 54.

(3) 3 Camp. 307.

(4) Id. 379.

(5) 1 Stark. R. 404. The cause was undefended.

The case of Digby v. Steadman(1) is sometimes considered as belonging to this class of cases. There, in an action of trover, the plaintiff's shopman, who proved the delivery, was allowed by Lord Kenyon to produce the shop-book, containing an entry of the delivery in the handwriting of his master, and seen by himself within a short time after it was made. It would seem, that, in the present day, a question of this kind could only arise upon the question as to the means by which a witness might refresh his memory.(2)

The more recent cases of Doe d. Patteshall v. Turford, and Poole v. Dicas, next to be mentioned, have settled the principle upon this subject.

In Doe d. Patteshall v. Turford,(3) the question was, whether a notice to quit had been served on a tenant by an attorney. It was shown to be the usual practice in the attorney's office, for the clerks to serve notices to quit on tenants, and to indorse on duplicates of such notices the fact and time of service. On one occasion, the attorney himself prepared a notice to quit to serve on a tenant; took it out with him, together with two others prepared at the same time, and returned to his office in the evening, having indorsed on the duplicate of each notice a memorandum of service on the tenant; two of them were proved to have been delivered by him on that occasion.(4) The question at the trial was, whether the indorsement made by him on the duplicate of the third notice, could be received, after his death, as evidence to prove the service of that notice. Littledale, J., received it; and the Court of King's Bench held, that it had been properly received. The cases before cited were referred to as authorities for the admissibility of the evidence. Lord Tenterden, C. J., first adverted to the practice in the office as to service of notices by the clerks, and observed that though they were regularly served by the clerks, and not by the principals, yet, that a principal might occasionally serve such a notice, and that the court must assume, that when a principal served the notice, he would do what he required his clerk to do. "The indorsement, then" (added the Lord Chief Justice, in conclusion), "having been made in the discharge of his duty, is, according to the authorities cited, admissible evidence of the fact of the service of the original." Littledale, J., said: "If the notice in question had been served by a deceased clerk, his indorsement on the duplicate, coupled with proof of the practice of the office, would have been sufficient evidence of the service. Then, is the indorsement of the attorney tantamount to a clerk's? I think it is; for it must be assumed, that he would do what he required his clerk to do." Parke, J., pointed out the several facts of the case,

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(1) 1 Esp. 327.

2) See Cooper v. Marsden, 1 Esp. 1.

(3) 3 B. & A. 890.

(4) This statement of the facts of the case was made by Tindal, C. J., in Poole v. Dicas, 1 N. C. 653.

which were strong circumstantial evidence, that the notice in question had been delivered at the time stated in the memorandum indorsed on the duplicate. Then adverting to the practice of the office as proved, he remarked that it must be presumed that the attorney (one of the principals in the office) observed the rule of the office as well as the clerks.

The case of Poole v. Dicas(1) recognizes and confirms the last-mentioned case of Doe v. Turford to its full extent. The question there was on the admissibility of an entry in a notary's book, as evidence of the dishonor of a bill. A notary's clerk stated at the trial, that when the bill became due (in June, 1833), it was left by the plaintiff with the notary, to demand payment. A copy of the bill was made in a book kept by the notary for that purpose, and one of his clerks (since dead) went out on a Saturday evening to demand payment of the acceptor: in a short time he returned, and in the margin of the book, containing the copy of the bill, wrote by the side of the copy "No effects." This entry was produced, and proved to be in the deceased clerk's handwriting. Another clerk made a similar entry from the deceased clerk's dictation in a separate book, which contained the protest for non-payment. All this was done in the regular course of the notary's business. The entry was received by Tindal, C. J., at the trial, and, as the Court of Common Pleas determined, properly received. After argument, the chief justice said: "We think the evidence in question was admissible, on the ground that it was an entry made at the time of the transaction, and made in the usual course and routine of business by a person who had no interest to misstate what had occurred. This does not carry the law further than the principle established in Doe v. Turford. The entry was made at the time: and all was done in the ordinary course of business. The clerk had no interest to make a false entry: if he had any interest, it was rather to make a true entry:—a false entry would be likely to bring him into disgrace with his employer." Park, J., was of the same opinion, and rested the admissibility of the entries on the ground that they were made in the ordinary course of business, and at the time when the act recorded was done.(2)

It is further to be observed, that in this case the deceased clerk charged himself with the noting of the bill;(3) and, therefore, in that sense, it was an entry against interest.

In the late case of Doe dem. Welsh v. Langfield,(4) it appeared that, by an inclosure act, claims to allotments were to be made in writing, and sent to the commissioners. The claims made were entered by the clerk

(1) 1 N. C. 649.

(2) See, also, Ward v. Garnons, 17 Ves. 134; Pickering v. Ely (Bp.), 2 Y. & C. 249.

It was lately held in Kentucky, that the entries of a deceased merchant, stating the giving of a note and its payment, are not admissible in favor of his partner in an action upon the note. Brannin & Smith v. Foree's Adm'r, 12 B. Mon. 506; 2 John. Cas. 198.

(3) See by Parke, B., 16 M. & W. 512.

(4) 16 M. & W. 497.

in a book, though not required by the act to be so kept. The claims allowed by the commissioners were marked in the book "allowed," and attested by their initials affixed thereto. The entries were made in the course of business and at the time they purported to bear date; and the court intimated a strong opinion (although the point became immaterial for the decision of the case), that these entries were admissible in evidence, upon proof of the clerk's death, and of a negative search for the original claims in the proper repository.

Knowledge of facts necessary.

The courts, however, have shown an indisposition to carry the doctrine of these cases further than they will strictly warrant.(1) It appears, therefore, to be an essential condition of the rule, that the party making the entry should have a personal knowledge of the facts. Upon this principle, it seems, the case of Brain v. Preece(2) was decided. It was proved there to be the course of business for one of the workmen at a coal mine to give notice to the foreman of the amount of coal sold in the course of the day, and the foreman, not being able to write, employed another person to make entries of the sales in a book at the time from the information of the workman: the foreman and workman were both dead; but it was held, in an action for the price of the coal, that such entries were not evidence. In answer to the objection urged against the admissibility of these entries, that they were made from the information of another party, the case of Poole v. Dicas(3) was relied upon as showing that the mere fact of the entry not being in the party's own hand made no difference. But Lord Abinger, C. B., said that that was the case of entries made in the course of business of a public officer; and that the case of entries not of that character, and not written by the party himself, but at his supposed dictation by another man, was widely different.

In the recent case of Davies v. Lloyd,(4) which was not a case of pedigree, in order to show the age of a Jew, it was proposed to give in evidence an entry made by the chief rabbi, who was dead, in a book kept at the Synagogue, it being proved that it was the duty of the chief rabbi to perform the rite of circumcision, which, by the law of the Jews, takes place on the eighth day after the birth of the child, and to make an entry of the fact at the time. But Lord Denman, C. J., after conferring with Patteson, J., ruled that the evidence was not receivable, but without giving any reasons for its rejection. It may probably stand upon the same principle as the last-mentioned case; inasmuch as the entry made by the rabbi would only show the performance of the rite, and any knowledge

(1) See by Lord Abinger, C. B., in Brain v. Preece, 11 M. & W. 775.
(2) 11 M. & W. 773.
(3) *Ut supra*, pp. 354, 355.
(4) 1 Car. & K. 275.

which he might be supposed to have, as to the age of the child, would be derived from the information of others.

In a late action of ejectment,(1) in order to show that the lands sought to be recovered were identical with those included in an ancient lease, to which a former Earl of Arundel was a party, a book found in the muniment room of the Duke of Norfolk, the heir of the Earl of Arundel, was tendered in evidence, purporting to be that of one Spiller, a deceased steward of a former Earl of Arundel, in which was entered a copy of a lease of the lands in question to one Henslow, and a minute to the effect that "Henslow's widow hath assigned to Sir E. Cresswell, who yet claimeth ten years to come;"—Sir E. Cresswell being the ancestor under whom the defendant held possession. But the court held that the minute was not evidence in the cause, as an entry made by a deceased party in the discharge of his duty; as not being an entry of anything done by the steward, but merely of a matter of hearsay, which he might think it important for his master's interest for him to note.(2)

Entries of independent matter not within rule.

The principle of this rule extends only to entries which are made in the ordinary and regular course of duty or business. And it does not extend to entries which, though made in the course of business, include independent matters, which are not necessary to the performance of the duty by the person who makes the entry.

In this respect the entries now under consideration differ materially from those which have been made against the interest of the party making them, which, it has been seen, are admissible not only as evidence of the facts which are directly against the interest of the declarant, but also of other independent facts contained in the same entry, and immediately connected with the other facts.(3)

But in the instance of entries made in the course of business, it has been laid down by a very high authority,(4) that "whatever effect might be due to an entry made in the course of any office, reporting facts unnecessary to the performance of a duty, the statement of other circumstances, however naturally they might be thought to find a place in the narrative, would be no proof of those circumstances."

This branch of the rule will be well exemplified by the case of Cham-

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(1) Doe d. Padwick v. Skinner, 18 L. J. (N. S.), Exch. 107; S. C., 3 Exch. R. 84.

(2) The entry was also held not to be admissible as evidence of reputation of the extent of the manor, or as being made against the steward's interest, or as professing to be a copy of a deed seen by the writer.

For a similar case, with like ruling, see Ridgeley v. Johnson and others, 11 Barb. 527.

(3) See Warren v. Greenville; Higham v. Ridgway, and the class of cases cited *supra*, p. 339, *et seq.*

(4) By Lord Denman, C. J., in giving the judgment of the Court of Exchequer Chamber, in Chambers v. Bernasconi, 1 C., M. & R. 368.

bers v. Bernasconi,(1) in which the question was, whether the plaintiff had committed an act of bankruptcy, and that principally depended upon the *place* where he had been arrested on the 9th of November, 1825—whether at his residence at Paddington, or in South Molton street; the alleged act of bankruptcy being the keeping house by the plaintiff and denying himself to his creditors at his residence at Paddington. To prove the place of arrest, the deputy under-sheriff produced a certificate, signed by a sheriff's officer (since deceased) who made the arrest, and afterwards sent the certificate to the sheriff's office: the witness stated at the trial (which took place in 1831), that the officers were always required to give in such certificates immediately after the caption; that the certificates were the foundation of the writs, and that the officers were charged by their certificates of the caption, and were required to insert in the certificates the place of arrest; but, in the course of the argument for a new trial, the deputy under-sheriff informed the court, that at the trial his attention had been directed to the practice of the sheriff's office at that time; and that he thought that in 1825 the practice of requiring the officer to make a return of the place of arrest had not been adopted.(2) The certificate in question was as follows: "9th November, 1825, arrested A. H. Chambers in South Molton street, at the suit of William Brereton." (Signed,) "Thomas Wright." Lord Lyndhurst, C. B., who tried the cause, received the evidence: but upon a motion for a new trial, the Court of Exchequer thought the question of the admissibility of the evidence of such importance, that they wished the parties to have an opportunity of putting it on the record; Bayley, B., expressing his opinion that, supposing the entry admissible at all, on the ground that it was the duty of the sheriff's officer to make the return, still that the return was not evidence as to the *place* of arrest; it not being (at least at the time when the arrest was made) a necessary part of the officer's duty to state the *place* of arrest.

The Court of Exchequer granted a new trial, and the cause was again tried before Lord Lyndhurst, C. B., who rejected the evidence before mentioned, which was again offered; upon which a bill of exceptions was tendered, and the exceptions came on for argument in the Exchequer Chamber.(3) The bill of exceptions stated, among other things, that the under-sheriff proved it was part of the course of the sheriff's office to require a return in writing of the arrest, and of the place where the arrest is made,(4) under the hand of the sheriff's officer making the arrest; that the sheriff acted on these certificates in making the return; that the certificate produced was annexed to the writ issued against the plaintiff, &c.

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(1) 1 C. & J. 451; S. C., 1 Tyr. 335; S. C. in error, 1 C., M. & R. 347.
(2) 1 C. & J. 452, n.
(3) 2 C., M. & R. 347.
(4) But see 1 C. & J. 452, n., *supra*.

Lord Denman, C. J., delivered the judgment of the court, and observed, that the ground upon which the argument was first rested, viz: that the certificate was an admission against the interest of the party making it, because it made him liable for the body arrested, was not much relied on; but recourse was had to a much broader principle, viz: that an entry written by a person in the course of his duty, where he had no interest in stating an untruth, is to be received after his death as evidence of the fact stated in the entry, and of every circumstance therein described, which would naturally accompany the fact itself. But that all the terms of that legal proposition were manifestly essential to render the certificate admissible; and the statement of circumstances which were not necessary to the performance of a duty, however naturally they might be thought to find a place in the narrative, would be no proof of those circumstances. "Admitting, for the sake of argument," continued his Lordship, "that the entry tendered was evidence of the fact of arrest, and even of the day when the arrest was made (both which facts it might be necessary for the officer to make known to his principal), we are all clearly of opinion, that it is not admissible to prove in what particular spot within the bailiwick the caption took place, that circumstance being merely collateral to the duty done."

In a later case,(1) Tindal, C. J., and Parke, J., both intimated an opinion,(2) that the case of Chambers v. Bernasconi was decided on the ground that it was no part of the officer's duty to certify as to the *place* of arrest; consequently, the certificate was not entitled to credit as an entry made in the regular course of business; that he was going beyond the sphere of his duty in making an entry of the *place* of arrest, and the entry therefore had no claim to be received as evidence of that fact.(3) It will be seen, however, although some doubt seems to have been raised upon the point in the court below,(4) that it was expressly stated in the bill of exceptions,(5) which statement was referred to in the judgment of the court,(6) that the officer was, by the course of the office, *required* to return the *place* where the arrest was made. It cannot, therefore, in strictness, be said, that it was no part of his duty to certify the place of arrest; but the ground upon which the decision rested was this—that the entry, to be admissible, should be confined to facts necessary to the performance of the duty—and that the spot where the arrest took place was merely collateral to the act of duty, which was the making the arrest.

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(1) Poole v. Dicas, 1 N. C. 649.
(2) Id., pp. 651, 655.
(3) See, also, by Parke, B., 16 M. & W. 512.
(4) See 1 C. & J. 452, n.
(5) See 1 C., M. & R. 348.
(6) Id., p. 367.

Meaning of usual course of business.

It may be observed here that the expression, "usual course of business," is applied in contradistinction to what is out of that course; and that where the course of business varies from time to time, nothing can be inferred from it.(1)

In the case of The Queen agt. The Inhabitants of Worth,(2) in order to show that a contract for service had been for less than a year, proof was given that the deceased master had made a practice, when he hired farm servants, of entering the time and terms of such hiring in a book kept by him for that purpose; but the court held the book was inadmissible, as the entries were not made in the course of any duty or employment.

In a late case of an ejectment, to recover some land as parcel of a certain manor,(3) the lessor of the plaintiff, who sought to trace his title through one Sir E. C., in order to prove a lease to one H., and assignments by him to P., and by P. to Sir E. C., offered in evidence an old book, found in the muniment room of the family to whom the manor belonged. This book, among other entries and receipts in the handwrititing of the then steward, contained an entry of the lease in question, and a minute to this effect: "H.'s widow hath assigned to Sir E. C., who claimeth ten years to come." It was held that this entry was not receivable in evidence, not having been made in the course of any duty or employment.

Entry must be cotemporaneous with act done.

Another term in the definition of the principle before stated is, that the entry or written memorandum, offered in evidence, must have been made cotemporaneously with the doing of the act therein recorded; that is (it is conceived), made in point of time so nearly after the act done, as to be reasonably considered a part of the same transaction, according to the ordinary and regular course of business. And this forms another difference from entries in declarations made against interest, which, as has been observed, are not required to be cotemporaneous with the facts to which they relate.(4) This distinction is pointed out by Parke, J.,(5) as follows: "It is to be observed, that in the case of an entry falling under the first head of the rule, as being an admission against interest, proof of the handwriting of the party, and of his death, is enough to authorize its reception; at whatever time it was made it was admissible; but in the other case (*i. e.*, of an entry made in the course of business or duty), it is essential to prove that it was made at the time it purports to bear date; it

(1) By Alderson, B., 16 M. & W. 508.
(2) 4 Q. B. 132.
(3) Doe d. Padwick v. Skinner, 3 Exch. R. 84.
(4) *Vide supra*, p. 339.
(5) In Doe d. Patteshall v. Turford, 3 B. & Ad. 897, 898.

must be a cotemporaneous entry."(1) In Price v. Lord Torrington, the entry was made at night, in the usual course,—the delivery of goods (for the proof of which the entry was wanted) having taken place, if at all, in the same day. In Doe v. Turford, the entry (an indorsement on a duplicate of notice) was made after the conclusion of the business, at the latest in the evening of the same day, if not earlier. In Poole v. Dicas, the entry was made in the regular mode, on the return of the clerk from the business in which he had been employed. In Chambers v. Bernasconi, the entry would have been made (according to the usual course) immediately after the caption. There was no difficulty in any of these cases upon the point whether the entry was made regularly in point of time, and cotemporaneously with the transaction recorded. But in Clerk v. Bedford,(2) there was an entire failure with respect to that term of the definition, which requires the entry to be cotemporaneous with the fact recorded in the entry. In that case the plaintiff, to prove delivery of wine to the defendant, produced a book belonging to his cooper (since dead), whose name was subscribed to several articles; after proof of the handwriting, it was proposed to read the articles so subscribed; but Lord Raymond, C. J., would not admit the evidence, saying it differed from Lord Torrington's Case, because there the witness saw the drayman sign the book every night.(3) In Champneys v. Peck,(4) Lord Ellenborough, C. J., was not satisfied with the evidence of the indorsement of a deceased clerk for proof of the time of the delivery of an attorney's bill, until it had been shown by extrinsic evidence, that the indorsement existed at the time when, according to its purport, the bill had been delivered.

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(1) See, also, by Parke, J., in Poole v. Dicas, 1 N. C. 654, 655.

The rule, as stated in New York, is, that entries and memoranda, made in the usual course of business by notaries, clerks and other persons, may be received in evidence after the death of the person who made them. If living, he must be called; if absent, he must be examined on commission. Brewster v. Doane, 2 Hill, 537. And such entries, verified by the person making them as having been so made, are admissible, though the witness have no present recollection of the transaction. Bank of Monroe v. Culver, 2 Hill, 531. The belief of the witness, based upon the entries, renders them competent evidence. Bank of Tennessee v. Cowan, 7 Humph. 70. If, however, the entry be made by a person having no actual knowledge of the transaction; as where a notary makes an entry in his book from a statement made to him by his clerk; the entry is not admissible in evidence, though the clerk testifies to the accuracy of the entries in the book, from the fact that they were made each day truly and exactly according to the facts, he having no personal recollection of this particular entry or of the facts stated in it. Lewis v. Kramer, 3 Md. 265. When the person doing the act makes the entry, it is not essential that he should be able to recollect the transaction, provided he can testify that, from the manner in which the business was done, he has no doubt that he gave the notice or made the demand according to the entry. 6 Cowen, 90; 15 Conn. R. 206; 8 Ala. 590; 1 Gill, 127; 26 Maine, 45; 4 Harring. 463.

(2) B. N. P. 382.

(3) See Calvert v. Canterbury (Abp.), 2 Esp. R. 646.

(4) 1 Stark. R. 404.

In the case of Pyke v. Crouch,(1) on a trial at bar, it was resolved, that if the duplicate of a will be written by the direction of a testator, and be sent by him to a stranger to keep it safely, and the stranger sends back a letter to the testator, in which he makes mention that he has received the will, such letter may be read after the death of the stranger as circumstantial evidence, to prove that such a duplicate of a will was sent by the testator to the stranger. It does not appear in this case (which was decided at a time when the principle applicable to cases of this description had not been well considered), that the transaction was according to the ordinary and regular course of business: from the nature of the transaction the contrary might be inferred; and if so, the case could not be brought within the principle above stated.

Corroboration, how far required.

It would appear from what is reported to have been said by Taunton, J., in the case of Doe d. Patteshall v. Turford,(2) that another limitation was annexed to the rule under consideration; namely, that entries made in the course of duty or business, require to be corroborated by other circumstances which render it probable that the fact, of which the entry is made, in reality occurred. His Lordship's words, as reported, are: "A minute in writing like the present, made at the time when the fact it records took place (that is, the fact of *delivery of notice*), by a person since deceased, in the ordinary course of his business, *corroborated by other circumstances which render it probable that that fact occurred*, is admissible in evidence."(3) Corroborating circumstances (it is conceived) were not necessary for proving that the fact, *the delivery of the notice*, occurred: but to prove that the making of the entry was *cotemporaneous with the fact of delivery*, circumstantial evidence would be necessary;—this was very clearly shown by Parke, J. The entry was in itself evidence of the fact of the notice having been delivered, and needed no corroborating circumstances as to that fact; corroborating evidence might add to the *effect* or *value* of the entry as proof of delivery, but could not be essential to its *admissibility*, and might not be wanted even for confirmation. It is not improbable, that two or three words may have dropped out of the report: it is conceived that if the proposition had been written thus: "A minute in writing like the present, made at the time when the fact it records took place, by a person (since deceased) in the ordinary course of his business, corroborated by other circumstances, which render it probable that *the entry was made when* that fact occurred, is admissible in evidence,"—it would have been more in accordance with the opinions of the other judges, none of whom require the limitation as expressed by Taunton, J.,

(1) Lord Raym. 730.
(2) 3 B. & Ad. 890.
(3) 3 B. & Ad. 898.

in the language of the report. The expression was, however, referred to by Lord Denman, C. J., in the case of The King agt. Cope,(1) without disapprobation.

Entries admissible though better evidence attainable.

It has been contended also,(2) that entries of this nature are not admissible when better evidence is attainable; but this limitation of the rule was repudiated by Tindal, C. J., who observed: "It has been argued that the decision in Doe v. Turford can only be supported on the supposition that no other evidence could have been given but that which was received. But that is carrying the case further than the facts warrant: for there might have been persons present when the notice was served. In the present case, it would operate as a great hardship to require the testimony of persons who might have been present. The clerk who presented the bill could scarcely, at the distance of two years, point out who it was that answered his application: and if it were necessary to call the persons who resided at the place of presentment, the expense and inconvenience would be enormous." In this respect, therefore, entries of this description stand upon the same footing as entries or declarations made against interest.(3)

Verbal declarations.

It appears also that the rule is not confined to written entries, but, as in the case of declarations against interest,(4) a verbal statement, made in the course of duty and under the other conditions expressed in the rule, will be admissible in evidence. In the Sussex Peerage Case, Lord Campbell remarked, "where a declaration by word of mouth, or by writing, is made in the course of the business of the individual making it, then it may be received in evidence, though it is not against his interest."(5)

In order to lay a foundation for the admission of entries made in the course of business, it must, as in the case of declarations by an agent made against his interest,(6) be first shown that the party was employed in that business; and it has therefore been held, that books in the handwriting of a party, sent by him after he had ceased to be an agent to a joint stock company, were not admissible in evidence against the directors of the company, unless it could be shown that the books were kept by him as such agent.(7)

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(1) 7 C. & P. 720, 727.
(2) In Poole v. Dicas, 1 N. C. 649, 651.
(3) *Vide supra*, p. 344.
(4) *Vide supra*, p. 304, where cases on the subject are cited.
(5) 11 Cl. & Fin. 113.
(6) *Vide supra*, p. 345.
(7) Shrewsbury v. Blount, 2 M. & G. 475.

Entries not evidence for parties in privity.

Entries and memoranda, of the nature under consideration, seem not to be admissible for parties *in privity* with the persons who made them. For although the principle on which such declarations are received, does not depend on the future use of the declaration, still the actual event of its being made available for persons in privity with the maker would, it is conceived, in general, be regarded as proof of an existing motive of interest, sufficient, according to the terms of the rule, to exclude the evidence. It has been seen, in the case of Outram v. Morewood,(1) that entries, admitting a fact adverse to the interest of the person making them, were not allowed to be used for the benefit of persons claiming under the maker. Although no general rule has been laid down by the courts on the subject, even as regards declarations against interest, and although the admissibility of that species of evidence rests on a different kind of presumption from the evidence under consideration, yet it is conceived that, in both instances, the declarations can only be made use of by strangers in interest.

Indorsements on bonds.

There are two remarkable decisions respecting indorsements of interest on bonds and notes, in which it has been held that indorsements, by the obligee or payee, of the payment of interest or part payment of the principal, as having been made in the course of business, were admissible in evidence for a party claiming under the obligee or payee, in order to rebut the presumption of entire payment, which would arise from lapse of time; though it did not appear by negative evidence, but that the declarations might have been made at a time when they would have promoted the interest of the representatives. It is proper to observe, however, that the indorsements in these cases have been represented, by great authorities, simply as declarations against interest. But as they may be considered perhaps as falling within the principle of both rules, it has been thought advisable to defer their examination until those rules had been each separately discussed.

In the case of Searle v. Lord Barrington,(2) which was an action on a bond, brought by the plaintiff as administratrix of the obligee against the

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(1) 5 T. R. 121; *Ante*, p. 335.

(In McKnight v. Lewis (5 Barb. N. Y. R. 681), the certificate of a notary, showing the protest of a note and notice to the indorser, made by him while he was not interested in the note, was held competent evidence of the facts stated in it, in an action on the note brought by the administrator of the notary, the note having been purchased by the latter some time after its dishonor and protest.)

(2) 2 Str. 126; S. C., 8 Mod. 279; 2 Lord Raym. 1370; 3 Brown P. C. 535; 3 P. Wms. 397; 2 Eq. Ca. Ab. 414, n. to Ca. 16; 12 Vin. Ab. 85. With reference to this case, see Glynn v. Bank of England, 2 Ves., sen. 42; Turner v. Crisp, 2 Str. 827; Rose v. Bryant, 2 Campb. 323; Bosworth v. Cotchett, and Gleadow v. Atkin, *infra*.

defendant as administrator of the obligor, the defendant insisted on the length of time that had elapsed between the date of the bond and the commencement of the action, which was about twenty-seven years, as raising a presumption that the money had been paid: in answer to this, the plaintiff offered in evidence two indorsements on the bond(1) in the handwriting of the obligee, one dated in December, 1699, the other in March, 1707, purporting that the whole of the interest had been paid up to the time of these dates.(2) Pratt, C. J., before whom the action was first tried, rejected the evidence(3), on account of the inconvenience which would arise from allowing the obligee, in whose custody the bond always remains, to make such indorsements, whenever he might think proper. The plaintiff was accordingly nonsuited. But after an argument in the Court of King's Bench, on a case stated for the opinion of that court, the other three judges held(4) that the indorsements in question ought to have been left to the consideration of the jury; "for the jury (as the report in Strange states) *might have reason to believe* that it was done with the privity of the obligor; and the *constant practice* is for the obligee to indorse the payment of interest—and that for the sake of the obligor, who is safer by such an indorsement than by taking a loose receipt." The report in 8 Mod. is full and strong to the same effect. "It is the *daily practice* (says that report) to make such indorsements on bonds, and generally at the request of the obligor; and this is the best and surest evidence of the payment of the money, because acquittances and notes may be lost, whereas indorsements will continue as so many brands on the bond, into whose hands soever it falls, as long as the original, which creates the charge, shall continue." The nonsuit was not set aside, because at that time there was a prevailing notion, that as the plaintiff had been put out of court by the nonsuit, the court could not order a new trial. The plaintiff afterwards brought a new action, which was tried before Lord Raymond, C. J.; and the same indorsements were again offered in evidence, to repel the presumption of payment of the principal. The counsel for the defendant objected to the evidence,(5) on the ground that it did not appear when those indorsements were made, otherwise than by the indorsements themselves. But Lord Raymond was of opinion that the indorsements were evidence to be left

(1) See 3 Brown, P. C. 593, and 2 Lord Raym. 1370.

(2) The dates will be found to be as follows: The bond was dated in June, 1697; the first indorsement was in December, 1699; the second in March, 1707; the obligor died in 1710; the plaintiff's letters of administration were obtained in July, 1723; the first action was tried before Pratt, C. J., in 1724; the second action before Lord Raymond, C. J., in 1726. The writ of error in the Exchequer Chamber was in 1729; and the judgment of the Exchequer Chamber was affirmed, on appeal to the House of Lords, in 1730. See the reports in Strange and Brown. The time of the *obligee's* death is not stated in any of the reports.

(3) See the reports in Strange, and 8 Mod.

(4) See the report in Strange.

(5) See the report in Brown.

to the consideration of the jury, and therefore allowed them to be read; and (as one report states) *other circumstantial evidence* being given to induce the jury to believe that the bond had not been satisfied,(1) the plaintiff had a verdict. The defendant's counsel tendered a bill of exceptions, which was sealed by the chief justice; and a writ of error was brought in the Exchequer Chamber. The errors were twice argued in the Exchequer Chamber, and the judgment of the Court of King's Bench was affirmed.(2) A writ of error was then brought in the House of Lords; and after counsel had been heard on this writ of error, and the judges had delivered their opinions *seriatim*, the House of Lords affirmed the judgment of the Exchequer Chamber. The grounds of the decision in the Exchequer Chamber, and in the House of Lords, do not appear in any of the reports.(3)

Indorsements on note.

This case has been followed by that of Bosworth v. Cotchett,(4), determined in the House of Lords. In that case the payee of a promissory note had written indorsements of the half-yearly payment of interest, from the time of making the note till his death (which happened within six years of the date of the note), and the like indorsements had been written by his executor (who died before the commencement of the action); and it was adjudged, that these indorsements were admissible in evidence, in answer to a plea of the Statute of Limitations; though there was no extrinsic evidence offered of the time when the indorsements were made, and though more than six years had elapsed between the death of the maker of the note, and that of the executor.

But now by the stat. 9 Geo. IV, c. 14 (commonly called Lord Tenterden's Act), § 3, it is enacted, that "no indorsement or memorandum of payment, written or made upon any promissory note or bill of exchange, by or on behalf of the party to whom such payment should be made, shall be deemed sufficient proof of such payment, so as to take the case out of the Statute of Limitations."(5)

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(1) Ibid.

(2) According to the report in Strange, five judges thought the evidence admissible; two were of a contrary opinion. The report in Brown states that the judgment was affirmed by the opinion of all the judges.

(3) Upon the argument in the case of Bosworth v. Cotchett, Lord Eldon directed the record in Searle v. Barrington to be examined, and it appeared that there was no mention of any circumstances to show that the indorsements were made before the presumption of payment could have arisen. But in Gleadow v. Atkin (1 C. & M. 410, 421), Bayley, B., said that he had discovered, by his own research, that evidence was given of the time when the indorsements were made. It appears, from a note in Brown's Reports, that Comyns, B., was for revising the judgment in Searle v. Barrington, and that Lord Raymond, C. J., Eyre, J., and Probyn, J., were absent.

(4) Tried at Leicester Sum. Ass. 1819, before Richards, C. B.; judgment in the House of Lords, 6th May, 1824.

(5) It has been suggested that this act was passed in consequence of the decision in Bosworth v. Cotchett. See by Vaughan, B., 1 C. & M. 428.

In the case of Gleadow v. Atkin,(1) it was held, that an indorsement upon a bond in the handwriting of the obligee, which appeared to have been made at or about the time when the bond was executed, but which was not proved to have been ever seen by the obligor, stating that the bond was given to the obligee in trust for a third person, was admissible in evidence to connect the payments of interest with the bond, the bond being upwards of twenty years old, but interest having been paid within twenty years by the obligor to the third person. The authorities of Searle v. Barrington and Bosworth v. Cotchett were relied on, and the court appears to have considered these two decisions, as well as the case before them, to fall within the principle, that the declarations of a person having peculiar means of knowledge, having no interest to misrepresent, and making a declaration against his interest, are admissible in evidence after his death.

Since the decision in this case, it has been enacted by the statute 3 & 4 Wm. IV, c. 42,(2) § 3, that all actions for debt, for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or *scire facias* upon any recognizance, &c., shall be commenced and sued within twenty years after the cause of such actions or suits; and by § 5, it is provided, that if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such indenture, specialty or recognizance, or his agent, or by part payment or part satisfaction, on account of any principal or interest being then due thereon, the person entitled to such action may sue for the money remaining unpaid, and so acknowledged to be due, within twenty years after such acknowledgment, by writing or part payment or part satisfaction; and the plaintiff in any such action may by way of replication state such acknowledgment, and that such action was brought within the time aforesaid in answer to a plea of the statute.

This statute does not contain any provisions corresponding with those in Lord Tenterden's Act, that an indorsement of payment made by the payee shall not be proof of the fact of payment, so as to take the case out of the operation of the statute. The law, therefore, with respect to indorsements upon specialties remains as before; and if the question is properly raised by the pleadings, that is, where to an action upon a deed the defendant has pleaded the Statute of Limitations (3 & 4 Wm. IV, c. 42), and the plaintiff has replied a part payment within twenty years after the cause of action, an indorsement on the deed of such part payment will be admissible as evidence of the fact, even though the indorsement were made by the party to whom the payment was made, whether the plaintiff be himself that party or claim under him.

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(1) 1 C. & M. 410.

(2) See the corresponding Irish act, 3 & 4 Vict. c. 105, §§ 32, 34.

Proof of time when indorsement made.

It may be questionable, however, whether some evidence will not be required to show that the indorsement was in fact made at the time when it bears date. It has been held, that where indorsements of receipts of part of a bond debt were proved to have been made *after* the presumption of payment had taken place, they are inadmissible;(1) Pratt, C. J., saying, that it differed from the case of Searle v. Barrington, where the indorsements appear to have been made, before they could be thought necessary to be made use of to encounter the presumption. Generally speaking, a presumption will be raised that a document or memorandum was written at the time when it bears date,(2) and before Lord Tenterden's Act this presumption was held, in the case of Smith v. Battens,(3) to apply to an indorsement of part payment made by the payee upon a promissory note. That case was decided at Nisi Prius by Taunton, J., upon the authority of Searle v. Barrington,(4) and Bosworth v. Cotchett.(5) But it has already been stated, that in the former of these cases evidence was given of the time when the indorsement was made.(6) In the latter case the argument, that unless extrinsic evidence was given to show when the indorsements were made, they could not be received, appears to have been urged without success.(7) In the case of Saunders v. Meredith,(8) where a receipt for the payment of interest within twenty years was indorsed upon a bond, there was also direct evidence of the payment of the interest. In the earlier case of Rose v. Bryant,(9) where the defendant produced direct evidence of payment of the principal sum and interest at a certain time *within* twenty years, the plaintiff was not allowed to encounter that evidence by an indorsement in the handwriting of the obligee, purporting that interest and part of the principal were paid at a subsequent time; on the ground, that supposing the fact to be true that the bond had been satisfied by payment, it would obviously be to the advantage of the obligee to make such an indorsement, which might afterwards be used as evidence in an action on the bond. Lord Ellenborough, C. J., in this case observed, he was at a loss to see the principle on which such receipts in the handwriting of a creditor had sometimes been admitted as evidence against the debtor; and

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(1) Turner v. Crisp, 2 Str. 827. And see by Lord Hardwicke, in Glynn v. Bank of England, 2 Ves., sen. 43.

(2) *Vide post*, chapter on *Presumptions*.

(3) 1 Moo. & R. 341.

(4) *Supra*, p. 364.

(5) *Supra*, p. 366; cited in Smith v. Battens as Parr v. Crotchett, from Stark. Ev. (2d ed.) p. 1085.

(6) *Supra*, p. 366, n. 3; by Bayley, B., 1 C. & M. 421.

(7) See by Vaughan, B. (who had been counsel in the case), 1 C. & M. 428.

(8) 3 M. & Ry. 116.

(9) 2 Campb. 321.

that he was of opinion they could not properly be admitted, unless they were proved to have been written at a time when the effect of them was clearly in contradiction to the writer's interest.(1)

It may, therefore, perhaps be doubted, whether the general doctrine, that a memorandum will be presumed to have been written at the time when it bears date, would be held now to apply to the case of an indorsement or part payment upon a bond, when such indorsement is relied upon by the party who made it, or by those claiming under him; although it must be admitted that the case of Smith v. Battens,(2) would support such an application of the rule; and that case has been cited by the Court of Common Pleas as an example of the doctrine.(3) But besides the strong opinion expressed by Lord Ellenborough, C. J., in Rose v. Bryant,(4) such an indorsement made by the creditor himself would appear to bear a close analogy to the case of an account signed by a bankrupt charging himself with a balance;(5) or of an I. O. U. given by a bankrupt,(6) where, though such documents may bear date before the bankruptcy, if they are put forward in support of a petitioning creditor's debt, some evidence besides the date will be required to show that the instrument produced for that purpose was in existence before the act of bankruptcy took place.(7) The ground for requiring such proof is, that as a proceeding in bankruptcy is retrospective, and the object of it is to invalidate all transactions which have taken place between the act of bankruptcy and the time when the fiat takes effect, it becomes necessary, in order to support such an instrument, bearing date before the act of bankruptcy, to give evidence in addition to the date.(8) It is the interest of the petitioning creditor to support the commission, and the practice has been established owing to the jealousy which the law feels of a collusion between him and the bankrupt.(9)

This reasoning appears to apply with equal, if not greater force, to the case of an indorsement of part payment made by the payee himself. Such an indorsement would, at first sight, appear to fall within the principle

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(1) Lord Ellenborough appears to have considered that such indorsements were only evidence as declarations *against interest.*

(2) 1 Moo. & R. 341.

(3) In Anderson v. Weston, 6 N. C. 296, 302.

(4) *Supra*, p. 368.

(5) Hoare v. Coryton, 4 Taunt. 560.

(6) Wright v. Lainson, 2 M. & W. 739.

(7) In Sinclair v. Baggaley (4 M. & W. 312), it was held that a statement of accounts between a creditor and a bankrupt, by whom it was signed, and bearing date previous to the bankruptcy, showing a balance due to the creditor, was *prima facie* evidence as against the assignees, in an action by them against the creditor, that it was written at the time it bore date. But the decision in this case has been greatly doubted. See by Alderson, B., in Gibson v. King, Car. & M. 458.

(8) *Per Cur.* in Anderson v. Weston, 6 N. C. 302.

(9) By Lord Abinger, C. B., in Sinclair v. Baggaley, 4 M. & W. 318.

which admits declarations that have been made in the course of business or against the interest of the party making them. But when it is put forward by the party as evidence for himself, in order to take his claim out of the Statute of Limitations, it is upon general principles open to some suspicion, and would seem to require corroborative proof to show that it was really made at the time it purports to have been made.

The rule as laid down by Vaughan, B., in the case of Gleadow v. Atkin,(1) is perhaps the most unexceptionable in such a case, namely, that where a document *appears* to be made at a certain time, it may go to the jury to say if it were *really* so made.

Shop-book.

The first section of the statute 7 Jac. I, c. 12, enacts, that the shop-book of a tradesman shall not be evidence in any action for wares delivered, or work done, above one year after the bringing of the action, except the tradesman or executor shall have obtained a bill of debt or obligation of the debtor for the said debt, or shall have brought against him some action, within a year next after the delivery of the wares or work done. And the second section provides, that nothing in the act shall extend to the mutual trading and merchandise between tradesman and tradesman. At the time of making that act of Parliament, there was an opinion growing up, that after a certain length of time, a man's shop-books would be evidence for him; to prevent which the act was made.(2) But it appears by several authorities, that shop-books alone, unless under the circumstances which have been noticed, are not admissible evidence, either within or after the year.(3)

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(1) 1 C. & M. 410, 426; *Supra*, p. 367.

(2) By Lord Hardwicke, C., 2 Ves. 43.

(3) B. N. P. 232; Pitman v. Maddox, 2 Salk. 69; Price v. Lord Torrington, 1 Salk. 285; S. C., Ld. Raym. 732, 745; Sikes v. Marshall, 2 Esp. 705, 745. See further, respecting shop-books, 12 Vin. Ab. tit. Evidence, 88, A, b. 15; Smartle v. Williams, Comb. 249; Blackeln v. Crofts, Comb. 348; Lee v. Lee, Keb. 27; Cary's Rep. 45; Crouch v. Drury, Keb. 27, pl. 78; Digby v. Steadman, 1 Esp. 328; Cooper v. Marsden, 1 Esp. 1; Ellis v. Cowne, 2 C. & K. 719.

NOTE 108.—This is also the law of *Alabama*, *Indiana*, *Kentucky*, *Louisiana*, *Mississippi*, *Missouri* and *Virginia*. 3 and 4 Griffith's Law Reg. U. S. pp. 362, 585, 467, 670, 696 and 1139. As to Virginia, shop-books were formerly evidence for the party, but the law is altered. Griff. Law Reg. U. S. 362. Farther, that they are not evidence in *Louisiana*, see Civ. Code, 2244; Cavalier v. Collins, 3 Mart. Rep. 188: Syndics of Johnson v. Breedlove, 2 Mart. Rep. (N. S.) 508; and Herring v. Levy, 4 Mart. Rep. N. S. 383. Farther, as to *Kentucky*, see 1 Monroe, 80. Whether books are not evidence in *Indiana* to the same extent as in *New Jersey* and *New York*, for which see *infra*? *Quere*. Harrison v. Lagow, 1 Blackf. Rep. 307. And see this case at length stated *infra*.

In several of the states, the party's books, containing his original entries, may be adduced as evidence, and supported by his own oath. This is so in Connecticut, a state which we refer to as resting her practice on the same principle which is common to several others. Although Connecticut has a statute alluding to the party's oath, and giving an action denominated *debt on book*, which is, in some respects, peculiar to this state (3 Griff. Law Reg. U. S. 77, 78, Swift's Ev. 81), yet the

statute, in its terms, rather presupposes than enacts that the parties are to be sworn; referring, evidently, to a former practice in the courts, of receiving such testimony; and still leaving the limits within which it is to be received, to remain as matter of judicial regulation: and the statute has always been treated as bearing that construction. 2 Swift's System, 166, 167. "Perhaps it is safe to affirm that no action of book debt can be sustained, unless it be for articles, the sale and delivery of which may be proved by the testimony of the parties." Per Daggett, J., in Terrill v. Beecher, 9 Conn. Rep. 349. Original entries, as evidence, are restricted in this state to charges in book account, of personal property sold and delivered, of services performed and materials found, and the use of any personal chattel hired and returned. 2 Swift's System, 167; Swift's Ev. 83.

Although the rules as to competency are not so strict, in respect to this proof, as in most other states, yet the following prerequisites are laid down as the law of Connecticut, in order to secure full credit. "The book ought to be kept in a fair and regular manner, and the articles truly entered at the time of the delivery or the performance of the service, so as to be consistent with, and support the oath of the party; for the book is to be considered as the essential part of the evidence, and the oath of the party as supplementary to it. The entries should be without rasure, alteration or interlineation. Merchants and traders should produce their day-books and ledgers, and so of mechanics whose business requires that mode of keeping accounts. The entries should also appear to be fairly made from day to day, in the usual course of their business. Where people make single entries only, the account should be fair, and properly dated. Where the books are not regularly kept; where there appear to be rasures, alterations, interlineations and additions; and where the accounts are made out after the dispute has arisen, there is a strong presumption against their truth, and the party must have other proof to corroborate his testimony, to entitle him to recover. When a demand is made for the original books and entries, and it is refused, if the party refusing cannot assign a good reason for it, everything is to be presumed against him, that the nature of the transaction will warrant; and the fact ought to be taken to be as contended by the other party, unless the contrary can be proved by disinterested testimony." Swift's Ev. 81, 82.

Speaking of the origin and reason of this practice, a learned judge has remarked, that it is "founded on a kind of moral necessity. The whole civilized and commercial world has, in substance, the same thing. The principles of it, I believe, were introduced into this country from Holland by the first settlers of New England. Its origin, doubtless, was in commercial transactions; but its use became necessary in the common intercourse of life between man and man. That, in this common and necessary intercourse, there should always be witnesses either of the delivery or payment of an article, could not be expected. Hence, a mutual confidence and an interchange of recollection became necessary, to furnish testimony founded on means of knowledge common to both." Per Brainard, J., in Beach v. Mills, 5 Conn. Rep. 496, 497.

The same general practice prevails in *Illinois*. 3 Griff. Law Reg. U. S. 423.

We give, from the same writer, a summary of the practice of the state of *Maine*, which will be seen by the authorities from Massachusetts and New Hampshire, to be cited when we come to treat of the subject in a more general way, to coincide with the practice of those states. "In actions of assumpsit, for articles delivered, or for work and labor performed, the admission of proof by the book of the plaintiff himself, appearing to be in his own handwriting, and supported by his suppletory oath, is practiced in this state. It is essential to this kind of evidence, that the charges appear to be in the handwriting of the party, and in such a state that they may be presumed to have been his daily minutes of business and transactions, in which regard is had to the degree of education of the party, the nature of his employment, and the manner of his charges against other persons. When this appearance has been wanting, and the presumption cannot be made, the evidence has usually been rejected as incompetent. The book of the plaintiff, though supported by his oath, is wholly incompetent to prove the payment of money to third persons, by order, or charges of rent; for better proof of such demands may be obtained. The books of deceased persons, the charges appearing in their handwriting, are admitted in evidence, although they cannot be verified by oath." 4 Griff. Law Reg. U. S. 1005, 1006. As to *Massachusetts*, see also Griff. Law Reg. U. S. 518. The law of *Pennsylvania* is the same as *Maine*. Id. 264 The cases will be given under our general heads. And see Kelly v. Holdship, 1 Browne, 36. As to *New Hampshire*, see Griff. Law Reg. U. S. 47, 48, and 3 N. H. Rep. 156.

By statute, in *Massachusetts*, the plaintiff's account must be copied *verbatim*, and filed by the time his writ is served; and if the defendant would set off an account, he must copy and file it so early as to give the plaintiff a reasonable time for inspection. 3 Dane's Abr. 318, 319. The practice of allowing the party's oath to small money charges, is also peculiar to this state. Cash charges, not exceeding six dollars and sixty-six cents, may be thus supported. Shillaber v. Bingham, 3 Dane's Abr. 321. Per Putnam, J., in Union Bank v. Knapp, 3 Pick. 109. This is equivalent to forty shillings, and evidently arose from the analogous practice of allowing the party to support his charges to that amount in chancery, on accounting before a master.

In *Rhode Island*, there is no statute on the subject; but, by a long and continued practice, it has now become a kind of common law that account-books are evidence. The party offering the books must be first put upon his *voir dire*, and swear that the books produced are his regular account-books, that the entries therein are the original entries, and were made at or about the time purported by the dates. All articles sold and delivered in the regular course of trade, and all kinds of service, and work and labor done, are considered proper charges in book account. 3 Griff. Law Reg. U. S. 116. Mr. Angell, an eminent lawyer of that state, confirms this account, by saying that the law, with its history, is the same there as in Massachusetts, whose decisions are generally followed by the courts of Rhode Island. Money charges, however, are not admissible. 3 U. S. Law Intelligencer, 227.

In *South Carolina*, the account-book containing the original entries is received in evidence when accompanied with the suppletory evidence of the oath of the party, clerk or other person making the entries, that they are true. 4 Griff. Law Reg. U. S. 864, and note 1. There is a statute recognizing, but not expressly authorizing, this kind of evidence. Boyd v. Ladson, 4 M'Cord, 76, 77; Slade v. Teasdale, 2 Bay, 172; Lamb v. Hart, 2 Bay, 362. The books of merchants, tradesmen and shopkeepers are conceded evidence. Foster v. Sinkler, 1 Bay, 40; Herlock's Adm'rs v. Riser, 1 M'Cord, 481. But a struggle was made to exclude mechanics' books. They were, however, held also admissible, with the books of some few others, whose accounts appeared to come within the same reason. Slade v. Teasdale, 2 Bay, 172; Lamb v. Hart, 2 Bay, 362; Gordon v. Arnold, 1 M'Cord, 517; M'Bride v. Watts, 1 M'Cord, 1. But the courts appear to be unwilling to extend the practice. Foster v. Sinkler, 1 Bay, 40; Lynch's Adm'r ads. Petrie, 1 Nott & M'Cord, 130. And a case which allowed the books of a ferryman to prove charges of ferriage (Frazier v. Drayton, 2 Nott & M'Cord, 471), was afterwards questioned (per Nott, J., in Boyd v. Ladson, 4 M'Cord, 77, 78), because ferrymen are not in the habit of giving credit. Upon the general principle, as adopted here, a carpenter's books have been received (Slade v. Teasdale, 2 Bay, 172); and a bricklayer's were said to be admissible (Lynch's Adm'r ads. Petrie, 1 Nott & M'Cord, 130, commented upon by Nott, J., 4 M'Cord, 77); especially if it include materials furnished (Id.); on the same ground, a printer's (Thomas v. Dyott, 1 Nott & M'Cord, 186; Richards v. Howard, 2 Nott & M'Cord, 474); a tailor's (Deas v. Darby, 1 Nott & M'Cord, 436); a seine maker's (*Semb.* Story v. Perrin, 2 Rep. Const. Ct. 220); a miller's (Gordon v. Arnold, 1 M'Cord, 517); a physician's (M'Bride v. Watts, 1 M'Cord, 1; Lane v. McKenzie, 2 Bail. 449; Spencer v. Sanders, 1 Bay, 119); a miller's who saws and sells lumber (Darby v. Farrow, 1 M'Cord, 517; Boyd v. Ladson, 4 M'Cord, 77). See a review of several of these cases, by Nott, J., in Boyd v. Ladson, 4 M'Cord, 77, 78. But a scrivener's books, charging for services and commissions, cannot be received; nor a planter's (Note to Slade v. Teasdale, 2 Bay, 173, citing Watson v. Bigelow, for the first, and Geter v. Martin, MSS. for the second); nor a schoolmaster's (Pelzer v. Cranston, 2 M'Cord, 328); nor a billiard table keeper's charging for games (Boyd v. Ladson, 4 M'Cord, 76). Besides, they are immoral. Per Nott, J., Id. 78. He compares such charges with those of showmen, rope-dancers and gamblers of every description, and denies that they are evidence, because the subject is immoral.

Books of original entries of the party are not evidence in this state without his oath. Everingham v. Langton, 2 M'Cord, 157.

It has been strongly intimated that original entries in a book are equivalent to a memorandum in writing; and will take the case of services performed for, or goods delivered to, a third person, out of the Statute of Frauds. M'Bride v. Watts, 1 M'Cord, 384.

We come now to the states wherein the admission of this evidence rests upon statute.

In *Delaware*, the oath or affirmation of the party, together with his book regularly and fairly kept, is allowed in all cases to charge the opposite party for goods, wares and merchandise, sold

and delivered, and in respect to other matters properly chargeable in account. The oath or affirmation must first prove that the book contains the original entries, made at the time they bear date, and that it is the book of original entries of the party producing it, kept either by himself or his clerk. This is all by statute. 4 Griff. Law Reg. U. S. 1068.

In *Maryland*, a book account is provable by the creditor's oath only where it is ten pounds (£10) currency or less. A statute provides a summary mode in which accounts, both of non-resident and resident merchants, tradesmen and manufacturers, may be proved by the deposition of such witnesses as would be competent to prove them at common law; to which the creditor's oath must be added, that he has received no payment or security, &c. 4 Griff. Law Reg. U. S. 942. The statutes give the form of the probate oath, and must be strictly followed. Smoot's Adm'r v. Bunbury's Ex'r, 1 Harr. & John. 136, 137, and note *a;* Dyson v. West's Ex'r, 1 Harr. & John. 567. The mere filing an account in bar is no proof of its truth in favor of the party filing it. Berger v. Collins, 7 Harr. & John. 213. The courts do not recognize book accounts as evidence on any other ground than the statute, and refused to receive them under the qualifications allowed by the cases in the state of New York. Owings v. Henderson, 5 Gill & John. 134, 142, 143.

In *North Carolina*, books of account (by the act of 1756, ch. 4, §) are to be received as evidence for goods sold or services performed, for all charges within two years, on the oath of the plaintiff that the account is just, and that he cannot otherwise prove the delivery, &c.; and so for executors or administrators, on oath of their belief, &c., and that they cannot otherwise prove the account. A copy of the book, on the like oath, may be received, unless the defendant, at joining issue, requires the original book to be produced. The like rule takes place between executors and administrators where both the original parties are deceased, the executors or administrators, being plaintiffs, making oath as above. But no such oath is allowed, to prove any article or articles, the amount of which exceeds thirty pounds (£30). The defendant may contest the account by any lawful evidence in his power. No book account is admitted at all (upon any evidence) for goods sold or services done, &c., but within five years before suit brought, except in cases of persons out of the government, or where the account is settled and signed. 3 Griff. Law. Reg. U. S. 224. Within the equity of this statute, a set-off may be sworn to. Thomequex v. Bell, Mart. N. C. Rep. 44.

As to *Tennessee*, the account given by Mr. Griffith, of the statute, shows it to be a literal transcript from that of North Carolina (*supra*). The additions mentioned are provisions for summary proof of accounts coming from another state; and defendants are allowed to prove their accounts offered in set-off, in the same form as if they were plaintiffs. 4 Griff. Law Reg. U. S. 795, 796. This statute is partially noticed in Easly v. Eakin (Cooke's Rep. 388).

In *Ohio*, on all book accounts, if not of more than eighteen months' standing, the party himself may be examined under oath; and of his testimony the jury are to judge. The courts hold that the eighteen months are to be calculated from the date of the last charge; and that all kinds of books of account are admissible with the party's oath. 3 Grif. Law Reg. U. S. 403; James v. Richmond, 5 Hamm. Rep. 237, 238. But the courts will inquire, and see that the accounts are continuously and fairly kept, and not with a view to evade the limitation. An account so kept is esteemed an entire thing, like the evidence of any other chose in action. James v. Richmond, 5 Hamm. Rep. 237, 238.

In *Vermont*, a statute gives the action of *book account*, directing that if the defendant plead any plea which shows, if true, that he ought not to account, the issue shall be tried by a jury. If found for the plaintiff, the court is to appoint auditors. Original books of entries, and the oaths of the parties, each being a competent witness, are admissible evidence before the auditors; and perhaps on any question arising on the acceptance of their report before the court. 3 Grif. Law Reg. U. S. 22. Both may be sworn and examined relative to their respective accounts, and cross-examined with respect to each other's accounts. This examination is general, and goes to all the circumstances in support of and defence against the accounts (Stevens v. Richards, 2 Aik. 81; Fay v. Green, 2 Aik. 386); though it is not a matter of course, that a party may testify respecting a mistake, after the books are closed and balanced. Whiting v. Corwin, 5 Verm. Rep. 451. But the defendant may testify to a warranty of the goods delivered to him (Stevens v. Richards, 2 Aik. 81); or that he paid for the goods, or received them for a pre-existing debt (Fay v. Green, 2 Aik. 386); and the parties may either of them testify as to the non-joinder of

the proper plaintiffs, where that inquiry is admissible before the auditors. Hilliker v. Loop, 5 Verm. Rep. 116. And so to a settlement, or to payments and items in the party's account from which a settlement may be inferred. Wales v. Corlew, 4 Verm. Rep. 12.

We come now to several states wherein books are receivable for the party who keeps them, without his oath, upon certain preliminary proof, derived from other sources, being first presented.

In *Georgia*, merchant's books containing the original entries, with proof of delivery of the articles by the clerk, or, if he be dead, of his handwriting, are evidence. If there was no clerk, then, on proof of that fact, inspection of the books, and the reputation of the merchant for keeping correct accounts, they are evidence of goods sold, but not of cash charges. 3 Grif. Law Reg. U. S. 445.

The following account of *New Jersey*, is given by Mr. Griffith, himself an eminent lawyer at the time, residing in that state. Books of account are admitted as evidence of debt for goods and articles sold, work and labor performed by a man, his servants, &c., as also for materials found and provided in the ordinary course of men's business and employments. The book must contain the original entries; and be first proved to be such book of the party producing it. A ledger, or book in which the original entries are posted up, is not evidence, nor admissible, otherwise than as used to facilitate, on trial, a reference to the original entries. If, however, the book of the party is kept ledgerwise, containing the original entries, and this is proved to be the manner in which he keeps his accounts, it is admissible. But books so kept are always received with suspicion; and if, on the face of the account, it appears to contain fabricated entries, or such as are not original, or are evidently altered, it would be rejected. As to items in a book account for cash lent, money paid for another, &c., whether such charges in a man's account can be considered as proved by an entry in his book, or, in other words, come within the legal acceptation of a book account, has not been determined by the courts. As to entries of special contracts, orders paid, &c., and in all cases where, from the nature of the transaction, there must exist higher evidence of the charges, than a man's own entry of them, such entries would be rejected as not the proper subjects of a book account. But, in reality, there is no settled law on this head; and books regularly proved seem to be admitted with little restriction, subject, however to be examined and weighed as to their truth and credit by the jury, with the advice of the court in point of law; and open to be disproved in whole or in part by all legal testimony on the part of the defendant. The oath of neither party is admitted. 4 Griff. Law Reg. U. S. 1299, 1300. And see Cole v. Anderson, 3 Halst. 68.

Whether a charge for money lent be receivable, the judges differed in Wilson v. Wilson (1 Halst. 94). They thought it might, and appear so to have held in Craven v. Shaird (2 Halst. 345). But the latter case was much questioned in Carman v. Dunham's Adm'rs (6 Halst. 189), where, the charge standing alone against the party, it was rejected. An entry of cash paid for the defendant to a third person is not admissible. Jones v. Brick, 3 Halst. 369. The judges also disagree as to receiving original entries kept ledgerwise. By Kirkpatrick, C. J., in Wilson v. Wilson (1 Halst. 94), they have been received; per Rossel, J., in Leveringe v. Dayton (4 Wash. C. C. Rep. 698), they have been disallowed; and he and Washington, J., disallowed them in that cause. The books are sufficiently identified, by proving that they are in the party's handwriting; and that in one of them (the waste-book) the witness now sees a charge which was true, and which the witness had settled, though he never saw the books before the time of the trial. Shute v. Ogden, 2 Penningt. Rep. 921. But it is not enough that the witness sees two or three charges in the books, now produced, of articles which the witness had of the party. Here is nothing to show that it was a book of original entries made as the transactions occurred. It might have been a copy made just before the trial. Cole v. Anderson, 3 Halst. 68. Nor is it enough to warrant the reception of the books by a justice, that they were proved before him on a former trial. Linberger v. Latourette, 2 South. 809.

In *New York*, as in New Jersey, this kind of evidence is not restricted to any particular class of citizens. See the remarks of Savage, C. J., in Rathbun v. Emigh, 6 Wend. 407, 409. The party is not admissible as a witness. To make the books competent, it must appear: 1. That there was a regular dealing between the parties; not merely a single charge; 2. That the bookkeeper had no clerk; 3. That some of the articles charged were delivered; 4. That the books produced are the books of account of the party; and 5. That he keeps fair and honest books, to

be shown by those who have dealt and settled with him. When all this is shown, the books are competent evidence; and the judge may submit them to the jury. Vosburgh v. Thayer, 12 John. Rep. 461. And see Linnell v. Sutherland, 11 Wend. 508. It seems to be no objection, that part of the entries are made by the party, and part by his clerk. M'Allister v. Reab, 4 Wend. 483. And proof that a mechanic had delivered two of the articles charged in his book, was held to satisfy the third requisition, in Vosburgh v. Thayer. Linnell v. Sutherland, 11 Wend. 568. See also per Sutherland, J., in the People v. Genung, 11 Wend. 21. In this state, too, though the courts adhere in other cases strictly to the rule that a witness must remember ordinary facts, independently of his memorandum made cotemporaneously, yet account-books for goods sold and delivered being proved by a clerk, are memoranda which become in a degree evidence of themselves. Though the clerk can remember only from seeing the charges, yet the original entries made by him may be produced, and then they become evidence. *Semb.* per Savage, Ch. J., in Lawrence v. Barker, 5 Wend. 306.

The following is the whole of the only reported case in *Indiana*, which we find in the books of that state upon this subject. But we have none of its reports before us later than November, 1831: "In assumpsit for goods sold and delivered, the plaintiffs, Lagow and others, to prove their demand, offered in evidence certain books of account, proved to be those of the Steam Mill Company. Held, that the books not being proved to be the plaintiffs', were inadmissible." Harrison v. Lagow, 1 Blackf. Rep. 307, Nov. 1824.

We have thus, as far as our materials would admit, gone through with the several states which receive the party's entries in proof, and noted the local peculiarities of each as they arise, either upon statute or a difference in the application of the general principle upon which the party's books are receivable. We have seen that among these, *Georgia*, *New Jersey*, *New York*, and perhaps *Indiana*, though they receive the entries, reject the party's oath; while *Connecticut*, *Illinois*, *Maine*, *New Hampshire*, *Massachusetts*, *Pennsylvania*, *Rhode Island*, *South Carolina*, *Delaware*, *Maryland*, *North Carolina*, *Tennessee*, *Ohio*, and *Vermont*, admit both. In respect to the last fourteen states, there are certain rules in common growing out of this mixed proof, which we next propose to notice; premising that where, as in Maryland, or Vermont, the statute may have fixed the forms of probate, or prescribed the extent to which parties may testify, or given any other direction, our remarks will be so far inapplicable.

With regard to the suppletory oath, the following particulars are to be considered:

1. Wherever a man's suppletory oath, were he plaintiff, would be receivable, it is equally so when the account is offered as a set-off. Thomequex v. Bell, Mart. N. C. Rep. 44.

2. The objection that witnesses are interested, does not lie in respect to matters whereof the party's suppletory oath is allowed. For as he, having the greatest interest, is received, all others may be. Swift's Syst. (ed. of 1796), p. 171. And so though the merchant be called to prove his account in another cause wherein he is interested, this cannot be objected (Black v. Shooler, 2 M'Cord, 298); as if he become insolvent, and be called to prove them for his assignees. Id. But it does not follow that because the party may be a witness, his wife may, though so far as interest goes, they would stand in *pari ratione*. But the wife is excluded, for the reason that her admission may interrupt the harmony of the matrimonial connection. Carr v. Cornell, 4 Verm. Rep. 116.

3. The oath must, it seems, in all cases, be administered in court; and cannot be received in the form of a deposition. Frye v. Barber, 2 Pick. 65. The party must be sworn, and produce his books in court; and his testimony cannot, like that of another witness, be taken on commission. Nicholson v. Withers, 2 M'Cord, 428. His entries cannot be proved unless his book be present; and a distant residence from the district affords no excuse for their non-production. Furman v. Peay, 2 Bail. 394.

4. The form of the oath, which is the *voir dire*, shows that the party is not a general witness. Shaw v. Levy, 17 Serg. & Rawle, 99, 100. And see Dodge v. Morse, 3 N. H. Rep. 232. But being allowed to testify concerning the principal subject, he may do so in respect to all collateral circumstances necessarily connected with it; as the price, quantity, quality, time, delivery, performance of services, and generally in support or confutation of all articles properly charged, freely and fully. Swift's Ev. 83; Bryan v. Jackson, 4 Conn. Rep. 292; per Ellsworth, J., in Phenix v. Prindle, Kirby, 209; per Daggett, J., in Weed v. Bishop, 7 Conn. Rep. 131; and in Terrill v. Beecher, 9 Conn. Rep. 349; Shaw v. Levy, 17 Serg. & Rawle, 99, 100. He may ac

cordingly prove the admissions of his adversary, or facts whence to infer an admission. Johnson v. Gunn, 2 Root, 130; Bryan v. Jackson, 4 Conn. Rep. 292. He "is permitted to state, in the first instance, only that the book produced is his book of original entries, that the charges are in his handwriting, that they were made at the times they purport to have been made, and at or near the time of the delivery of the articles, or the performance of the services. He may, however, be cross-examined by the other party, in which case his answers become evidence, and he is entitled to give a full explanation of any matter in relation to which an inquiry is made on the cross-examination. But a cross-examination does not authorize him to testify to independent facts, not necessary to the explanation of the facts respecting which he may have been questioned upon the cross-examination. It does not make him a witness in chief in the cause." Eastman v. Moulton, 3 N. H. Rep. 156. If the parties settle, but in terms except all articles omitted in the credit, as to these the account is still open, and the party's oath may be received. Austin v. Meigs, 3 Verm. Rep. 58. And this though a note be given for the supposed balance. Id. But the parties are not unlimited witnesses. The plaintiff cannot testify to any special agreement of the defendant (Johnson v. Gunn, 2 Root, 130); and it is said not even to a promise to pay interest on the debt as it stands charged upon the book (per Ellsworth, J., in Phenix v. Prindle, Kirby, 209); nor to a charge of a double credit (*Semb.* Whiting v. Corwin, 5 Verm. Rep. 451): nor, perhaps, as to a mistaken omission of a charge on settlement, though he might as to the fact of the delivery. 5 Verm. 457. By Punderson v. Shaw (Kirby, 150), he shall not be a witness in such a case. Whether he can testify to a special agreement in any case, *quere*. See Kirby, 209; 2 Aik. 83, 389; 4 Conn. Rep. 292. But where any matter is pleaded in bar, or where, in any other way, a matter entirely collateral arises, the party cannot testify as to that. 2 Swift's Syst. 171 (ed. of 1796). Thus he cannot testify to a release or a tender. Per Daggett, J., in Weed v. Bishop, 1 Conn. Rep. 132; and in Terrill v. Beecher, 9 Conn. Rep. 349. And in replevin, where a party's entries were in question, it was held, that he might be interrogated on cross-examination as to the book being his, and the time of the entry; but that he could not be even cross-examined as to other matters, aside from and entirely disconnected with the books, which arose and were drawn in question by that action. Shaw v. Levy, 17 Serg. & Rawle, 99, 100. Nor is the party's oath receivable to take the case out of the Statute of Limitations. Weed v. Bishop, 7 Conn. Rep. 128.

The party claiming the account on his oath must answer all pertinent questions, even if the answer go to criminate him, or the account will be disallowed. Mattocks v. Owen, 5 Verm. Rep. 42.

5. The party's general credit may be impeached, the same as that of any other witness; *e. g.* it may be shown that he is unworthy of belief on his oath. Kitchen v. Tyson, 3 Murph. 314. So of his particular credit; if he swears corruptly false as to one item, the whole testimony shall be rejected. Otherwise, if he merely mistake, or is not corrupt. In this, as in other cases, *falsus in uno, falsus in omnibus*. Sanders v. Leigh, 2 Har. & M'Hen. 380.

6. The entry must be made by the very party who takes the oath. Eastman v. Moulton, 3 N. H. Rep. 156. If by a clerk, the party cannot be received till the death of the clerk be shown, or that he is, at least, beyond the power of the court. Sterritt's Ex'rs v. Bull, 1 Binn. 234. Nor indeed, then, can the party's oath be received; but there must be other proof of the handwriting; and this was held where the entries were made by the party's daughter, who had died. Karpser v. Smith, 1 Browne, app. 43. This is plain; because the party then has the usual common-law proof at command, which is better than his own oath. And so where there are two parties partners, and the entries are made by one, he must be sworn, and he only, unless he be dead or absent from the state; and then, when this is clearly shown, the other may be received. Foster v. Sinkler, 1 Bay, 40; Walker v. Parkham, 3 M'Cord, 295. So if the sole party be clearly shown to be out of the jurisdiction of the court, his handwriting may be proved. Spence v. Sanders, 1 Bay, 119. But farther the courts will not go; and though the party-enterer reside out of the state, if he be within it while the court is in session, his oath shall not be dispensed with. Walker v. Parkham, 3 M'Cord, 295. Even his absence from the state was afterwards denied as an excuse, and proof of his handwriting and book was refused. It is always in his power to attend, and it is his own fault if he do not. It is otherwise with a clerk, as in Elms v. Cheevis (2 M'Cord, 349); and the three cases of Foster v. Sinkler, Spence v. Sanders, and Walker v.

Parkham, were all on executing writs of inquiry. Such secondary proof is never allowed where the party appears and regularly contests the cause. Douglass v. Hart, 4 M'Cord, 257.

But the books of deceased persons are considered as sworn to; and come with the same force as books supported by the oath of living parties. Swift's Ev. 83; per Hosmer, C. J., in Dwight v. Brown, 9 Conn. R. 93; Prince, Adm'r, v. Smith, 4 Mass. Rep. 455, 458, *semb.* And the course, where the party has died, is to prove his handwriting, which then shall be received as *prima facie* evidence of the services performed (where it is a case of service), and the materials delivered, and the retainer of the plaintiff to perform the services, just as it would be evidence both of the sale and delivery of goods. M'Bride v. Watts, 1 M'Cord, 384. The personal representative may be sworn to identify the book and prove the deceased's handwriting. Dodge v. Morse, 3 N. H. Rep. 232. And where he proved that the entries were in the hand of a third person, who had not, as he thought, after diligent inquiry, been heard of for seven years, and that he knew of no other who could prove his hand, the account was allowed to go to the jury. Stevelie v. Greenlee, 1 Dev. 317.

Where the books were burnt, it was held that the party might give secondary evidence of their contents; but not by a copy from the party's account, verified only by his own oath. He should prove the original by evidence other than himself, as he would any other paper. Prince v. Smith, 4 Mass. Rep. 455; Holmes v. Marden, 12 Pick. Rep. 169.

We come now to the consideration of this evidence in its connection with the principle of "moral necessity," as it has been recognized in at least seventeen, and perhaps eighteen states of the confederacy, if not, as remarked by Brainard, J., in Beach v. Mills (*supra*), through "the whole civilized and commercial world." For the extent to which it prevails on the continent of Europe, the learned reader may consult the references by Mr. Angell, in 3 U. S. Law Intelligencer, 187, and in Mr. Wheaton's note, in the 2d Vol. of his reports, pp. 117, 118.

In the eye of the English law, the party's books are less than secondary evidence for him. They are no evidence, being hearsay, of his own fabrication. And it will be seen by all the American decisions, that their departure from that rule gives no higher character to this sort of evidence than a secondary one. It is received upon the presumption, that unless this can be received, there will be a total failure of proof. And whenever that presumption is repelled by its appearing, in any way, that the ordinary common-law proof does in truth exist, in relation to all or any of the items charged, the book proof is rejected as inadmissible. The reason for the exception then ceases; and the party can no more be entitled to introduce his entries, than he would be a copy of documental evidence, because he had neglected to obtain the original. He must, in such a case, first restore the presumption, by proving that what appears to be plainly in his power, is in fact placed beyond it. We are then to look, and see to what class of dealing the law has *prima facie* ascribed a destitution of the usual means of proof; and we shall find a general concurrence among the several statutes, adjudications and dicta, in pointing to the daily sale and barter of merchandise and other commodities, and the performance of services and letting of articles to hire: circumstances so frequent in succession, and generally so trivial in their individual amount, that the procuring of formal proofs would not compensate for the time bestowed. In relation to these things, all mankind, with few exceptions, have fallen into the line of daily and brief memoranda, called accounts; and the strong presumption always is, that entries in that form have been made, and that no other proofs exist. Such a presumption from the general and usual course of business, is a common act of the law. But whether that law will hazard facilities to fraud, by letting in book proof as the consequence of this particular presumption, is a question for its own wisdom to determine.

1. The more usual and important test by which to indicate the competency of this proof, is the subject matter of the book account. This is briefly said to be property sold and delivered, services performed, and materials found and provided, and the use of property hired and returned. It is not considered an objection to entries of any charges proper in account, that the price was specially agreed on. 2 Swift's Syst. 128; Newton v. Higgins, 2 Verm. Rep. 366, 369.

Property sold and delivered. This is of course confined to personal property (Swift's Ev. 83); and though the rule intended generally was of small values, and many items, it cannot be practically governed by a distinction of a number and magnitude; and two articles only—one 78 bushels of salt, and the other 132 gallons of rum—were allowed as proper subjects of this proof. Shillaber v. Bingham, 3 Dane's Abr. 321. So a single item of 2,088 lbs. of wool. Leach v.

Shephard, 5 Verm. Rep. 363. It may be of articles supplied to the defendant's wife or children, where he has turned them away and neglects to provide for them (Swift's Ev. 84); or articles for which the defendant agrees to pay in a particular mode, *e. g.*, in goods or produce, or part in goods, and part in a note at the bank. Swift's Ev. 84. So of lottery tickets, sold and delivered. Mills v. Brownell, 3 Verm. Rep. 463. Entries were allowed in proof of necessaries advanced by a guardian to his ward. Mills v. St. John, 2 Root, 188. And a shopkeeper's charges for spirituous liquors in small quantities were allowed in evidence, though he showed no license. Herlock's Adm'rs v. Riser, 1 M'Cord, 481. But to warrant a charge, the goods must be delivered in all cases (per Henderson, J., in Howell v. Barden, 3 Dev. 449); and, accordingly, the right to charge was denied where the articles were not deliverable till paid for in a particular way. Read v. Barlow, 1 Aik. 145, 148; S. C., 1 Verm. Rep. 97, by the title of Barlow v. Read. Entries were made after the goods were ordered absolutely, yet, being before they were actually delivered, the book was disallowed in evidence. Rhoades v. Gaul, 4 Rawle, 404.

The right to charge must exist at the moment of delivering the article, not arise afterwards, in consequence of some special circumstance or contract. Money delivered, to be applied by the defendant, but which is misapplied, cannot be charged. Bradley v. Goodyear, 1 Day, 104; Slasson v. Davis, 1 Aik. 73, 74. So money advanced in consideration of an agreement to deliver goods. Peck v. Jones, Kirby, 289. And where an infant agreed to work for the plaintiff, who furnished him with clothes, &c., but the infant left him in violation of the agreement, held that the plaintiff could not therefore charge, and give his charges in evidence, to maintain book debt for the advances. Terrill v. Beecher, 9 Conn. Rep. 344.

Services performed. Swift's Ev. 83; Newton v. Higgins, 2 Verm. Rep. 366. This head includes an attorney's bill, which may be proved by his original entries (Charlton v. Lawry, Mart. N. C. Rep. 26); work done by the plaintiff's slaves for the defendant (Mitchell v. Clark, Mart. N. C. Rep. 44); a postmaster's charges for postage, and a justice's charges for official services (Sargeant v. Pettibone, 1 Aik. 355); work by the month, at a fixed price, payable at a future day (Fry v. Slyfield, 3 Verm. Rep. 246); services in making betterments on the defendant's land, being done at his request (Minor v. Erving's Ex'rs, Kirby, 158); repairs done by one joint owner of a ship for another (Bowers v. Dunn, 2 Root, 59); and services as a counselor at law (Bell v. M'Lean, 3 Verm. Rep. 185). But work and labor must, in general, be executed before it is charged. Per Henderson, C. J., in Howell v. Barden, 3 Dev. 449.

Entries are proof of the use of anything hired and returned, *e. g.*, oxen, horses, &c. (Swift's Ev. 83; Easly v. Eakin, Cooke's Rep. 38); interest on book debt, where the promise is implied or express (Phenix v. Prindle, Kirby, 207); and freight, where the amount is left to be implied or is agreed upon (Boardman v. Keeler, 2 Verm. Rep. 65).

Every one sees, in the above list of items, that direct, frequent and simple kind of dealing which is, of course, committed to the book account, and which may be presumed to rest in the exclusive knowledge of the parties.

On the other hand, the authorities exhibit several instances not coming within that reason, and which they, therefore, put to common-law proof. Entries in the following cases have been held inadmissible, as not presenting the usual subjects of book charge: The claim by one town against another, for keeping a pauper, on the mere ground that he is chargeable to the defendant town, there being no actual privity of contract (Swift's Ev. 83); and a special unexecuted contract, as an agreement to receive goods, and a refusal (Swift's Ev. 84). The charge should not be of a tort, nor any consequence of it (Swift's Syst. 168; Swing v. Sparks, 2 Halst. 59); but only of such things whereof the prices can be ascertained in market (Swing v. Sparks, 2 Halst. 59); nor of a bond, note, receipt, nor special agreement (per Ford, J., in Wilson v. Wilson, 1 Halst. 94). In an action for clocks sold, the defendant's entry, that he received them on commission' was rejected, the court saying that an agency could not be so established. Baisch v. Hoff, 1 Yeates, 198. Nor can a special contract be contradicted by a book entry. Pritchard v. M'Owen, 1 Nott & M'Cord, 131, note *a*. Nor can it be shown, by the defendant's entry, how much time the plaintiff's slave lost while engaged at work for the defendant. M'Kewn ads. Barksdale, 2 Nott & M'Cord, 17. Nor where the plaintiff goes on his original entries will the defendant be allowed to give in evidence his own counter entries of the same work. Summers v. M'Kim, 12 Serg. & Rawle, 405. Under no circumstances can a charge that goods were delivered on bailment, *e. g.*, on commission, be supported by the party's book. Kerr v. Love, 1 Wash. Rep.

172. Nor is a special agreement to pay interest chargeable (Phenix v. Prindle, Kirby, 207, 209; *quere*, *vid.* 2 Aik. 83, 389); nor a mistake in a former settlement. Punderson v. Shaw, Kirby, 150; Rogers v. Moor, 2 Root, 58. But see Whiting v. Corwin, 5 Verm. Rep. 451, 457. Work and labor must, in general, be executed before it can be charged. The party cannot make valid entries of a special contract to employ him, and in this form claim damages for non-performance (per Henderson, C. J., in Howell v. Barden, 3 Dev. 449); nor of a special collateral promise by A. to pay for goods delivered to B. (Poultney v. Ross, 1 Dall. 238); nor of a charge against an attorney for attending as a witness in behalf of his client, for the latter is primarily liable; the attorney only in consequence of an express personal engagement (Sargeant v. Pettibone, 1 Aik. 355); nor of a demand due from an indemnitor (Stocking v. Sage, 1 Conn. Rep. 75); nor any collateral undertaking, as that "if A. employ you I will see you paid" (Skinner v. Conant, 2 Verm. Rep. 75); nor any mere claim for damages for any tortious act or neglect, or for any breach of contract (per Hutchinson, J., in Fry v. Slyfield, 3 Verm. Rep. 249); nor of money lent (Case v. Potter, 8 John. Rep. 211; Vosburgh v. Thayer, 12 John. Rep. 462; Ducoign v. Schreppel, 1 Yeates, 347); nor money had and received on notes delivered, to be collected and applied, but which were collected and not applied (Farrand v. Gage, 3 Verm. Rep. 326); nor of a balance struck, as of ten dollars for a trespass (per Ford, J., in Wilson v. Wilson, 1 Halst. 94); nor a settlement or balance struck on book account (Prest v. Mersereau, 4 Halst. 268; and see Worman v. Boyer, 14 Serg. & Rawle, 212; per Ford, J., in Wilson v. Wilson, 1 Halst. 94); nor of money paid to or for the person sought to be charged (Ducoign v. Schreppel, 1 Yeates, 347; Prince v. Smith, 4 Mass. Rep. 455; per Tilghman, C. J., in Juniata Bank v. Brown, 5 Serg. & Rawle, 231; Sargeant v. Pettibone, 1 Aik. 355; Sawyer v. Proctor, 2 Verm. Rep. 580; Jones v. Brick, 3 Halst. 369); yet particular necessity has been received to create an exception, as where the disbursements related to a distant commercial transaction, and were charged by the remote agents and consignees against the owners of a vessel (Seagrove v. Redman, 2 Yeates, 254; S. C., 4 Dall. 153); nor of rent (Prince v. Smith, 4 Mass. Rep. 455); nor use and occupation of a wharf, or any other real estate (Wilmer v. Israel, 1 Browne, 257; Beach v. Mills, 5 Conn. Rep. 493; Swing v. Sparks, 2 Halst. 59; Case v. Berry, 3 Verm. Rep. 332).

2. As we noticed on introducing these instances, even though the case be *prima facie* a proper one for proof by entries, if it appear, either on the face of the charge, or in any other way (*e. g.* by the party's oath in states where that is receivable), that there is, in fact, living or attainable proof of the item, independent of the entries, the latter are then inadmissible; for it being apparent that the ordinary common-law proof exists, which is superior in degree, that must be produced. It can then only be dispensed with, and the entries received, where it is shown to be in truth beyond the reach of the party. The common case in New York is where the party has a clerk (Vosburgh v. Thayer, 12 John. Rep. 462); though one case seems to hold that the entire entries may be received, though part were made by the clerk, and the rest by the party. M'Allister v. Reab, 4 Wendell, 483. But *quere* as to such entries as appear to be made by the clerk; for other cases have, with a laudable jealousy of such self-fabricated evidence, adhered closely to the rule that where the entry is made by the clerk, nothing shall excuse his absence except his death. Kenedy v. Fairman, 1 Hayw. 458; Whitefield v. Walk, 2 Hayw. 24. In the first of these cases, the clerk was absent in the West Indies, and in the other at South Carolina; yet held no excuse in either case. Some cases, however, allow the excuse that the clerk is permanently beyond the power of the court. Sterritt's Ex'r v. Bull, 1 Binn. 234. Upon the same principle, a schoolmaster's original entries are no proof; for he has usually many witnesses by whom to prove his services; and he must avail himself of them. Pelzer v. Cranston, 2 M'Cord, 328. The analogy of these cases has been carried by authority into a variety of transactions; and the courts very judiciously appear determined to act on the same principle in regard to all matters forming the subject of evidential account-books. True, in one case, a lime burner and vendor's book was received to prove large sales of lime delivered out by servants and agents, where the party was generally present, either at the kiln, when the loads were placed in wagons, or else saw the delivery; and this, though he was absent on a very few occasions (Curren v. Crawford, 4 Serg. & Rawle, 3); and in another case, entries made by the party from a memorandum of a servant were received (Ingraham v. Bockius, 9 Serg. & Rawle, 285); yet the subsequent cases of Smith v. Lane (12 Serg. & Rawle, 80, 82), and Kessler v. M'Conachy (1 Rawle, 441),

both stated *infra*, manifest a strong tendency to greater strictness, and a conformity with the other cases in the state of Pennsylvania and elsewhere. But see Kaughley v. Brewer, 16 Serg. & Rawle, 133, 134, stated also *infra*. In a former case in that state, charges for work done by a servant were disallowed as evidence, the court saying such evidence was allowed from necessity, and where the work has been done by a third person, the necessity does not exist. He can prove it. "*Cessante ratione, cessat ipsa lex.*" Wright v. Sharp, 1 Browne, 344. So, charges for work done by servants; for they are competent witnesses. Wright v. Sharp, 1 Browne, 344. If the goods were delivered to a third person on account of the vendee, the books are not evidence (Kerr v. Love, 1 Wash. Rep. 172); not even though they were the vendee's servants. Eastman v. Moulton, 3 N. H. Rep. 156. So, though the books of a printer be receivable, they are no farther so than to prove the retainer to do the work; for the files may be produced to show the *quantum*, and the price may be proved by others (Richards v. Howard, 2 Nott & M'Cord, 474); nor are a tailor's books receivable to prove goods delivered to the defendant's ward by the order of the defendant. Here they are mere proof of the delivery. Books are, in general, not allowed to prove a direction or instruction to deliver to a person other than the defendant. Deas v. Darby, 1 Nott & M'Cord, 436. The charge on its face, purporting to be of goods delivered to another on the defendant's order, it was rejected as incompetent. Tenbroke v. Johnson, 1 Coxe's Rep. 288; Townley v. Wooley, 1 Coxe's Rep. 377. And where goods were delivered delivered on written orders, an account was excluded as evidence, for that reason among others. The orders should be produced, or otherwise proved on accounting for their absence. Smith v. Lane, 12 Serg. & Rawle, 80. Where the goods are delivered out by another or by others, the account kept by them, or by one on their information, cannot be received; for the party has other proof by those who delivered the goods, and they must be produced, or their absence accounted for. Smith v. Lane, 12 Serg & Rawle, 81. Where the charge was for medicine and attendance on an aged menial servant of the defendant, the plaintiff's book was received as usual: but it was held that the defendant's agreement to pay must be proved by evidence *aliunde*. Coffin v. Cross, 3 Dane's Abr. 322.

Yet, charges for goods sold and delivered to, and services performed for one on account of another, have been sustained by the claimant's original entries in Connecticut, without showing the death or absence of the witnesses. But the question was not presented in the above points of view; and some reliance seems to have been placed on the statute of that state as controlling the case. Bryan v. Jackson, 4 Conn. Rep. 288, 292; Swift's Ev. 84.

3. To be admissible at all, the entries should be made at or near the time of the transaction. The law fixes no precise instant. They are not to be registers of a past transaction; but memoranda of transactions as they occur. Per Duncan, J., in Curren v. Crawford, 4 Serg. & Rawle, 5; Cogswell v. Dolliver, 2 Mass. Rep. 217; Eastman v. Moulton, 3 N. H. Rep. 156; Ewing v. Sparks, 2 Halst. 59; Kessler v. M'Conachy, 1 Rawle, 441. And where some were made at the time, and others some months after, without distinguishing which, or assigning a good reason, the whole were rejected as incompetent. Vance v. Feariss, 1 Yeates, 321; S. C., 2 Dall. 217, by the title of Vance v. Fairis. The party saw his lime, in general, either loaded at the kiln or delivered to the vendees, but not always, and trusted to his wagoners for some of his charges; yet, his book of charges for the lime was allowed to go the jury. Curren v. Crawford, 4 Serg. & Rawle, 3. A butcher's servant, carrying out meat, uniformly marked in pencil the quantity delivered, which his master copied into his book on his return. The book was held receivable. Ingraham v. Bockius, 9 Serg. & Rawle, 285. And see Curren v. Crawford, *supra*. But see Smith v. Lane, 12 Serg. & Rawle, 80; and Kessler v. M'Conachy, *infra*. So, where one of two butchers (partners) customarily marked the scores of meat with chalk on a cart, and the other, before the cart went out again, copied the scores into the book, it was held receivable, on the oath of both partners. Smith v. Sandford, 12 Pick. 139.

It is no objection to the book though the entries be first made on a slate and then transcribed by the party, if done in the ordinary course of his making such entries (Faxon v. Hollis, 13 Mass. Rep. 427; Kessler v. M'Conachy, 1 Rawle, 441); though properly they should be transcribed daily; and where it was left in doubt whether a day or two after, they were rejected (Ogden v. Miller's Exr's, 1 Browne, 147); and they will, of course, be rejected, if it do not appear that the party made the entries on the slate—but it is left to be inferred that they were made by a servant, who could attest to them himself. Drummond v. Hyams, 1 Harp. 268. And see

Kessler v. M'Conachy, *infra*, and Ingraham v. Bockius, *supra*. And where the journeyman made the entries, some of them on a slate, whence they were copied by the master—some in a day or two, some in a week, some perhaps not short of two weeks, without distinguishing which was longer or shorter, the book was held altogether inadmissible. And much stress was laid on there being better evidence, the journeyman himself; they should at least have been both made and transcribed at or about the time the work was done; and the party should distinguish the entries so made from those made more loosely, or the whole must be rejected. Kessler v. M'Conachy, 1 Rawle, 441. A book is receivable as evidence though the work be charged while in progress, and before it be completed; as where a tailor made his charges on the work being cut out and delivered to his journeymen, who worked in the same house with him. Such mode of keeping books as is usual and known to all tradesmen cannot safely be declared bad by the court. In some trades the work is in hands for several days, and goes through more than one hand; and the entry may be made during the period of its manufacture, or at a stated time when it has progressed a certain length. The court would not say a shopkeeper could charge goods not yet measured or weighed off; nor a tradesman work not yet begun; but they hesitated to say that a blacksmith who has prepared and weighed iron work, and then charges before he puts it on the wood, which might take him a week, or a chairmaker who makes and paints the chairs and charges them before sent to be gilt, shall not read his book. Kaughley v. Brewer, 16 Serg. & Rawle, 133, 134.

4. The entry must be in the book of the party, kept by him for the purpose of his daily accounts, generally, with all those persons who may have dealings with him; and must be made in conformity to the prevalent manner of his keeping the book; and in a regular course with other charges. If they stand insulated on the front leaf of the book, and not falling into a regular order with the other charges, they will be rejected. Lynch v. Hugo, 1 Bay, 33. So, if on a separate sheet, especially when it appears that the party in fact keeps an account-book. Prince v. Smith, 4 Mass. Rep. 455. So of a mutilated piece of paper, which appears to have been torn out of a book, in which the name of neither party appears, which contains no charges against the defendant, and which is unintelligible without explanation by the plaintiff. Hough v. Doyle, 4 Rawle, 291. Where six charges, amounting to six hundred and fifty dollars, were on one of the last leaves of the book, separated from all the entries by intervening blank leaves, and dated during the same period with thirteen other charges made in the body of the book, apparently regular, the six charges were held properly to be no part of the book, and inadmissible, the same as entries on a separate leaf. Per Kirkpatrick, C. J., in Wilson v. Wilson, 1 Halst. 94; Rozell, J., *contra*. Charges on several disconnected pieces of paper were rejected. Thompson v. McKelvey, 13 Serg. & Rawle, 126. After the defendant's demand accrued against the plaintiff, the latter caused a series of charges to be continuously written down in his regular book against the defendant, ranging through 1816, '17, '18, '19 and '20, without a single intervening charge. The book was held clearly inadmissible as evidence of such charges. Swing v. Sparks, 2 Halst. 59. But in Vermont, an entry of a service as counselor at law on a separate slip of paper, filed according to the party's usual practice, was received. Bell v. M'Lean, 3 Verm. Rep. 185.

5. To make the book admissible for any purpose, it must contain the original entries of the party made by himself; and must be an account of his daily transactions. Per Duncan, J., in Curren v. Crawford, 4 Serg. & Rawle, 5; Sterritt v. Bull, 1 Binn. 237; Prince v. Smith, 4 Mass. Rep. 455; Eastman v. Moulton, 3 N. H. Rep. 156; Swing v. Sparks, 2 Halst. 59. And one reason why they must not appear to be made by another is, because he is then *prima facie* a witness, and must be produced. Eastman v. Moulton, 3 N. Hamp. Rep. 156. But regard is had to the party's degree of education, and *semb.*, if he cannot write so as to make entries, they may be made by another. Prince v. Smith, 4 Mass. Rep. 455; Eastman v. Moulton, 3 N. Hamp. R. 156. If it clearly appear that the entries are not original, either upon inspection or from extrinsic testimony, they are to be withheld as incompetent evidence. Cogswell v. Dolliver, 2 Mass. Rep. 222; Curren v. Crawford, 4 Serg. & Rawle, 3; Prince v. Smith, 4 Mass. Rep. 455; Swing v. Sparks, 2 Halst. 59.

6. Being original entries, the question then arises upon the form in which they are to be kept. Among the European continental nations, which have adopted the civil law as the basis of their own, this proof by book account also prevails. If we may be allowed to judge of its form from the French Code, and the more approved French writers on jurisprudence, who confine it to mer-

chants of good standing, we shall have reason to believe that the avenues to abuse are partially closed by the cautious manner in which accounts must be arranged and checked, in order to give them the character of competent proof. Code de Com. Liv. 1, tit. 2; des Livres de Commerce, art. 12; Poth. des Obl. nos. 719, 720. Yet the book itself is not such evidence as will warrant a sentence in favor of the party producing it. 1 Dom., p. 444, b. 3, tit. 6, § 3, art. 9. It is but semi-proof, which may be rendered perfect by the suppletory oath of the party. Poth. *ut supra.* But in many of the United States, where this kind of evidence is left to be framed by citizens of every occupation and every variety of language and character, and that, too, in their own way, any considerable degree of safety derived from the forms of bookkeeping is the last thing to be expected. Yet books are rarely rejected for a defect of form, even in those states where they are not brought down to semi-proofs, and where, in the hands of inexperienced tribunals, it is almost of course that, being received, they should reach the effect of *prima facie* evidence. Frail as such proofs must be, however, perhaps the law can hardly be censured for thinking they would be but little fortified by the suppletory oath of an interested and excited party. So long as such books are admissible, whatever guards the law may throw around them by way of testing their credibility, must be little more than naked theory, banded against the devices of interested trickery. Nothing, perhaps, short of the bann of incompetency, would afford an adequate security against partial simulation, and occasionally, in a long run of heedless security on the side of the debtor, the most ruinous and oppressive interpolations, as the satirist has it, in

> "Those unpaid bills, which time has taught to grow,
> Faster than poplars on the banks of Po."

But, to proceed with the judicial treatment of this evidence. Being the original or first entries of the party in his own hand, these books are the least suspicious when kept in the form of daily entries in a single journal or day-book, of the debts and credits of the different persons with whom the party deals, in the order of dates, without blanks, chasms or marginal references. In France, if any of these requisites are wanting, the book is not competent evidence. Code de Com. tit. 2; De Livres de Commerce, art. 8, 10. This is the most perfect form, and one which has never been questioned in the American courts, where book accounts are received in any way. But generally they do not require anything like these formalities, in order to render books competent. We have seen *ante*, in our quotation from Judge Swift's Treatise of Evidence (pp. 81, 82), what is necessary to insure credibility, according to the judicial experience of Connecticut, which, if not greater, has probably been recorded with more care than that of any other state. And, considering the suspicious nature of this evidence, in itself, there can be no doubt that the party should be put to common-law proof, should the entries come short of the character which Swift has demanded. At least, the entries should be, in all such cases, strongly and clearly confirmed by common-law evidence, even where the oath of the party is required. Still, however, they are competent, that is to say, they stand something above zero, though they may come short of the standard of credibility. One striking instance is in receiving entries kept ledger-wise; that is to say, where the account of each man dealing with the party is kept by itself, in a separate department of the book; thus affording every facility for undetected interpolation, either *ante* or *post litem motam.* Yet such books are receivable. Swift's Ev. 81, 82; Rodman v. Hoop's Ex'rs, 1 Dall. 85; Faxon v. Hollis, 13 Mass. Rep. 427; per Kirkpatrick, C. J., in Wilson v. Wilson, 1 Halst. 94; Cogswell v. Dolliver, 2 Mass. Rep. 217; Griff. Law Reg. U. S. *ut supra*, of New Jersey, *ante.* This was denied of New Jersey, in Leveringe v. Dayton (C. C. U. S. N. J. Sittings, *Cor.* Washington, J., and Rossel, Dist. Judge, 4 Wash. C. C. Rep. 608); but the weight of authority seems to be the other way, even in New Jersey; and decisively so when connected with the decisions of the neighboring states. Books thus kept were received, though the entries in question were intermixed with various charges, notes, receipts and memoranda relating to the party's dealings with others, in whatever blank spaces he happened to find, without any regard to the order of dates or pages. Cogswell v. Dolliver, 2 Mass. 217.

But whether in a day-book or ledger form, the entries must appear to have been made daily, or they cannot be admitted. Eastman v. Moulton, 3 N. H. Rep. 156; Smith v. Lane, 12 Serg. & Rawle, 80. If it appear, at any stage or in any way, that charges arising at different dates were in fact made at the same time, the book is not evidence. Eastman v. Moulton, 3 N. H. Rep. 156.

It must also be apparent that the entries were intended as book charges, in account with the identical party against whom they are offered in evidence. Rhoades v. Gaul, 4 Rawle, 404; Rogers v. Old, 5 Serg. & Rawle, 404; Smith v. Lane, 12 Id. 80. If they are kept merely as a memorandum between the party and another, they are inadmissible. Smith v. Lane, 12 Serg. & Rawle, 80. Arbitrary marks fixed to the entries, not intended to charge the vendee, but merely to inform the porter and prevent a delivery of similar articles twice, cannot be used to aid in the evidence of delivery, especially if not always made by the same person making the residue of the entry, nor by the party nor his clerk. Rhoades v. Gaul, 4 Rawle, 404. So a book kept by a forgeman to settle by with his customers, though it name the vendees, and sometimes the price, is not evidence against the latter. Rogers v. Old, 5 Serg. & Rawle, 404.

It is not an insurmountable objection to the competency of the book, that there be erasures and corrections. Its character is not thus destroyed as a book of original entries. The alteration is open to explanation; and the objection goes to the credit only. Sargeant v. Pettibone, 1 Aik. 355. But it is a serious objection against its credit; and if gross, suspicious, or unexplained, it will destroy the competency of the book. Swift's Ev. 81, 82; Eastman v. Moulton, 3 N. H. Rep. 156. And so of any other fraudulent appearances. Eastman v. Moulton, 3 N. H. Rep. 156.

Not only the day-book, but if it be posted, the ledger must be produced, that it may be seen what credits there are. This was held where post-marks appeared on the day-book. Prince v. Sweet, 2 Mass. Rep. 569; Eastman v. Moulton, 3 N. H. Rep. 156. And it is the same in whatever way the fact of posting may be made to appear. Eastman v. Moulton, 3 N. H. Rep. 156.

The book being competent as a whole, almost any series of figures, abbreviations and words, which can be explained into a signification, will do for particular charges. The following is a specimen of charges for lime, allowed in Curren v. Crawford, 4 Serg. & Rawle, 3:

"‖ 15 B. Marpol.

60 Themerty Coren."

And regard, as we have seen, is always to be had to the party's degree of education, the nature of his employment, and the manner of his charges against others. Prince v. Smith, 4 Mass. Rep. 455. But the charges must be specific; that is to say, they must denote the particular work or service charged, as it arises daily, and the quantity, number, weight, or other distinct designation of the materials or articles sold or furnished, and attach the price or value to each item. Hughes v. Hampton, 2 Const. Rep. 745; Lance v. M'Kenzie, 2 Bail. Rep. 449; Lynch's Adm'r ads. Petrie, 1 Nott & M'Cord, 130, cited 4 M'Cord, 77; Hagaman's Case, 1 South. 370. Accordingly, a bricklayer's charge of "190 days' work," was rejected; it should be placed in the book daily, being entered at the time as it occurs (Lynch's Adm'r ads. Petrie, 1 Nott & M'Cord, 130, and see S. C., 4 M'Cord, 77, cited); and a physician's charges "for medicine and attendance;" and another thus: "13 dollars for medicine and attendance on one of the general's daughters in curing the hooping cough" (the charges were against Gen. Wade Hampton); were also rejected as too indefinite (Hughes v. Hampton, 2 Const. Rep. 745); and a like general charge was rejected in Lance v. M'Kenzie, 2 Bail. 449. But this is a matter which must reside very much in the discretion of the judge, to be exercised according to the nature of the subject, and its susceptibility of being precisely charged. Where, within this rule, to be applied on the examination of witnesses and otherwise, the charge is sufficiently specific, it will be received; and such was the course in judging of a physician's bill and admitting it, in Schmidt v. Quin (1 Rep. Const. Ct. 418); and rejecting it in Lance v. M'Kenzie, *supra*. The rules of the medical society in South Carolina fix specific rates, as far as practicable, to the services of the medical profession; and physicians generally adhere to them in their charges. Per Johnson, J., 2 Bail. 450. And see the evidence detailed in the case. A receipt in the account-book, purporting to be signed by the vendee, is not receivable in proof as an original entry. Sterritt's Ex'rs v. Bull, 1 Binn. 234. If the prices be not carried out, the books are imperfect; and, if admissible at all, prove nothing as to the price, and the jury cannot guess at that; so the charge goes virtually for nothing. Hagaman's Case, 1 South. 370.

7. We have already seen that, so far from being primary evidence, superior in degree to the mere oral testimony of disinterested witnesses, books are treated by the cases, according to their true character, as evidence secondary to common-law proof. It was in one case hastily holden, that the party's book must be produced like any other written evidence, as standing higher upon the scale, or that its absence must be accounted for, before proof by witnesses should be received.

Kelly v. Holdship. 1 Browne, 36. But this, beside being contrary to various other cases which we have cited, *supra*, is contrary to Wright v. Sharp, in the same book. p. 344. The book is, no doubt, essential where the suppletory oath is resorted to; otherwise, where witnesses are called; a distinction which, in the haste of a trial, was overlooked in Kelly v. Holdship. Where the party is sworn, the book must be produced, for there it is the principal evidence (Nicholson v. Withers, 2 M'Cord, 428); and if it be lost, the party loses his oath, as we saw *supra*, by Prince v. Smith. 4 Mass. Rep. 455. In such a case, the contents of the book may be proved; but this must be by common-law evidence, though the party made the entry himself. Id. If proved by another who made the entries, the book must be in court, or its absence accounted for; and so where the entries of a third person, deceased, are the subject of proof. In such case, the contents of the paper itself being in question, they must be proved like those of any other paper, by itself, if it can be had. Nor will the excuse that the party resides at a great and inconvenient distance, be received. Smith v. Peay, 2 Bail. 394. The rule as to showing the contents of documents by themselves only, has been applied to account-books by several cases. Keller v. Ord, 1 Dall. 310; Herring v. Levy, 4 Mart. Lou. Rep. (N. S.) 383; Smith v. Peay, 2 Bail. 394; Nicholson v. Withers, 2 M'Cord, 428. But extracts from the books of foreign merchants, verified by the oaths of their clerks, were received, the court saying it would be unreasonable to require the books themselves. Bell v. Keely, 2 Yeates, 255. And see Lewis's Ex'r v. Bacon's Legatee, 3 Hen. & Munf. 89. *Quere.* See Elms v. Cheevis, 2 M'Cord, 349, also stated *supra*.

It is perfectly well settled, by a series of adjudged cases, that a party may, in his discretion, waive his books altogether, and rely upon his common-law proof, by witnesses or otherwise. Levenworth v. Phelps, Kirby, 71; per Washington, J., in Cambioso's Ex'rs v. Maffett's Assignees, 2 Wash. C. C. Rep. 101; Nicholson v. Withers, 2 M'Cord, 428; Read v. Barlow, 1 Aik. 145, 147, 148, per Skinner, Ch. J.; Palmer v. Green, 6 Conn. Rep. 14, 17; Bernham's Adm'r v. Adams, 5 Verm. Rep. 313; Whiting v. Corwin, 5 Verm. Rep. 451. The party may take his account and proof from his adversary's book. But the non-production of his own book would many times, and especially if called for by his adversary, be a heavy circumstance against him. Swift's Ev. 82; Palmer v. Green, 6 Conn. Rep. 14, 17. A very ordinary expedient of the common law is, to prove the entries of a deceased clerk as mentioned *ante*, note 107.

8. Books are evidence, both of the item charged and the price or value carried out, subject to inquiry on other evidence. Ducoign v. Schreppel, 1 Yeates, 347. Properly attested, they are *prima facie* evidence of the delivery of articles of merchandise (Foster v. Sinkler, 1 Bay, 45, per Pendleton, J.); indeed, both of sale and delivery; and in case of services, they are evidence of retainer to do the service, the doing of it, and the delivery of materials in the course of the service. M'Bride v. Watts, 1 M'Cord, 384. Nor need entries of charges for spirituous liquors sold in small quantities be followed with proof of a license to sell. Herlock's Adm'rs v. Riser, 1 M'Cord, 481. The book is to be taken together, with its charges and credits, especially where both are of the same date. Harrington v. Hall, 2 Aik. 175.

9. *Semb.* The party's books would be admissible on a collateral point in a cause, as if in an action to recover money from the defendant, it should be material to determine the state of his accounts with another. Mifflin v. Bingham, 1 Dall. 272, 276. But it was afterwards held that, the third person being himself a witness and his oath better evidence than his books, he should be produced. The case would not then come within the necessity on which this kind of proof is founded. Juniata Bank of Pennsylvania v. Brown, 5 Serg. & Rawle, 226.

10. We noticed, *supra*, the tests of credibility arising from the face of the account, and from various other collateral circumstances, while speaking of the law of Connecticut. Their good sense will commend them to all persons engaged in the judicial investigation of accounts, which are always, though the books be received, open to objections as to their credit, from unfair appearances or other evidence. See per Sewall, J., in Prince v. Smith, 4 Mass. Rep. 455.

(The subject may be further illustrated by some of the more recent decisions: Jones v. Jones, 1 Foster (N. H.) 219; entries made upon loose sheets of paper are not to be presumed to have been made as daily minutes of the parties' business transactions, and are not admissible in evidence. To render a book evidence, it must appear to have been regularly kept in such a manner as to afford a strong presumption of its accuracy; in other words, the charges in the handwriting of the party must appear in such a state that they may be presumed to have been his daily minutes of his transactions and business. Richardson v. Emery, 3 Id. 220. But if the book ac-

count appears to have been regularly kept, and the charges were made at or about the time the work was done, or materials found, it will not be rejected merely because it is proved by the party's suppletory oath that the entries were not invariably made on the same day the work was done, or articles furnished. Morris v. Briggs, 3 Cushing, 342. Neither the manner nor the form in which the book is kept is material, so that it appear to have been fairly and honestly kept; thus, an account for work, entered on one leaf of a book with no intervening charges, is admissible supported by the suppletory oath of the party, though the entry be in pencil. Gibson v. Bailey, 13 Met. 537.

Clough v. Little, 3 Rich. 353; when the party offering his book in evidence is supporting it by his own oath, he may be cross-examined like any other witness; and if on his examination he show that the entries were made by himself from the statement of his clerk in regard to the sale, the evidence is insufficient. On the other hand, if the party offering show that the book, or even separate sheets of paper, contain the original entries of the account made by the party, and the usual additional facts, the evidence is admissible; and the credibility both of the book and of the party is to be weighed by the jury. Taylor v. Tucker, 1 Kelly (Geo.), 231.

Where goods are sold on an order, or where they are entered in a pass-book, and delivered to a third person, the order or the pass-book must be produced; in other words, the books of the party are not evidence of the agency of the person to whom the delivery was made. Thompson v. Porter, 5 Strobh. Eq. 58. When the defendant calls for the plaintiff's books and introduces them in evidence for one purpose, as to prove the goods charged to another person, the plaintiff may read from the books for another purpose. Lewin v. Dille et al., 17 Mis. (2 Bennett), 64. Loose memorandums made by a party's clerk, not in the course of his employment, are not evidence against his principal. Lockey v. Schreiber, Id. 146.

Books of original entries are not evidence of the casual sale of an article (such as a horse) not in the course of the parties' business, and of which it is usual to take other proof or evidence of sale. Shoemaker v. Kellogg, 11 Penn. State R. 310. Nor are they evidence of a collateral fact. Little v. Wyatt, 14 N. Hamp. 23.

In Maine, where a party relies upon his book of original entries supported by his oath, only, he must swear that he made them at or about the time they purport to have been made; that they are his original entries of the transaction; and that the articles and services were respectively delivered and performed as charged. Durnel v. Pottle, 31 Maine, 167. An attorney may prove his entries for services rendered in same way. Codman v. Caldwell, Id. 560.

In the case of a sale, if the party shows a delivery to a third person, the book is to be excluded unless there be other evidence showing the latter's authority to receive. Soper v. Veazie, 32 Id. 122. The delivery must be proved. Godfrey v. Codman, *supra*. So, under the book-debt law of North Carolina, the party must testify to the delivery of the articles sold. Adkinson v. Simmons, 11 Ired. 416.

The book offered must be one of original entries. Toomer v. Gadson, 4 Strobh. 193.

It is no objection to a book of original entries that part of them are written in pencil; so held where the party offering them was a vendor of coal, at his coal bank, and the book offered in evidence was the original entries of the coal sold and delivered. Hill v. Scott, 12 Penn. State R. 168. Such books are commonly used as evidence of a sale and delivery of goods, but may be verified by a witness and used as memoranda to designate them. Fitler v. Eyre, 14 Id. 392. And they may be used to show the consideration given by the indorsee of a note, the note and other items being credited in an account between the parties, and the whole being verified by a clerk and shown to be a part of the *res gestæ*. Rosenberger v. Bitting, 15 Id. 278. So, in a remote transaction, the books of a broker may be used to determine in what character and for whom he acted in the sale of real estate. Sergeant v. Ingersoll, Id. 343. So a trustee's books may be used to show the character in which he held certain real estate; as where he held the premises by a conveyance in trust, and conveyed them to the daughter of the grantor in fraud of creditors. Hollingshead v. Allen, 17 Id. 275.

Though the book offered in evidence contain entries which are not original, that does not form any objection to its being received as to those entries which are original and properly entered. Wollenweber v. Ketterlinus, 17 Id. 389.

Books of account are not evidence of money lent. Henshaw v. Davis, 5 Cush. 145. Nor of money paid to a third person. Faunce v. Gray, 21 Pick. 243; Inslee v. Prall, 3 Zabr. N. J.

Entry by person *deceased.*

It will appear that in the cases before mentioned, relative to declarations against interest, and in the cases which have been considered in this section, that the declarations were those of persons deceased; the necessity of proving the declarant's death will be considered more particularly in that part of the work which treats of the subject of primary and secondary evidence. It is also requisite, where the declarations are in the nature of written entries, that they should be produced from the proper custody. This circumstance, which is essential for their authenti-

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457. Nor of three months' service, entered as one item. Henshaw v. Davis, *supra.* Nor of the making of stairs, the work being done under a special contract. Earle v. Sawyer, 6 Cush, 142. Nor of expenses incurred in search of a slave. Redden v. Spruance, 4 Harring. (Del.) 217. But a book of account is evidence of meals furnished to the defendant and his servants from day to day. Tremain v. Edwards, 7 Cush. 414.

The account-book of the payee of a note is not evidence to prove that the note was given for necessaries; but is competent to show the delivery of the articles charged. Earle v. Reed, 10 Met. 387.

In Arkansas, the original entries of a merchant in books kept by himself and a clerk, now absent from the state, are not evidence in his favor, though he offer to verify its accuracy by his oath; entries by a clerk may be proved in this manner on showing that he is dead, but not otherwise. Burr v. Byers as Ad., 5 Eng. 398. So in Alabama, there being no statute admitting books in proof of an account, the entries of a tradesman by himself, stating the delivery of goods, are not evidence in his favor. Moore v. Andrews, 5 Porter R. 107; Scott v. Coxe's Adm'r, 20 Ala. (N. S.) 294. In Florida, the books of a party having a clerk cannot be used as evidence of a merchant's account by proving that they were correctly kept, and that part of the articles were delivered. Higgs v. Shehee, 4 Florida, 382. In Kentucky, books of account are, under certain circumstances, admitted in evidence; but are not admissible to prove payment of a note. 12 B. Mon. 506.

In Georgia, books of original entry kept by the party himself, are admissible in evidence, if they appear on inspection to have been fairly kept, and it be shown by the party's customers that he keeps correct books; and though there be interlineations in the books made in a different ink, the circumstance may be explained, and though unexplained, should go rather to the credit than the exclusion of them. Bower v. Smith, 8 Geo. 74. In Ohio, a party is entitled to sustain his book account by his own oath; and if he omits to do so, his book cannot be received in evidence (Kugler v. Wiseman, 20 Ohio, 361); but if the party be incapable of testifying, having become insane, his guardian may verify the books by his own oath. Holbrook v. Gay, 6 Cush. 615.

In New York, books of account are received with great caution; they are allowed in evidence upon preliminary proof that the books offered contain original entries, made by the party himself; that they are fairly kept; that the party had no clerk, and had dealings with the person charged. Larue v. Rowland, 7 Barb. 107. The fact that plaintiff keeps honest books may be sufficiently proved by one witness (Beattie v. Qua, 15 Barb. 132); and the fact of regular dealings between the parties may and must be established like any other fact—one transaction is not enough. Corning v. Ashley, 4 Denio, 354. The preliminary proof being given, the books are admissible from the necessity of the case, to prove an account for goods sold, or services rendered; they are not evidence of cash lent. Lowe v. Payne, 4 Comst. 247. But since the party is by a late statute a competent witness for himself, and his books have been heretofore allowed in evidence on the ground of necessity, it is quite clear that he must now support his books by his own testimony.)

cation is particularly considered in that part of the work which treats of written evidence.(1)

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(1) NOTE 109.—These entries in books by the party against himself belong to the class of admissions (Pringle v. M'Clenachan, 1 Dall. 486), which we shall consider, *post*, when we speak of entries in books, &c., made by the party against himself, and how far his whole entries shall be taken together. See, also, several cases, *post*, as to what shall be considered the party's books by reason of his being concerned in them as a member of the club or partnership which keeps them, or having access to them, &c.; and as to the effect of entries in these and the like books, which are made there for or against him. The instance of entries by a bankrupt being evidence, put by our author in the text, will occur to the reader as an exception to the rule that a party's declarations shall not be received as evidence in favor of one claiming under him. The bankrupt not being a witness, his former entry, made at the time against himself, but which, by a change of circumstances, turns out now to be favorable, by sustaining a suit which may be beneficial to him, is, notwithstanding, received. The reader will see a similar turn recently given to entries and balances struck, by a father in favor of his son, to prove that the former was indebted to the latter. These entries were against the interest of the father at the time. Now a bill is filed by his creditors, accusing both father and son of combining to create fictitious debts from the former to the latter, in order to withdraw funds due to creditors. The books kept in common between them, *ante litem motam*, were received in their favor to show that the debts were *bona fide*. Dwight v. Brown, 9 Conn. Rep. 83, 90, 91, *et seq.*

Having now gone through with those matters which seemed to connect themselves with our author's distribution of hearsay evidence, we shall conclude this head by a brief notice of some particulars, appearing to form exceptions additional to those which he has mentioned.

1. It has recently been held that common reputation is the best evidence of the state of a man's property, when the question arises collaterally. On an indictment for passing counterfeit bills, with a guilty knowledge of their character, the *scienter* finally becoming the only question, the prisoner's counsel proposed to repel that fact, which is so often entirely inferential from circumstances, by showing the competent state of the prisoner's fortune, as an argument for the improbability that a man, so situated, would resort to the practices imputed by the indictment. The prisoner had recently removed from North Carolina to Georgia; and the counsel proposed to inquire of the sheriff "whether it was not generally understood and believed, by the neighbors and acquaintances of the prisoner, that he was a moneyed man, and that he carried considerable money with him on his removal to Georgia." This being overruled, on objection, and the prisoner being convicted, error was brought, and the judgment reversed for that reason alone. Henderson, J., who delivered the opinion of the court, said the facts offered to be shown "tended to throw light upon the subject the jury were then trying, viz: the defendant's knowledge that the notes were bad. And this seemed to be admitted from the manner in which the case is stated. The objection seems to be to the mode of proof, to wit, common reputation. I think it the best, and almost the only, proof by which such facts can be established. They exist in reputation; for, although proof may be had that a person had much property in his possession, yet, when the question arises collaterally, recourse must be had to common reputation as to his being the owner, and not to the title deeds, and especially whether he is a moneyed man. Such a character consists of so many distinct facts, as how much had he—was it his—would not his necessities compel him to use it, and not keep it—could he soon replace it—what were his habits, that of keeping and dealing in money or realizing it—that I think it almost impossible otherwise to prove it. Besides, it is of such a character that it is almost impossible for it to become reputation unless the fact be so. There is, therefore, very little danger of imposition in receiving it, and the prisoner certainly had a right to the benefit of it before the jury. For, upon a question of *scienter*, there is more probability that a vagabond, found in possession of one thousand dollars in bad money, knew it to be bad, than if such a sum is found in the possession of a moneyed man. In the first case, we cannot well account for the vagabond's having so large a sum, otherwise than by its being bad, or of his knowledge of it, unless he shows how he got it; whereas, in the

other case, the reverse may happen. And if it weighed ever so little, the prisoner was entitled to its weight before the jury." State v. Cochran, 2 Dev. 63.

2. It has been suggested by a learned writer, that, where a person comes forward and confesses the crime of which another is accused, and surrenders himself to justice, such confession would be admissible evidence in favor of the accused. 3 M'Cord's Rep. 232, note. But *quere*. The confession merely of a third person, that he was the guilty man, has been held no evidence for the accused, any more than other hearsay. Commonwealth v. Chubbock, 1 Mass. Rep. 144. And if an actual surrender should make the declaration admissible, it would at once throw open the door for fraudulent testimony, even in exculpation of the most atrocious criminals. The self-accuser is yet to be tried; and he may act under the full consciousness of having such clear proofs of his own innocence, an *alibi*, or some other evidence, that he would be risking but little by doing the whole as an act of solemn trickery in behalf of his friend. The surrender would not estop him. Even should the people prosecute, convict and execute him as the sole malefactor, the verdict would not conclude them, nor by any evidence whatever against the first accusation. It would be *res inter alios acta*.

4. In Graham v. The Pennsylvania Insurance Company (2 Wash. C. C. Rep. 113, 124), which was an action on a marine policy of insurance upon a cargo, the invoice was offered in evidence by the plaintiff, but objected to. Washington, J., said that, "according to the general rules of law in other cases, it would, by itself, be inadmissible. But in commercial cases, it is uniformly admitted, if it carries with it the proof of its fairness. It is not known to have ever before been questioned. It is *prima facie* evidence of value, and no more."

5. At common law, the certificate of an officer having the legal custody of papers, that he had searched, and failed to find any paper pertaining to his files, is mere hearsay, and no evidence of its loss or absence. Bowlin v. Pollock, 7 Monroe, 26, 43, 44. But by the usage in Pennsylvania, the certificate of a prothonotary, that a writ, declaration or statement cannot be found in his office, is admissible to prove the loss. Ruggles v. Alexander, 1 Rawle, 232. So of an officer of the land office, that a warrant or return of survey cannot be found; or of a recorder of a county, that a deed is not recorded. Per Huston, J., Id. 236. And in New York, "wherever any officer, to whom the legal custody of any document or paper shall belong, shall certify, under his official seal, that he has made diligent examination in his office for such paper, and that it cannot be found, such certificate shall be presumptive evidence of the facts so certified, in all causes, matters and proceedings, in the same manner and with the like effect, as if such officer had personally testified to the same in the court, or before the officer before whom such cause, matter or proceeding may be pending." 2 R. S. 552, § 12.

6. General reputation has been, in two instances, received, and expressly recognized by the Supreme Court of New York, as auxiliary evidence that the defendants were partners, in order to charge them all jointly in a suit upon a contract made by one. Whitney v. Sterling, 14 John. Rep. 215; M'Pherson v. Rathbone, 11 Wend. 96. No objection to the evidence was taken in the first case; and in the last it is quite questionable whether any exception was taken which would reach the point. It does not appear to have been made on argument; and there was enough in the case without it; for written articles were proved. In the first case the court doubted whether reputation alone would implicate the defendants. In the last, the learned chief justice said: "It was undoubtedly competent to have proved the partnership of all these defendants by general reputation." Upon such authority, this must be taken as the settled law of New York. That it constitutes one of the most striking exceptions to the rule denying hearsay as evidence, is, however, equally obvious. No authority is cited in either case going to maintain the exception. And we believe that British authority has gone no farther than to look into the act of the party, and declare that if his conduct be such as to lead the public to a belief of his being a partner, he, thus drawing credit to the firm, when he comes to be sued by a creditor whom he may have led to become such, shall not be heard to gainsay his own virtual admissions. The question turns upon his assent, which must be shown, not by general repute, but by witnesses who know the fact, or by circumstantial evidence. This is the farthest that the British law has gone. Roscoe's Ev. 212. Nor are we aware that any American authority beside New York has ever recognized mere hearsay as adequate proof of a partnership; though Tilghman, C. J., said, in one case, it was corroborative evidence. Allen v. Rostain, 11 Serg. & Rawle, 373. The point, however, did not here arise upon the bill of exceptions; and we believe that to this

SECTION IX.

Exception to the General Rule as to Hearsay, where Witnesses, since Deceased, have given Evidence on a former Trial.

It has been held, that the testimony of a deceased witness, who has been examined upon oath on the trial of a former action, between the same parties, and where the point in issue was the same as in the second action, is admissible on the trial of the second action.(1) This kind of

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day nothing to sustain this evidence can be found which will amount to an express adjudication, going even thus far. We are aware of Bernard v. Torrance (5 Gill & John. 383, 405), but understand that the evidence was received merely upon the point of notice to the plaintiff; not as proving or disproving the fact of partnership. Yet the evidence is constantly received at the circuits in New York; and where would it not be under such imposing dicta? Looking to this matter *a priori*, we find a contract of the nicest frame, which, when carefully analyzed, has puzzled the closest inquiries, both of the common and civil law, in fixing its character, referred for proof of its details and its legal effect, to the loosest of all testimony: "surmises, jealousies, conjectures," excited and confirmed by interested creditors. There is scarcely a question upon which common reputation is more liable to be misled by appearances, or abused by sinister misrepresentation.

7. Another exception to the rule that hearsay is not evidence, has been adopted upon summary inquiries into the validity of elections to the legislature, on complaint that votes were obtained by bribery. The declarations of voters may be received as evidence of the bribery. This is, however, only to annul votes, but not to sustain a charge of bribery against the candidate with the view to disqualify, or affect him, otherwise than by vacating his election. See the cases of Milborne Port, 1 Doug. Election Cases, 67; of Ivelchester, 3 Id. 76; Petersfield, Id. 6; Worchester, Id. 129; and Shaftesbury, Id. 150.

In this last case, money to the amount of several thousand pounds had been given among the voters, in sums of twenty guineas a man. The persons who were intrusted with the disbursement of this money, and who were chiefly the magistrates of the town, fell upon a very singular and absurd contrivance, in hopes of being able to conceal the channel through which it was conveyed to the electors. A person concealed under a ludicrous and fantastical disguise, and called by the name of Punch, was placed in a small apartment, and through a key-hole in the door, delivered out to the voters parcels containing twenty guineas; upon which they were conducted to another apartment in the same house, where they found a person called Punch's secretary, and signed notes for the value; but which were made payable to an imaginary character, to whom they had given the name of Glenbucket. Two of the witnesses, called by the counsel for the petitioner, swore that they had seen Punch through the hole in the door, and that they knew him to be one Matthews, an alderman of Shaftesbury; and, as the counsel for the petitioner had endeavored to prove, an agent for the sitting members.

On the part of the petitioner, witnesses were called to prove declarations of voters, who, at the poll, had taken the bribery oath, that they had received Punch's money. This was objected to by the counsel on the other side; but the evidence was admitted. See 3 M'Cord, 233; note of the learned reporter there, to whom the editor is indebted for the above remarks and references.

(1) R. v. Carpenter, 2 Show. 47; Buckworth's Case, Sir T. Raym. 170; Vin. Ab. tit. Evidence, T, b. 88, pl. 4; Coker v. Farewell, 2 P. Wms. 569; Pyke v. Crouch, 1 Lord Raym. 730; Todd v. Winchelsea, 3 C. & P. 387; Doe d. Lloyd v. Passingham, 2 C. & P. 440. That the shorthand writer's notes of the evidence of living witnesses is not receivable, see Williams v. Taylor, 3 M. & P. 350.

NOTE 109 *a*.—All the cases agree that the decease of the witness will let in testimony of what he swore to on a former trial. Glass v. Beach, 5 Verm. Rep. 172; Swift's Ev. 125; Jackson

ex dem. Potter v. Bailey, 2 John. R. 17; Miles v. O'Hara, 4 Bin. 108, 111; White v. Kibling, 11 John. R. 128; Beals v. Guernsey, 8 Id. 446; Jackson ex dem. Gillespy v. Woolsey, 11 Id. 446; Wilbur v. Selden, 6 Cowen R. 162; Crary v. Sprague, 12 Wend. 41; Clark v. Vorce, 15 Wend. 193; S. C., 19 Id. 232; Sheridan v. Smith, 2 Hill, 538; People v. Newman, 5 Hill, 295; Osborn v. Bell, 5 Denio, 370; Green v. Brown, 3 Barb, 119; Marsh v. Jones, 21 Vt. 378; McAdams v. Stilwell, 13 Penn. State R. 90; Regina v. Bird, 2 Eng. Law & Eq. 439; Philadelphia, Wilmington & Baltimore Railroad Co. v. Howard, 13 How. U. S. 307; Williams v. Willard, 23 Vt. 369; Huff v. Bennett, 2 Sand. 120; Weeks v. Lowerre, 8 Barb. 530; Chambers v. Hunt, 2 New Jersey, 552; Jones v. Wood, 16 Penn. State R. 25; Crawford v. Ward, 7 Geo. 445; Kendrick v. The State, 10 Humph. 479; Heth v. Young, 11 B. Mon. 278; Young v. Dearborn, 2 Foster (N. H.) 372.

NOTE 110.—The former testimony of the deceased witness is admissible in another trial of the same cause, either upon repleader, appeal or new trial. Swift's Ev. 125; Marsh v. Jones, *supra*. Nor is it necessary that the former testimony should have been given on the trial of a cause in the exact technical shape of an action. It is enough that the point was investigated in a judicial proceeding of any kind, wherein the party to be affected by such testimony had the right of cross-examination. Accordingly, this doctrine was held of a witness sworn and testifying before commissioners appointed by a statute to settle the title to lands (Jackson ex dem. Potter v. Bailey, 2 John. Rep. 17); before the trustees of an absconding debtor (Cox v. Pierce's Trustees, 7 John Rep. 298); before commissioners legally appointed to examine into the affairs of an estate represented insolvent (said in Fitch v. Hyde, Kirby, 258, 259; before arbitrators; Forney v. Hallagher, 11 Serg. & Rawle, 203; Arwin's Lessee v. Bisling, 1 Yeates, 400); though this was denied as to a former deposition before referees (Staret's Lessee v. Chambers, 2 Yeates, 232, note), on what ground it is not perceived. The doctrine was lately applied to a proceeding and testimony of a deceased witness, on a caveat against the proof of a will, in the Register's Court (Ottinger v. Ottinger, 17 Serg & Rawle, 142); and the Superior Court of Connecticut held the same of a deposition taken on the hearing of a petition before the legislature. Ray v. Bush, 1 Root, 81, 82.

What a witness swore as to a credit, on a summary application before a judge, to mitigate bail, was refused on the trial, as not within the rule; though the testimony having been given without contradiction by the party, it was held competent within the maxim *qui tacet consentire videtur*. Jackson v. Winchester, 4 Dall. 205; S. C., 2 Yeates, 529.

The doctrine has also been denied all application to a criminal cause, whether it relate to felony or a mere misdemeanor. 2 Ev. Poth. 229; State v. Atkins, 1 Tenn. Rep., by Overton, 229; Finn v. The Commonwealth, 5 Rand. 701, 708. Neither Mr. Evans nor the judges in the first case cite any authority; but the judges remark that such evidence would violate the clause in *magna charta*, demanding that the accused should be confronted with the witness. In the second case, Peake's Ev. 60, is cited, who refers to Fenwick's Case. That was a proceeding in Parliament by bill of attainder, against Sir John Fenwick, for high treason. Lady Fenwick had spirited away a material witness who had sworn against Cook, on his trial for the same treason. It is true that Peake relies on that case as proving that such evidence is inadmissible in a criminal proceeding; but he is followed by no other writer; and the case itself carried the rule even farther against criminals, than was ever done against a party in a civil cause. That case may be seen to this point in 5 Harg. St. Trials, 62, *et sequente*. The recorder had said the deposition taken before the examining justice, was evidence against the prisoner, he having spirited the witness away. This was treated as something extraordinary; and said to be without book; and no lawyer would advance it, who was out of his A. B. C. Upon this, Mr. Sloan said he thought Lord Hale was beyond his A. B. C., especially in the Pleas of the Crown; and he read from his book, that an *ex parte* deposition, taken under the statutes of Phil. & Mar., might be used against the prisoner, when the witness was dead or withdrawn (and see *post, et seq.*, of the text). The general rules of evidence are the same both in civil and criminal cases. In the latter, the law even allows greater latitude than in the former, by receiving declarations *in extremis*. As to the constitutional difficulty, the criminal is confronted by the witnesses in both the former and present trial; and we think Macnally tacitly admits (1 Macnally, 390), that the rule under consideration applies as well to a criminal as a civil cause. On trial of an indictment for robbing the mail (a capital offence), before Washington, J., the objection was not

thought of. United States v. Wood, 3 Wash. C. C. Rep. 440. See also Rex v. Barber, 1 Root, 76; where what a witness swore before the grand jury, was received against the prisoner without objection. In Crary v. Sprague (12 Wend. 45), Nelson, J., expresses the opinion that such testimony is receivable in a criminal case.

It was very properly held that such evidence could not be received of what a witness swore on examination before the board of property (or, in the New York phrase, the commissioners of the land office). The reason given is, that the board could not enforce the attendance of witnesses, punish for contempt, nor even administer an oath. They are, therefore, no court, in any sense of the word. Montgomery's Lessee v. Snodgrass, 2 Yeates, 230; De Haas' Lessee v. Galbreath, Id. 315; Sherman's Lessee v. Dill, 4 Id. 295. See also, Parker's Lessee v. Gonsalus, 1 Serg. & Rawle, 526, 537, 538, and Foster v. Shaw, 7 Serg. & Rawle, 156, 159, 160, 161. (Testimony given before arbitrators duly empowered, by a witness since deceased, may be proved in a suit between same parties litigating same subject matter. McAdams v. Stilwell, 13 Penn. State R. 90. So may testimony taken before a committing magistrate, in a criminal case. Kendrick v. The State, 10 Hump. 479. So may depositions taken on a former trial, or in another action to which the parties to the action on trial were also parties. Philadelphia, &c., Co. v. Howard, 13 How. U. S. 307; Crawford v. Ward, 4 Geo. 445; Whitcomb v. Steward, 1 Carter, (Ind.) 208; Samuel v. Withers, 16 Mis. (1 Bennett), 532.)

NOTE 111.—The cases all agree that the parties must be the same. See for the general doctrine, Arderry v. Commonwealth, 3 J. J. Marsh. 183; Jackson ex dem. Potter v. Bailey, 2 John. Rep. 17; Powell v. Waters, 17 John. Rep. 176; Lightner v. Wike, 4 Serg. & Rawle, 205; and Bowie v. O'Neale, 5 Harr. & John, 226, 231; and indeed almost every case which occurs on this branch of evidence. See also *post*, of depositions.

Where the testimony is offered as being between the original parties, they must be identically the same with those on the first trial. Though they be the same, with the addition of one defendant on the second trial, the testimony is inadmissible. Boardman v. Reed's Lessees, 6 Pet. Rep. 328. The same thing was said where plaintiffs were added in the second suit, though the testimony was received as hearsay in respect to pedigree. Boudereau v. Montgomery, 4 Wash. C. C. Rep. 186, 187, 188. The doctrine of these cases is very strict; for, in both, the testimony offered was to prove what a witness swore against parties, all of whom were before the court on the former occasion, with every chance of cross-examination. The objection lay on the single ground, as was agreed, that the parties offering the testmony were the only persons who had multiplied. The point of inquiry, in both the former and present suits, was exactly the same; and the additional parties, who alone could oppose on substantial grounds, were willing to waive the objection to their want of opportunity for cross-examination in the former suits. *Quilibet potest renunciare legi pro se introducto.* Had the objection emanated from a new party, it would have been another matter. These learned courts have tied up the receipt of this kind of testimony to a greater strictness than appears to be required, even in respect to verdicts or judgments. Lawrence v. Hunt, 10 Wend. 80. Where the addition or subtraction of parties changes the point or subject matter in controversy, as is often the case, the objection comes under a distinct category. An ejectment for land was brought by G.'s heirs against S., and depositions were taken by S., when the suit came to an end by his death. His children then brought a new action for the same and other land, against G.'s heirs and the children of one J., as joint defendants. S.'s depositions were rejected as evidence in the second action, 1. Because neither J. nor his children were parties to the first suit; 2. The lands in controversy were not identical; and 3. All the land now in question was never claimed by G. or his heirs, but only a part, the residue being claimed by J. and his children. Walker v. Walker, 16 Serg. & Rawle, 377.

It is not necessary that the now parties should be literally or nominally the same. If the former cause were one in which they had notice, and might come in and cross-examine, the identity is complete. In assumpsit by Ritchie & Co. agt. Lyne for goods, money, &c., the defendant offered depositions taken in a former cause between himself, plaintiff, and one Crawford, the factor of the now plaintiffs, involving the same question in respect to the same subject, as the present suit. The first cause had abated by Crawford's death. The depositions were received; for the two were in fact cross suits between the same parties in interest. The factor had due notice of taking the depositions, and might have cross-examined; and he represented his principals. Ritchie v. Lyne, 1 Call, 489. Again: a caveat was entered against the proof of a will in the Registers'

Court, by O., a legatee. A deposition was thereupon taken in that court to be read on an issue of *devisavit vel non*. The will was admitted to probate; and now another legatee appealed. On hearing the appeal, the deposition taken on the caveat was received as evidence against the appellant, and held well—that all the legatees were virtually parties to the proceeding on the caveat, and would have been concluded if there had been no appeal. By appealing, too, the appellant had acknowledged himself to be a party. Ottinger v. Ottinger, 17 Serg. & Rawle, 142. The former trial was in Wilbur & Doremus agt. Selden, Richards & Ogden. The now trial was in Wilbur, survivor of Doremus, agt. Selden, impleaded with Richards, survivors of Ogden. Held substantially the same parties. Wilbur v. Selden, 6 Cowen's Rep. 162, 164.

This sort of testimony is admisible not only against the party in the former cause, but against those who are privy to him, in estate, in blood, or in law; and especially where they claim under him by title derived since the former examination. Said or admitted in Jackson ex dem. Bates v. Lawson, and Jackson ex dem. Barton v. Crissey, *infra*.

A. devises a farm to his wife, to hold during her widowhood, remainder to his children. B., claiming under a deed of the land from A., brings ejectment against the widow and another, in which he recovers, on proof of the existence and contents of the deed from A., which was lost or otherwise could not be produced. B. goes into possession under his recovery. After the death of the widow, C., claiming as the grantee of some of A.'s devisees in remainder, brings ejectment against B.; and, on the trial, B. offers evidence of what had been sworn to on the trial of the former suit by a witness since deceased, whose testimony went to establish the existence of the deed from A. to B. Held, that the evidence was admissible; the widow and the remaindermen from whom C. derived his title, and who all claimed under the will of A., being privies in estate. Jackson ex dem. Bates v. Lawson, 15 John. Rep. 539. And see per Washington, J., in in Boudereau v. Montgomery, 4 Wash. C. C. Rep. 188, S. P. But this was denied as to the reversioner, of a deposition taken in a suit where the tenant for life was a party. Rowe v. Smith, 1 Call, 487. Depositions taken in a suit against one of two administrators, may be read in a subsequent suit against both, for they are privies in law; one represents both. Per Washington, J., in Boudereau v. Montgomery, 4 Wash. C. C. Rep. 186, 188.

But where two persons now claimed separate parcels of land, both of which were once owned by a person from whom the two separately derived title, what a deceased witness once swore in a separate ejectment against one, is not therefore evidence against the other; for there is no privity of estate between them in respect to such evidence. Jackson ex dem. Barton v. Crissey, 3 Wend. 251. And the testimony of a deceased witness, given on the trial of an action brought by one person claiming a separate interest, in order to contest a will, is not receivable, though to the same point, in an action brought by another against a different defendant, also to invalidate the same will. M'Cully v. Barr, 17 Serg. & Rawle, 445, 451. See Walker v. Walker, *supra*, and Pegram v. Isabell, 2 Hen. & Munf. 193.

The defendant in ejectment having some years before obtained a verdict for the premises in question, the present lessor of the plaintiff, though neither party nor privy to the former action, went into evidence of what passed at the former trial, to show that the verdict was an improper one. After this, the now defendant was allowed to show what deceased witness swore on that trial, with a view to establish the correctness of that verdict. Doe ex dem. Lloyd v. Passingham, 2 Carr. & Payne, 440. But *quere*. It does not follow that, because one party has given irrelevant testimony, the other may reply to it.

(The parties to the action on trial need not be identical with those in the former action, in order to let in the evidence of a witness sworn in the former, and since deceased; it is enough, if the parties to the present action were also parties to that. Philadelphia, Wilmington and Baltimore R. R. Co. v. Howard, 13 How. U. S. 307. It is sufficient, if the plaintiff in the action on trial is the administrator of a former plaintiff in a suit involving the same interests (Osborn v. Bill, 5 Denio, 370; Clealand v. Huey, 18 Ala. (N. S.) 343; Long v. Davis, Id. 801); though the general rule is, that the parties must be the same, litigating substantially same issues (Crawford v. Ward, 7 Geo. 445; Bishop v. Tucker, 4 Rich. 178); and the record of the former suit must be produced as a preliminary to the examination. Heth v. Young, 11 B. Mon. 278; Chambers v. Hunt, 2 New Jer. 552.)

NOTE 112.—The point in issue to be the same. Admitted, Jackson ex dem. Bates v. Lawson, 15 John. Rep. 539; recognized, Wilbur v. Selden, 6 Cowen's Rep. 162, 164. See also Walker

v. Walker, stated *ante*. Almost every case upon this branch of evidence agrees that the point of the two issues must be the same.

It is proper to observe also that, so far as identity of parties and point or subject matter are concerned, the evidence derivable from former verdicts, judgments, &c., and of depositions in a former cause, are considered as resting on the same principle with the former testimony of a deceased witness. And the cases on one head are, as will be seen by the reports, often adverted to by jurists as reflecting light on the others. See those titles *post*, and see especially Bull. N. P. 242.

(That the point in issue must be the same, see Osborn v. Bill, *supra;* McAdams v. Stilwell, 13 Penn. Stat. R. 90; 13 How. U. S. 307; Heth v. Young, 11 B. Mon. 278. Though the issue need not be precisely the same in both suits, the testimony must relate to the same subject matter, must bear directly on the subject of dispute. Crawford, Governor v. Ward, 7 Geo. 445; Jones v. Wood, 16 Penn. Stat. R. 25; Davis v. The State, 17 Ala. (N. S.) 354; Long v. Davis, 18 Id. 801; Warmley v. The Commonwealth, 10 Gratt. (Va.) 658.)

NOTE 113.—The Supreme Court of New York have recently decided that the defendant's own witness on a former trial having died, the plaintiff, on a second trial of the same cause, could not use his former testimony, because the witness was interested to testify in his favor. The defendant was allowed on the last trial to object to the incompetency of the witness, the same as if he had been now primarily introduced by the plaintiff; and the reason given for the decision is, that he would not, on such primary offer and objection, be now receivable. Crary v. Sprague, 12 Wend. 41.

This is the only case, we believe, which treats this kind of testimony as primary in any point of view. It is introduced in the same cause, or comes in from another between the same parties on the same point, as secondary evidence, upon the ground that the witness is dead or (as we shall see) becomes insane, or has been kept out of the way by the party against whom his former testimony operated; or, as many cases have it, simply where the witness is absent beyond the jurisdiction of the court. Per Tilghman, C. J., 4 Serg. & Rawle, 319. The primary testimony being competent at the time, it follows in all other cases that, upon its loss, the secondary is receivable if the loss be not attributable to the willful fault of the party who proposes to give the evidence. Several cases have held, that if the party do not object at the time of the original examination of the witness, by which this kind of secondary evidence is created, he cannot do it afterwards, when it comes to be offered. Answers in a chancery cause to *leading interrogatories*, were read in a suit at law between privies (the witnesses being dead), though the objection was raised at law. The court say, the objection to the interrogatories not having been made in the former cause, shall not be received now. Williams v. Williams, 4 Maul. & Selw. 497. In another case, the plaintiff examined an interested witness *de bene esse*, whom the defendant cross-examined without objection. On the trial (the witness being absent) the court refused to hear the objection, and received the deposition. Ogle v. Peleskie, Holt's N. P. Cas. 483. Yet, had the witnesses been alive and primarily offered, the objections would have been good in both the above cases. The party not objected to, and *a fortiori* introducing the witness himself, is the same as if the objection never had existence. In the latter case, he creates the secondary evidence by his own hand, in despite of his adversary, deprives him of all means of restoring competency to and availing himself of the evidence in a primary shape; and then objects that he shall not use the remnant thus left to him. The same principle would apply, had the party sent his witness away, on finding him unfavorable.

In a word, the decision of Crary v. Sprague seems to be a departure from the analogy of many principles and adjudged cases, which it is presumed, however, the court do not mean to shake. (And the decision has not been followed in similar cases (Thomas v. Kinsey, 8 Geo. 421; Jones v. Wood, 16 Penn. State, 25); where the testimony was taken on commission, notice of its intended use should be given. Whitcomb v. Stewart, 1 Carter (Ind.), 208; Samuel v. Withers, 16 Mis. (1 Bennett), 532.)

NOTE 114.—The circumstance usually mentioned in the cases as depriving the party of his witness in person, and letting in the testimony which he gave on the former trial, is his death. Up to 1826, the New York cases had allowed no other excuse. Jackson ex dem. Potter v. Bailey, 2 John. Rep. 17; Beals v. Guernsey, 8 John. Rep. 446; White v. Kibling, 11 John. Rep. 128; Jackson ex dem. Gillespy v. Woolsey, Id. 446. In Powell v. Waters (17 John. Rep. 176, 179),

Spencer, Ch. J., incidentally mentions death as an essential prerequisite; and finally, in Wilbur v. Selden (6 Cowen's Rep. 162, A. D. 1826), the court, on solemn argument, and upon full consideration of the authorities, virtually re-asserted the dictum in Powell v. Waters, and refused the excuse of absence beyond the jurisdiction of the court. In a still later case (Crary v. Sprague, 12 Wend. 41, 45), they manifest a strong inclination to adhere to their former strictness, although they admit "it is obvious there can scarcely be a shade of difference between death and absence either in principle or hardship." The same prerequisite is essential in Indiana. Hobson v. Doe ex dem. Harper, 2 Blackf. Rep. 308.

(The later decisions incline to the same strictness, excluding the testimony unless it be shown that the witness is dead or incompetent to testify. Brogy v. The Commonwealth, 10 Gratt. (Va.) 722; Bishop v. Tucker, 4 Rich. 178; Weeks v. Lowerre, 8 Barb. 530. In these cases the testimony was not allowed, though the witness was absent from the state at the time of the second trial. *Contra*, Long v. Davis, 18 Ala. (N. S.) 801.)

As far as the courts in Massachusetts have spoken to the question, they have manifested an inclination to the same strictness (per Parker, C. J., in Le Baron v. Crombie, 14 Mass. R. 234, 236), though it will be seen by the text of our author that the learned chief justice errs in that case in supposing that the English courts do not admit the loss of the witness from any other cause as an excuse. Id. 236. He is more accurate in saying (Id.) that a supervening interest in the witness will not, in England, be received as an excuse (Chess v. Chess, 17 S. & R. 409, S. P.), though even this is repudiated by the Court of Chancery (see *post*, of the text), and in the chief justice's own state and in his own court it was repudiated in a former case. Gold v. Eddy, 1 Mass. R. 1, 4. The point directly decided in Le Baron v. Crombie, was, that incompetency arising from conviction of an infamous crime should not avail. The courts also in Virginia seem inclined to deny the excuse of absence beyond the jurisdiction of the country. Finn v. The Commonwealth, 5 Rand. 701, 708.

Other courts allow a much greater latitude of excuse, letting in not only the death of the witness, in which all the cases agree, but any other ground by which the party is permanently deprived of the primary testimony of the former witness. We have seen by the text, that if the witness have been regularly subpœnaed, and there is slight reason for believing that he is kept away by the adverse party, this is one excuse. Rex v. Barber, 1 Root, 76, and per Cheves, J., in Drayton v. Wells, 1 Nott & M'Cord, 411, S. P. An eminent jurist, in England, thinks that residing beyond the jurisdiction of the court, is another. 2 Ev. Poth. 229; said also in Drayton v. Wells, 1 Nott & M'Cord, 409, 411. And this was directly adjudged in Pennsylvania, where the witness had gone several years before to the state of Ohio. Carpenter v. Groff, 5 Serg. & Rawle, 162, 165; Magill v. Kauffman, 4 Id. 317, 319, 320, cited 5 Id. 165. Magill v. Kauffman was the ordinary case of a witness examined *viva voce*, and Carpenter v. Groff, of a deposition taken in another cause. The learned court, however, place each on the same footing as secondary evidence, and receivable upon the same foundation as secondary evidence in any other case. Insanity is another excuse. A person insane is to be considered in the same state, for this purpose, as if he were dead. Per Lord Kenyon, Ch. J., in Rex v. Eriswell, 3 T. R. 707, 721; per Cheves, J., in Drayton v. Wells, 1 Nott & M'Cord, 409, 411. If the witness has become interested by being a party to the present suit, such disability to testify has the same effect as if he were dead, and his deposition on the former trial may be used (Gold v. Eddy, 1 Mass. Rep. 1, 4); though the mere circumstance of his becoming interested for the party, as by giving a bond of security in the cause, but still being within reach of process, would not have that effect. Chess v. Chess, 17 Serg. & Rawle, 403, 412. The court consider this as the settled doctrine in England, as to the courts of law; and it is so. *Post*, of the text. A strong additional reason is, that the witness, if produced, might, if objected to, be rendered competent by an indemnity, and ordinarily in a variety of other ways. Beside, it was the party's own fault in this case, and all the authorities agree that one cannot willfully and purposely create the ground for secondary evidence. Irwin v. Reed, 4 Yeates, 512, S. P. Yet, in another case, the Supreme Court of Pennsylvania had allowed the handwriting of a witness to be proved, because he had become interested, after his attestation. Hamilton v. Marsden, 6 Binn. 45. The strict principle of analogy would seem to warrant the secondary evidence proposed in Chess v. Chess, though the court thought otherwise. 17 Serg. & Rawle, 413.

The courts of Louisiana have been quite latitudinary in the ground of excuse. In allowing the temporary sickness of a witness, they have not gone beyond the reason of receiving a depo-

sition *de bene esse;* and are easily vindicated upon principle. The witness had been examined in open court, and notes of his testimony carefully taken. As the court remark, "to have examined him again, laboring under disease, would have afforded no better evidence, perhaps not so clear, as that which had been obtained from him on the former trial." Miller v. Russell, 7 Mart. Rep. (N. S.) 266, 268, citing 2 Stark Ev. 261. But when they come to receive the former *viva voce* testimony of a deputy sheriff who had been subpœnaed, because absent on official duty, we search in vain for any principle or analogy in the learned writer whom they cite (2 Stark. Ev. 262), to justify such extreme liberality. Noble v. Martin, 7 Mart. Rep. (N. S.) 282. Such testimony has been often repudiated, where the absent witness was alive and well, and within reach of process, or rather where the contrary did not appear (Baylor v. Smithers, 1 Monroe, 6, 7; Mendum v. Commonwealth, 6 Rand, 704; Richardson v. Stewart's Lessee, 2 Serg. & Rawle, 84; Powell v. Waters, 17 John. Rep. 176, 179; Arderry v. Commonwealth, 3 J. J. Marsh, 183, 185); and especially if the witness be present, and capable of being sworn (State v. M'Leod, 1 Hawks, 344), even though he may now have forgotten the facts which he formerly swore to. Drayton v. Wells, 1 Nott & M'Cord, 409.

In reviewing the above authorities, it is obvious that those which have come nearest to the liberal principle on which secondary evidence is generally received, are less anomalous, and therefore more scientific than the narrower decisions. We were struck, on reading the two cases of Magill v. Kauffman, and Wilbur v. Selden (*supra*), with the different influence which the same analogy exerts upon the minds of two learned men. In both they were called to look at the settled doctrine that a subscribing witness being permanently absent from the state, lets in the proof of his handwriting; and thence to infer that similar absence should furnish similar grounds for the secondary evidence in question. Tilghman, C. J., yields at once to the force of such an analogy, one which the New York court admit in 1834 (12 Wend. 45), is scarcely a shade difference from the case of death. Savage, C. J., though he concedes the same analogy as to the ground of excuse, denies it in regard to the degree or strength of the secondary testimony which follows. He considers an unsworn attestation proved by opinion of handwriting, and which might have been surreptitiously affixed by the witness after the instrument was executed, as safer than proof of testimony given in public, the only error in respect to which would be a possible misrecollection; and this too, much more easy of correction than details of conversation and hearsay, which are every day received without hesitation. Is it too much to suppose that a simulated attestation might be, and is much oftener palmed off upon a jury, than a deceptive history of what a witness had sworn before a crowded court room? We admit that this jealousy of Chief Justice Savage is not singular. It began with Livingston, J., in Jackson ex dem. Potter v. Bailey (2 John. Rep. 21). With him, neither memory nor notes can give the former testimony as it should be; nothing short of a written deposition. It comes out again in Powell v. Waters, where death alone is to warrant such testimony. And see per Cheves, J., 1 Nott & M'Cord, 411. Then, after taking its turn in Wilbur and Selden, we are finally told by Nelson, J. (12 Wend. 45, citing Livingston, J.), that this testimony is to be confined to an impracticable strictness, from its great danger of abuse. All analogy and principle are to be cut down, through fear that a sworn relation in presence of the parties, their counsel and the court who take notes, the jury and an assembled multitude who hear, should be perverted beyond the possibility of correction. We have only to say, that if this be so, the faculties of hearing, attention and recollection, in respect to all other conversation, should be stricken out from among the instruments of judicial investigation.

NOTE 115. As to the person by whom the former *viva voce* testimony may be proved, the American cases agree with the English, that this may be done by any one who heard the testimony, the judge, counsel, jury or by-stander, provided he will, on his oath, undertake to repeat it in such detail as the practice of the courts may require. Miles v. O'Hara, 4 Binn. 108; Pegram v. Isabell, 2 Hen. & Munf. 193; United States v. Wood, 3 Wash. C. C. Rep. 440; Lightner v. Wike, 4 Serg. & Rawle, 203; Foster v. Shaw, 7 Serg. & Rawle, 156; Caton v. Lenox, 5 Rand. 36; Cornell v. Green, 10 Serg. & Rawle, 16; Wolf v. Wyeth, 11 Serg. & Rawle, 149; Ottinger v. Ottinger, 17 Serg. & Rawle, 143; Chess v. Chess, 17 Serg. & Rawle, 409. And see three case *infra*, cited from 8 John. Rep. 446; 2 Id. 17; and 11 Id. 128.

The copy of a judge's notes, or the notes themselves, are not, *per se*, evidence. To make them of any use, he must resort to them merely as a memorandum to refresh his memory, the same as

any other witness. Held, in a case where Judge Yeates's notes were offered. Miles v. O'Hara, 4 Binn. 108); and per Tilghman, C. J.: "It is no part of his official duty to take notes of the evidence. It is not usual to take down everything that a witness says. In general, the judge takes what he thinks to be material; he condenses it, and puts it in his own language. In doing this, he may happen to omit things that are very material. If Judge Yeates had appeared as a witness, with his notes in his hands, he could have derived no privilege from his official station; but, if required, must have sworn that he took those notes at the trial, and that they contained, to the best of his knowledge and belief, the true substance of what was sworn," &c. Id. 110. And per Yeates, J.: "If a by-stander on the trial, who heard the testimony given ten years before, would undertake to state upon oath the testimony that the witness had given, he clearly might be received for this purpose; but it must have been under the sanction of an oath or affirmation. His certificate could not be received; and the certificate of a judge or juror stands on no different foundation. There are grades of credibility, but none of competency. The notes of a judge are no part of the record; but are his mere private memoranda to assist his recollection. It is sufficient for the judge's purpose, if he commits to paper every material fact stated by the witness which can throw light on the cause." Id. 111, 112.

And though the judge may have died, his notes are not therefore evidence for any purpose, whether in chief, or to support or discredit a witness. But per Duncan, J.: "I do not give any opinion how far a case of necessity might justify, in a civil action, the admission of a deceased judge's notes; as a long acquiescence in a former verdict, the death of the jury, a sedulous inquiry without effect, to procure living testimony." Foster v. Shaw, 7 Serg. & Rawle, 156, 162, 163. Nor can the judge's statement of the facts, on granting a new trial, be read to show the testimony of the witness on the first. Drayton v. Wells, 1 Nott & M'Cord, 409.

How far the memory must be connected with the notes, see *post*, notes, several Pennsylvania cases in those notes.

Though the deceased witness refreshed his memory from a day-book, as to time, that book need not be produced on the second trial. You want the witness's former testimony; not the ground of it, nor the manner in which his memory may have been refreshed or aided. Cox v. Norton, 1 Pennsylvania Rep. 412, 414, 415.

It would, at this day, be disrespectful towards very able judges, to repeat the sarcastic commentary of our author upon what some have considered Lord Kenyon's impracticable requisition of the witness's very words. Any judge who ever held a circuit, nay, the humblest smatterer in mental philosophy, must agree with Mr. Phillipps that, if taken strictly, it amounts to a total interdict of what, in the present frame of our judicial system, is by no means an unimportant or unusual branch of secondary evidence.

In some of our courts, however, the interdict has gone forth. At the New York city circuit, Mr. Sedgwick, counsel in the former cause, was sworn to prove the *viva voce* testimony of one Scott, who was sworn in that cause, but was now absent in the state of Pennsylvania. Mr. S. could not state with precision what Scott swore to, and could not recollect the phraseology of the witness. His testimony was therefore objected to; but the judge allowed him to state his recollection of the substance of what Scott swore to; and he produced his notes of Scott's testimony, but did not pretend that they contained Scott's exact words or phraseology. The Supreme Court held, in the first place, that Scott's being alive was a decisive objection to the evidence. They then observe, "There is yet another difficulty. *Mr. Sedgwick could not state the words, but only the substance of his testimony.*" The chief justice then cites the rule of Lord Kenyon with approbation, that *the words*, and not *the effect*, is to be given; and then relies on Chief Justice Tilghman, in Lightner v. Wike, as showing satisfactorily the reason of the rule, and the objection to receiving the notes of counsel; and he finally concludes that the testimony of Mr. Sedgwick was inadmissible, because he could not give the words. Wilbur v. Selden, 5 Cowen's Rep. 162, 165. This was in 1826. In 1834, we are told by the same court that eminent judges have cast a doubt over the soundness of the rule which receives such testimony at all. Lord Kenyon is mentioned with apparent approbation, too, as confining the operation of the rule to an almost impracticable strictness (12 Wend. 45), indeed, it should have been said entirely impracticable, if he is to be understood according to the commentary of Wilbur v. Selden. The rule does in truth seem to be pretty much gone in New York. See further to that point, *ante*, note 114. Hardly any one can present a more perfect history of *viva voce* testimony than was offered by Mr. Sedgwick.

Such testimony had formerly been given by Mr. Fisk, counsel, from his notes, in Jackson ex dem. Gillespy v. Woolsey (8 John. Rep. 446); by a commissioner, of what a witness swore before the board for settling the Onondaga titles (Jackson ex dem. Potter v. Bailey, 2 John. Rep. 17); and by a by-stander, in White v. Kibling (11 John. Rep. 128). These passed, however, without objection as to details. When Lord Kenyon's rule in its stricter sense comes into action, the most experienced stenographer cannot satisfy it. On a second trial of the prisoner for robbing the mail, Mr. Bache, who was engaged in reporting, and who published the former trial, was called to prove what Hare, now dead, swore on that trial. The court said the evidence was admissible, provided the witness could repeat the testimony which Hare gave, and not merely what he conceived to be the substance and effect of it, of which the jury alone were to judge. He may refresh his memory from notes which he took of the evidence at the trial, or from a newspaper printed by himself containing the evidence of Hare, as taken down by the witness. But he must be sure of the accuracy of the statement, from his own recollection; and not merely from a confidence in the accuracy of the statement to which he refers. The witness acknowledged he could not say that he recollected the words of Hare; though he felt the most entire confidence that he had taken them down as the witness uttered them; and that they were truly copied into the paper published under his own inspection. The court refused to suffer him to be examined. United States v. Wood, 3 Wash. C. C. Rep. 440.

Lord Kenyon's rule has been understood very differently by his most learned commentators. Mr. Starkie, understanding the *very words* to be required, adds, "But *quere*, whether so great exactness is necessary; even an indictment for perjury sets out the substance only." 2 Stark. Ev. 280, note *n*. Our author, it will be seen, thinks the words of the rule susceptible of such a construction as shall let in the substance, and requiring certain of the exact words only, as in stating a conversation, where they are requisite to a safe understanding of its substance. In Pegram v. Isabell (2 Hen. & Munf. 193), the substance of a deceased witness's testimony was proved, and received without objection; and in a subsequent Virginia case, this is shown not to be a departure from Lord Kenyon's meaning. The last case was as follows: A new trial being granted, and one of the witnesses on the first trial (Gibson) having since died, the plaintiffs offered on the new trial to show, by one of the jurors on the first trial, what Gibson swore. It was objected that the juror must give the very words of Gibson; not the *substance* of what he swore to. The objection was overruled; and the court allowed him to state the substance, which he did. On appeal, the leading opinion on this point was concurred in by all the judges present (three out of five). That was delivered by Judge Carr, who reviews the cases. He did not think the *dictum* of Lord Kenyon meant that the *very words* must be given. This was a restriction which, in ninety-nine cases out of a hundred, would prevent the application of the rule he had just recognized, that the testimony of the former witness might be given. He said, a man who has listened attentively to a witness, especially a juryman (as here), may, if called upon within twelve months (as in our case), give substantially a correct detail of what the deceased witness stated. But if you call upon him to repeat the words, and to swear that they are the *very words*, no man who had the least respect for his reputation would venture to do it, unless he had written down the words at the moment of their delivery. In Pyke v. Crouch (1 Lord Raym. 730), it is said the *matter* deposed at the former trial may be proved. It is not confined to the *words*. In Buckworth's Case (Sir T. Raym. 170), and Coker v. Farewell (2 P. Wms. 563), the rule was admitted without qualification. In Mayor of Doncaster v. Day (3 Taunt. 261), Mansfield, Ch. J., said, what the former witness swore may "be given in evidence, either from the judge's notes, or from notes that have been taken by any other person, who will swear to their accuracy; or the former evidence may be proved by any other person who will swear, from his memory, to its having been given." This case seemed to him (Judge Carr) to lay down the rule as broadly as any of the former. "A judge's notes will furnish proof of the evidence. These notes, we know, never pretend to contain the very words of the witness. The judge notes the substance only of the facts which he deems material. The same doctrine is also distinctly laid down as settled, in White v. Kibling, 11 John. Rep. 131, and Miles v. O'Hara, 4 Binn. 111. I think, on the whole, that it is the doctrine both of reason and authority, that where a witness who has been examined in a cause dies, his evidence may be proved in any subsequent trial of the cause, if the person proving it will swear that he gives the matter *substantially*." Caton v. Lenox, &c., 5 Rand. 36 to 39. The courts in Maryland and

North Carolina also take a distinction between the substance and the effect of the former testimony; the *substance* may be given, not the *effect;* the exact words are not necessary. Bowie v. O'Neale, 5 Har. & John. 226; Ballenger v. Barnes, 3 Dev. 460. The now witness, say the court, in the first case, must not give *his own inference* from the former testimony; as the jury alone are competent to draw *conclusions* of fact from testimony. The distinction seems to reconcile Lord Kenyon's rule with the common and practicable course in proving all other matters of hearsay. It deserves illustration. A witness says that A., on the former trial, proved the defendant's handwriting. That would be speaking to the *effect* of A.'s testimony. That A. said he had often seen the defendant write, by which he had become acquainted with his handwriting, and he verily believed that the name subscribed to the note produced was the defendant's hand, would be the substance. This would give the words themselves with a degree of exactness, which might, therefore, in one sense, be called the very words. Put the witness to repeat all the very words of A. with the strictest degree of verbal exactness, and he would blunder even in such a short history. The medium exactness is about the same as required in proving oral slander, perjury, oral contracts, admissions, declarations, &c. Even in New York it is expressly holden, that in swearing to an ordinary conversation, the witness may give *his impressions as to the substance.* Snell v. Moses, 1 John. Rep. 99, 103.

In Pennsylvania, the narrow construction of Lord Kenyon's rule, if it ever prevailed, maintained but a short ascendency. The judges of that state, like those of New York and Mr. Justice Washington, admit that the law of England requires the very words in the strictest sense; and did not undertake, like our author and the Virginia courts, to give it a practical application. They seem wisely to have seen that, under a system where new trials in land causes are a matter of course, and where also the right to bring error, or appeal, the liberality of courts in granting new trials, and the facility with which juries are discharged for obstinate disagreement, result in such very frequent re-investigation of causes as we witness in the American courts, and consequently where immense tracts of evidence must lie in the *viva voce* testimony of deceased or absent witnesses on former trials of the same causes, truth will be continually obscured, if we allow the suppression of such testimony. The result has been an avowed departure from what they conceived to be the English rule, in a series of cases, not only establishing a practical mode of communicating such testimony, but which have enlarged the means for the preservation of other evidence, by a judicious combination of memoranda and memory.

We have already seen in Miles v. O'Hara (*supra*), that notes of the former testimony are not *per se* evidence, by whomsoever made. The following cases will show how far they must be connected with the memory. To prove testimony of a witness, counsel on the former trial was called, but did not remember the testimony, even after he had read his notes. His notes were offered. These were held mere private memoranda from which he might refresh his memory, from which, when refreshed, he must swear, and not from his notes. Tilghman, C. J., said: "In general, the taker of notes condenses the words of the witness into what he conceives to be the substance. But the partiality of counsel inclines them to view everything in a light favorable to their cause. During the trial, their ideas pass through a medium that diverts them from the right line." Lightner v. Wike, 4 Serg. & Rawle, 203, 205, 206. In another case, Mr. Douglass, of counsel, stated in writing what he could testify of the deceased witness's evidence, on a former trial between the same parties; and said "this was all he could recollect of what the witness said on his examination in chief." Held inadmissible. Tilghman, C. J., said: "Evidence of what the former witness swore could not be admitted, unless you have the whole of it. To give what he swore on his examination *in chief*, and omit his *cross-examination*, would be to deprive the opposite party of the benefit of his cross-examination. He recognized the rule in Cornell v. Green (by the title of Armstrong, &c., v. Green), that the witness may be admitted, if he can undertake to give the *substance* of what the deceased witness swore: but said he must give the *whole* of it; not the whole of a long examination, in which the deceased person may have spoken to a variety of facts; but he must be able to give the whole of what was said on the particular subject he was called to prove." Wolf v. Wyeth, 11 Serg. & Rawle, 149, 150, 151. In another case, M. was called to prove what a deceased witness swore. He said he could not say the exact words, but could give the amount and substance; remembered that there was a cross-examination, but not what questions were put; but if reminded by questions now, he thought he

could recollect some of them. Held inadmissible. The court say they do not require the very words, as is done in England, but allow the substance to be given; but in this, there must be no equivocation or ambiguity. Watson v. Gilday, 11 Serg. & Rawle, 337, 338, 342.

The following cases illustrate still farther the degree of connection required between notes and memory, while they settle that the substance of the former testimony need only be given; and, indeed, in some cases where that is not recollected, that the effect alone will be received. Fisher, of counsel for the plaintiff, was offered to prove what a deceased witness swore on the former trial. He said, from having been consulted before the suit was instituted, and directing what was to be done, and from what the deceased witness swore was done, from having frequently recurred to his notes, and from conversation with him before the trial, he had a perfect recollection of what he swore. He was in the habit of taking down the very words of a witness, not the substance; and believed his notes contained every word. Without his notes, he would not undertake to state every word; but could state the material part without recurring to his notes. He was permitted to testify. On error, upon this point, the court said, by Gibson, J., they could not see any reason for the rule stated in Phillipps, that the witness must undertake to repeat his very words. The rule, applied in that degree of strictness, would be useless in practice; for there is no man, be his powers of recollection what they may, who could, in one case picked out of ten thousand, be qualified to give such evidence; and if he should undertake positively to swear to the very words, the jury ought, on that account alone, to disbelieve him. The reason assigned, that the jury, and not the witness, is to judge of the effect, is more plausible than sound. The truth is, that evidence of what a deceased witness said, being inferior in its nature to a personal examination, is admissible, on the ground that better evidence does not remain, the jury being left to form their own judgment of the accuracy of the narration. I cannot see why the same necessity, which opens the way for secondary evidence of the very words of a deceased witness, should not open the way also for the substance of his testimony when his very words cannot be recollected, or discover the policy of a rule which should shut out the little light that is left, when it is all that is left, merely because it may not be sufficient to remove everything like obscurity. Cornell v. Green, 10 Serg. & Rawle, 16, 17. "Where *written notes* of a deceased witness are proved, it is sufficient to prove, by the person who made them, that they contain the true substance of what was said." Miles v. O'Hara, 4 Bin. 108. "It seems singular, that instead of trusting to Mr. Fisher's recollection, the plaintiff did not offer his (Mr. F.'s) *notes* in evidence, against which, when properly authenticated, there could be no sort of objection." Gibson, J., in Cornell v. Green, 10 Serg. & Rawle, 17. In another case, per Gibson, J.: "By the English law, a person who is called to prove what a deceased witness swore, must undertake to repeat his very words; and not merely to swear to their effect. To do this, would require powers of memory which seldom fall to the lot of any one; and the rule, under this restriction, although it might often produce perjury, would be of no practical utility; for no juror of common discretion would believe a witness who should undertake to repeat the very words of another, in relating the manner in which any transaction took place, whether simple or complicated. But this absurdity has been exploded by this court; and, in this state, it is unnecessary to profess to use the language of a deceased witness, but only to undertake to state the substance of all he swore in relation to the particular transaction." Smith v. Lane, 12 Serg. & Rawle, 34, 35. In another case, Mr. Forward, of counsel for the defendants, was introduced for them, to prove what H. and C., both deceased, swore on the former trial of the cause. He said, "I was counsel for the defendants on the last trial. I took full notes of the trial. I took down the testimony of the witnesses in question. I believe the greater part is in the words of the witnesses. The whole of it may not be in the very words. I don't recollect the testimony independent of the notes. I do not recollect any question put on the cross-examination, nor whether there was a cross-examination. I believe I put down what was stated by the witnesses in reply. I may have omitted to note what I supposed to be immaterial to the issue trying." On objection, his notes were received in connection with his testimony. On error, held well. The court denied that the former testimony need be given word for word. Swearing to his belief that the notes contain the true substance, is sufficient. There was no proof here of any cross-examination; much less, that it produced anything worth remembering. To require the identical words, would destroy the rule which admits this kind of evidence. It was impossible, after a lapse of time, for an indifferent person to remember the words, or an advocate or

evidence, though classed among the exceptions to the rule respecting hearsay, is of a different character from any which has been before mentioned; for not only is it free from the objection of being extra-judicial, or of being without oath, but the party also, who is to be affected by it, had the power of cross-examining the witness under the same circumstances as on the subsequent trial.

The exception in question applies to depositions taken in chancery or before magistrates, and receives much illustration from the decisions respecting those kinds of documents. It will, therefore, be further considered in that part of the work which treats of written evidence.

How testimony may be proved.

The proof may be given, either by notes made at the time by a party who heard the testimony, provided he can swear to their accuracy, or from the memory of such party;(1) or even, it has been said, from the judge's notes.(2)

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judge to note down everything, whether pertinent or not. Without notes, one may state substance, but not words. The only chance of approaching the words is by the notes of the judge or counsel. Even in proving slanderous words, a case of great strictness, all the words are not required. The witness, without pretending to give all, may give what he does remember. In proving a lost deed, or other writing by parol, no one ever heard of a witness being called on to repeat *verbatim*. True, counsel may sometimes take notes chiefly to assist their own arguments. They may set down part and trust to memory for part. But if the notes on one side are not trusted, let those on the other be produced and sworn to, if they can be sworn to, or the notes of the judge, or let recourse be had to the memory of jurors, or other persons present, if it shall be insisted that memory is safer than writing. Chess v. Chess et al., 17 Serg. & Rawle, 409. On the trial of Ballenger v. Barnes (3 Dev. 460), which was a case much like the last, the course here recommended was pursued. The counsel testified for the plaintiff, to the substance, from notes; and the defendant afterwards, when it came his turn to go on with his proof, added evidence of other facts, to which the former witness swore. He then moved to shut out the whole as incompetent, because not truly given at first. But this was not allowed; and the result of the examination on both sides went to the jury. On motion for a new trial, the practice was decidedly approved. Henderson, J., said, "No man can give the words where the testimony exceeds a single sentence." p. 465. On another occasion, a witness testified to what a former deceased witness stated, and remarked that his memory had been refreshed by hearing the notes of the former testimony read. It was held proper, then, to inquire of him whether he had not heard the counsel say on oath, that the notes were taken, not on the former trial, but preparatory to it, and consisted of what the counsel expected to prove. Withers v. Atkinson, 1 Watts, 236.

(The minutes of the judge who presided on the former trial are not of themselves evidence of what the witness testified to; but if the person making them can swear that they are correct, or that he has no doubt of their being so, they are admissible. Huff v. Bennett, 4 Sand. 120; Jones v. Wood, 16 Penn. State R. 25; 13 Id. 90; Regina v. Bird, *supra*. The precise words of the deceased witness need not be given; but the person called to prove his testimony must state the substance of his whole testimony. Young v. Dearborn, 2 Foster (N. H.), 372; Kendrick v. The State, 10 Humph. 479. If he took minutes of the evidence taken on the former trial, and testifies to their accuracy, he may read them. Van Buren v. Cockburn, 14 Barb. 118; Riggins v. Brown, 12 Geo. 271. See also Williams v. Willard, 23 Vt. 369; and Marsh v. Jones, 21 Id. 378.)

(1) Doncaster (Mayor) v. Day, 3 Taunt. 262; Strutt v. Bovington, 5 Esp. 57; S. C., 1 Stark. R. 211, n. See also by Lord Kenyon, C. J., in R. v. Joliffe, 4 T. R. 290.

(2) By Lord Mansfield, C. J., in Doncaster (Mayor) v. Day, *ut supra*. See Crease v. Barrett, 1 C., M. & R. 919.

It has been said, that the person called to prove what a deceased witness said on the former trial, must undertake to repeat precisely his very words, and not merely to swear to their effect.(1) This, it is conceived, can only mean, at the furthest, that he must be able to speak to the identical words of the former witness, when it is essential that the very identical words should be known. In some cases, proof of the substance of the former evidence may be as satisfactory as proof of the identical words,—unless the witness can undertake (what is not possible) to deliver the same words precisely with the same manner and in the same tone. Even on an indictment for perjury, it has been held sufficient, that a witness state from recollection the evidence which the defendant gave,—though he cannot say with certainty, that it was all the evidence which he gave,—if he can say with certainty, that it was all he gave on that point, and that there was nothing to qualify it.(2) Where a person, who had been sworn on a former trial between the same parties on the same issue, and subpœnaed to appear as a witness at a second trial, did not appear in obedience to the writ, the Court of King's Bench, seeing reason to believe that he had been kept away by the contrivance of the adverse party, admitted other witnesses to prove what he had sworn on the former occasion.(3)

Who are considered the same parties.

It has also been held, that where a witness has been examined as the attesting witness to a will, upon an issue of *devisavit vel non*, in which A. and others were plaintiffs, and B. defendant, his examination, after his decease, may be adduced by B. in an ejectment, brought by him against A. alone; for the lessor of the plaintiff is the real party in an ejectment, and A. had the same power at the former trial of objecting to the competency of the witness, and the same right of cross-examination and of calling witnesses to contradict or discredict his testimony, as he would have had, if the witness had been alive and subpœnaed on the second trial. It was also held, that the evidence was producible in the cause for the same purpose and to the same extent, as if the witness had been alive and had given his evidence; consequently, that his evidence at the former trial was sufficient proof of the will, and the evidence of a surviving witness was not better evidence.(4)

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(1) Lord Palmerston's Case, cited by Lord Kenyon, C. J., in R. v. Joliffe, 4 T. R. 296; Ennis v. Donnisthorne, Corn. Sum. Ass. 1789, by Lord Kenyon, C. J., citing R. v. Deboragh from one of his own notes.

(2) R. v. Rowley, 1 Mo. Cr. Ca. 111; R. v. Dowlin, Pea. R. 170. See also R. v. Jones, Id. 38.

(3) Green v. Gaturk, B. N. P. 243.

(4) Wright v. Doe d. Tatham, 1 A. E. 321.

Privies.

It seems that the same rule would apply, where the parties to the first trial were represented on the second occasion by persons who had succeeded to them by privity of law, of blood, or of estate; and that the rule upon the subject is in this respect analogous to that which prevails as to estoppels by judgment, the admissibility of verdicts, and the effect of admissions.(1)

SECTION X.

Exception to the General Rule as to Hearsay, in the Case of Admissions by Parties to the Suit.

Exceptions to the rule respecting hearsay evidence are made in the case of admissions by parties to the suit, and in the case of confessions by prisoners. The principle on which they are received is founded chiefly on the reasonable presumption in favor of the truth of a statement, when it is against the interest of the person who makes it.(2)

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(1) See Doe d. Foster v. Earl of Derby, 1 A. & E. 790, where the evidence was rejected on the ground that the two trials were not substantially between the same parties. See the decisions as to depositions, and as to verdicts and admissions, *infra.*

NOTE 116.—Beals v. Guernsey, 8 John. Rep. 446, S. P. The record of the former recovery was produced to lay the foundation for the testimony of a deceased witness. Jackson ex dem. Bates v. Lawson, 15 John. Rep. 539. If no objection be made for the want of the roll, Nisi Prius record, or other preliminary evidence that the former cause was tried, it will be presumed that such was the fact; and the objection cannot be afterwards made. Beals v. Guernsey, 8 John. Rep. 451; White v. Kibling, 11 John. Rep. 128. (As to proof of witness's death, that he was, when he testified, a very old man, and that the now witness believes, though he does not positively know him to be dead, was holden sufficient. Pegram v. Isabell, 2 Hen. & Munf. 193.)

(2) NOTE 117.—The learned author has not thought it necessary to observe, that the admission or declaration of a party shall not be received as evidence in his favor. As a general rule, this is most plain. Yet even this rule is by no means universal; for, as will hereafter be seen, declarations which make a part of the *res gestæ*, entries in book accounts, declarations by officers in their returns, and admissions given in evidence by the opposite party, are many times evidence in favor of the person who makes them. Declarations, too, which, when made, are against the party, may sometimes be given in evidence by himself on that ground; as where he indorses a payment upon a bond or note, which he may sometimes use to repel the Statute of Limitations, or the presumption of payment arising from lapse of time. All these and other like cases will be found to present themselves in the course of this and subsequent notes. So many admissions or declarations have been proposed, as evidence for the party making them, upon the above or some other grounds; so many American cases have arisen and been reported, pointing out principles upon which they are to be received or rejected; and, withal, the distinctions are sometimes so subtle between those which are admissible and inadmissible, that a glance at the latter will be found quite useful towards an understanding of the former. I propose, therefore, to introduce the subject here, by noticing some of those which are not admissible, to be followed by some few which are admissible, leaving the latter, however, mainly to subsequent and more appropriate heads of this work.

First, then, as to the general rule. An admission or declaration is not admissible in favor of the party making it. La Farge v. Kneeland, 7 Cowen's Rep. 459; Robbins v. Harvey, 5 Conn. Rep.

335. And even an indorsement of part payment on a promissory note, is not of itself, and as a matter of course, admissible to take it out of the Statute of Limitations. Whitney v. Bigelow, 4 Pick. 110; Roseboom v. Billington, 17 John. Rep. 182. When it may be received will be seen *infra* in this note. So of a credit on an account-book, the credit being small in proportion to the account, dated after six years have run, and apparently made with a view to elude the statute. Taylor's Ex'rs v. M'Donald, 2 Rep. Const. Ct. 178; S. C., cited, 2 M'Cord, 418, 419, 420.

It was said in Roseboom v. Billington (*supra*), that the indorsement would have been admissible, had it been shown to have been made at a time when it was against the interest of the party who made it. But this principle of receiving admissions is by no means universal, nor is it a sufficient reason that the admission is made before any controversy has arisen. Thus, in an action for goods sold, the defendant had been charged as trustee in respect to the debt in question as due to a third person, and had admitted this to be so, and had judgment against him. The debt was in truth due to the plaintiff, though the question was a doubtful one upon the facts. Held, that the defendant's admissions in the former suit were not evidence for him. Wise v. Hilton, 4 Greenl. 425. So an entry in the party's books, though at the time against him, is not afterwards evidence for him. Thus, in assumpsit on a note payable to the plaintiff's testator, against five persons as makers, one question was, whether two were not principals, and the other three sureties. To show this, the book of the two crediting the note as their own to the testator at its date, was offered by the defendants. Though the entry was against the interest of the two at the time, yet held that it could not be used in their favor, or in favor of their co-defendants. Schermerhorn v. Schermerhorn and others, 1 Wend. Rep. 119. So, in an action on a note, dated 14th April, 1828, commenced by attaching the goods of the maker, Gregory, on the same 14th day, Peck, a subsequent attaching creditor, was allowed to defend on the alleged ground that the plaintiff's note was a fraud on creditors. A part of the consideration of the plaintiff's note was two orders drawn by Gregory on, and accepted by the plaintiff, in favor of two other creditors of Gregory, on the same day. To show that the orders were accepted anterior to the commencement of the suit, the plaintiff offered in evidence his own declaration to B., a witness, made on the same day, but before the attachment, that he had agreed to pay the debts secured by the orders. Held inadmissible. The court, by Parker, C. J., said, "The declarations of a party in his own favor, by the general rule, are inadmissible. A man cannot testify in his own cause; much less can his declarations not under oath be admitted. There are cases of declarations or entries, operating in favor of the party making them, which are admissible; but in all instances they relate to or accompany some act, and therefore are a part of the *res gestæ*. The declarations excluded in this case were not of that character, but mere naked assertions of a fact, which do not come within any of the exceptions to the general rule. It is said that the declaration so made is a fact. That is true; but the fact is also a declaration only, made by a party to support his own interest. Now it is true that, at the time of making the declaration, it probably had no reference to any controversy, Yet, if it be admitted that such declarations are good evidence, we shall soon find cases of declarations and assertions of a fact as having happened, with a view to support what may be afterwards done, when it is too late to have its effect, and when it may become necessary to ante-date, if we may use the expression, the fact in controversy. I cannot see that anything beyond this is meant by Starkie (Ev. pt. 1, pp. 48, 49), and he cites no authority for some of his positions. Carter v. Gregory, 8 Pick. 165, 168, 169. In Massachusetts, the return and acts of a ministerial officer are denied as evidence in his favor. Thus, in trespass by the plaintiff, a deputy sheriff, he proved that he had attached certain property of S. on the 17th December, 1825, which was afterwards removed by the defendant. The defendant, another deputy, offered in evidence a writ, and his own return upon it, showing that he had attached the same property the day before, and also, that on the day before, he was seen at work within view of the property, and told a witness he had attached it. Held, that neither the return nor declarations were admissible, not being a part of the *res gestæ*. Merrill v. Sawyer, 8 Pick. 397, 398. But see Cornell v. Cook (7 Cowen's Rep. 310, 313), also stated *infra*, *contra*, with several similar cases also noticed *infra*, of the return and records of officers.

Letters written by a party are not evidence for him. Fowle v. Stevenson, 1 John. Cas. 110; Champlin v. Tilley, 3 Day, 303, 306. Thus, in ejectment by the proprietor of Pennsylvania, the defendant showed a deed to himself. The plaintiff offered a letter from William Penn, the pro-

prietor, to show that the grant was on a condition not performed. Overruled, on the ground that a man cannot create evidence for himself. Proprietary's Lessee v. Ralston, 1 Dall. 18.

If a party's declarations or admissions, which when taken in one way are evidence against himself, shall not be received for him; if his letters in his own favor are to be excluded, it follows of course that other oral or written declarations, either indifferent at the time or favorable to his own interest, are inadmissible. Accordingly, in an action against A. & B., as partners, on a contract executed in the partnership name, A. suffered a default, and B. pleaded the general issue. Held, that letters written by A. in the partnership name could not be read in evidence by B. to show that he was not a partner with A. Champlin's Ex'r v. Tilley, 3 Day, 303, 306.

It is said, the declarations of a party are never evidence for him, unless they accompany acts and be *pars res gestæ*, and are offered as such; not even to prove insanity. State v. Scott, 1 Hawks, 24. So in trespass against an overseer for killing the plaintiff's slave, the defendant offered evidence of an apology which he rendered to the surgeon for not calling in his aid sooner, after beating the slave. Held inadmissible. Perrie v. Williams, 5 Mart. Lou. Rep. (N. S.) 694. The registry of a vessel procured by a party is no evidence for him, though it may be against him. Ligon v. Orleans Nav. Co., 7 Lou. Rep. (N. S.) 682, 683. A prisoner has no right to demand that his statements, on examination before the magistrate, be read for him. The People v. Jordine, N. Y. Gen. Sess. Oct. Term, 1818, Jud. Repos. 107. Nor what he said in conversation when charged with the offence (People v. Scott, N. Y. Gen. Sess. Sept. Term, 1818, Jud. Repos. 50), unless it be a part of the *res gestæ*, or to discredit a witness (Id.), or be introduced by the prosecution. Id. A survey, though ancient, made by direction of the owner of the land, for his own convenience, is not admissible evidence for him or those claiming under him. Jones v. Huggins, 1 Dev. 223. On a question whether the plaintiff, to whom cotton was consigned as a factor of the defendant, had sold it in a foreign market; held, that the plaintiff's letters, averring and inclosing an account of sales of the cotton, among other articles, though offered merely with the view of fixing the defendant with notice and subsequent acquiescence in the correctness of the accounts, and so to infer the sales, were inadmissible. Anthoine v. Coit, 2 Hall's Rep. C. P. N. Y. 40. In an action against alleged partners, the declarations of the defendants, made subsequent to the commencement of the alleged partnership business, are not admissible for them to limit its nature and extent; as to show it an agency the one for the other; though an agreement between them, at or before its commencement, would be. Mitchell v. Roulstone, 2 Hall's Rep. C. P. N. Y. 351. A written communication, made by the defendant to the plaintiff, in respect to the claim of the latter, was held inadmissible in evidence for the defendant. Birkbeck v. Burrows, 2 Hall's Rep. C. P. N. Y. 51. In an action for fraudulently passing the bills of a broken bank, the plaintiff was denied liberty to prove that he showed the bills to the witness and stated that he had them from the defendant—even to show how the witness's attention was drawn to the bills, and thus strengthen the inference that he had correctly identified them with bills which he had before seen in the hands of the defendant. Watson v. Osborne, 8 Conn. Rep. 363. An inventory made and returned by an administrator, after an action commenced by him for the recovery of the property inventoried, is not evidence for him. Allender v. Riston, 2 Gill & John. 86. The admissions of a debtor against the garnishee in a foreign attachment are not receivable; for they go to throw the claim from the debtor on to another. Enos v. Tuttle, 3 Conn. Rep. 247. In an action against a sheriff for not returning an execution within thirty days, his return, indorsed that he omitted to do so by reason of sickness, is not admissible to prove the fact; for it is no part of his office to make such a return. Bruce v. Dyall, 5 Monroe, 125, 126. Therefore, it is no more than a written declaration by a private person. Id.

It is the same though the declarant be dead, and his declarations be offered for his estate. Thus, in trover for bonds of the intestate, the defendant (the intestate's son) insisted the intestate gave them to him. The intestate's declarations tending to negative this, made in the defendant's absence, were held inadmissible. Romig v. Romig, 2 Rawle, 241; Scull et al., Adm'rs of Irwin v. Wallace's Ex'rs, on error, 15 Serg. & Rawle, 231, 233.

A corporation is in this respect on a footing with natural persons. Thus the North Carolina State Bank, being a mere private corporation, its books of accounts of bank dealing are not, in a suit between the bank and a third person, evidence for the former. The State Bank of N. C. v. M'Neil, 1 Hawks, 36.

So the statements of a party's agent are not admissible for him, unless a part of the *res gestæ*.

Thus the letters of an agent giving his principal an account of what had taken place in respect to the matters of his agency are inadmissible for his principal, even after the agent's death. Norton's Adm'r v. Smith, 4 Monroe, 314.

Admitting a party's declaration in his own favor, if objected to, is fatal on error, though the court below direct the jury to disregard it. Tuttle v. Hunt, 2 Cowen's Rep. 436; Penfield v. Carpenter, 13 John. Rep. 350; Fisher v. Bailey, 1 Ashmead's Rep. 209.

Secondly.. It remains to consider some exceptions to the rule that a party's declarations or admissions shall not be received as evidence for him. These exceptions arise in general, when they are connected with some circumstance giving the evidence a force beyond what it can have as a mere naked assertion. Accordingly, a constable's return is evidence for him in an action for taking the goods away under pretence of a previous levy. Cornell v. Cook, 7 Cowen's Rep. 310, 313. *Contra*, Merrill v. Sawyer, *supra*. But why should this not be so? Indorsing a return is part of his office. It is an act, not only part of the *res gestæ*, but the *res gestæ* itself. On what other principle is it that the record of a justice, drawn up for the very purpose long after the conviction, will protect him against an action? Fawcett v. Fowles, 7 Barn. & Cress. 394; Rogers v. Jones, 3 Id. 409; Mather v. Hood, 8 John. Rep. 44; Bridgett v. Coyney, Esq., 1 Man. & Ryl. 211, per Ld. Tenterden, C. J., towards the close of his opinion. But to make a return evidence for the officer, it must be strictly within his official duty; for where he indorsed that he had omitted to return within the required time by reason of sickness, this was holden out of his duty, and therefore not admissible for him. Bruce v. Dyall, 5 Monroe, 125, 126.

A certificate of a justice (authorized as evidence generally by a statute in New York) of a judgment, execution or other proceeding in a cause before him, is evidence for himself. It may be made out after the expiration of his office. Maynard v. Thompson, 8 Wend. 393. *Semb.* In an action by an officer for property levied on by him, his own indorsement on the execution of the property levied on, is evidence to identify the property. Spoor v. Holland, 8 Wend. 445.

An indorsement of part payment upon a promissory note, everything about it appearing fair, is admissible as evidence to the jury to take it out of the Statute of Limitations, and will control, unless the defendant impeach it in some way. Gibson v. Peebles, 2 M'Cord, 418. As where the note was large (*e. g.* four hundred dollars), and the indorsement bearing date two years after the date of the note, was of three hundred and fifty dollars, leaving a balance of only fifty dollars. Id. Or where it is proved that the indorsement was in truth made when it was against the interest of the party who made it. Roseboom v. Billington, 17 John. Rep. 182. In such case, it will be received to rebut the presumption of payment arising from the lapse of time. Id.

So where the party's declarations are a part of the *res gestæ*, they are evidence for him. Smith v. Morrow, 7 Monroe, 234, 236. Thus, though the declarations of a testator of the plaintiffs in general are not evidence for his executors, yet, where he had been administrator of the defendant's intestate, never having brought in his account, and this omission was urged against him as showing that he knew he had no claim, held, that his declarations that the intestate's estate was indebted to him, might be received to rebut the inference sought to be raised. Scull et al., Adm'rs of Irwin v. Wallace's Ex'rs, on error, 15 Serg. & Rawle, 231, 233. And it was put that a prisoner's conversation may be evidence for him where it is a part of the *res gestæ*. People v. Scott, N. Y. Gen. Ses., Sept. Term, 1818, Jud. Repos. 50. So, on a trial for forcible entry and detainer, the question being upon the relator's entry, and the extent and nature of his possession; he having proved that he was in possession, was allowed to show his own declarations as to its extent, and the person under whom he held. Smith v. Morrow, 7 Monroe, 234, 236. And see several other cases to this point, cited in a subsequent note, devoted more particularly to the subject of declarations constituting parts of the *res gestæ*.

The question whether, and how far, the introduction of the defendant's confession or declaration in evidence by the plaintiff, *et sic e converso*, shall make it evidence for the party who made it, has arisen principally upon the confessions of prisoners on trial for crimes. By these cases and others, the following general doctrine seems to be well established:—A party's declarations are evidence in his favor when introduced by his opponent; though their truth may be contradicted by contrary declarations of the former, or by other evidence, and the whole shall go together to the jury, who are not bound to credit the exculpatory confession. Rex v. Jones, 2 Carr. & Payne, 629; Rex v. Higgins, 3 Id. 603; Rex v. Clewes, 4 Id. 221; Rex v. Steptoe, Id. 397; Smith v. Blandy, Ry. & Mood. N. P. Rep. 257; Cray v. Hall, cited Ry. & Mood. N. P. Rep. 258; Remmie

It is obvious, that the evidence which is the subject of these exceptions, is liable to many of the objections attaching to hearsay evidence in general. Other objections are of a peculiar nature, especially in the instance of confessions. And in the instances in which persons are liable to be affected by the admissions of others, as being identified with them, the principles upon which the exceptions under consideration are founded, lose a considerable part of their effect. Hence, these exceptions are subjected to certain restrictions and qualifications,—which it is proposed to treat of, First, as they regard the law of admissions,—Secondly, as they regard the law of confessions.

The present section treats of admissions; the following section of confessions.

It is proposed to treat the subject of admissions in the following order:

First, Of general admissions by a party to the suit, or by one for whose benefit the suit is brought.

Secondly, Of admissions made under a judge's order.

Thirdly, Of admissions made by a general agent of a party to the suit, and

Fourthly, Of admissions made by particular agents, such as undersheriffs, bailiffs, guardians, attorneys, &c.

1. Of general admissions by a party to the suit, or by one for whose benefit the suit is brought.

Whole of admission to be received.

On the subject of admissions, it may be laid down as a first principle, that the whole of the statement containing the admission is to be received together.(1) This is necessary, in order to enable the court to judge of the true meaning and extent of the admission, which, when taken entire, will often have a different import from that which a partial account might convey.(2)

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v. Hall, Mann. Dig. 464, cited and explained in Smith v. Blandy; People v. Scott, N. Y. Gen. Ses., Sept. Term, 1818, Jud. Repos. 50, note. The above cases of Rex v. Jones and Rex v. Higgins are stated more at large, *post*, in the note respecting confessions by prisoners.

A party's declarations are, of course, inquirable into, in order to test the credit of a witness; as, if the witness has stated them in a certain way, then the party may contradict him by showing what in truth he did say at the time, in order to correct or discredit the witness. Conceded in People v. Scott, N. Y. Gen. Ses., Sept. Term, 1818, Jud. Repos. 50.

(1) See cases collected in note to Roe d. Pellatt v. Ferrars, 2 B. & P. 548; Dartmouth (Countess) v. Roberts, 16 East, 334; Barne v. Whitmore, Bac. Ab. tit. Evidence, 622; B. N. P. 337; Salk. 286.

(2) By Abbott, C. J., in Thompson v. Austen, 2 D. & R. 361. See, also, Fletcher v. Froggatt, 2 C. & P. 569.

NOTE 118.—Gray's Ex'rs v. Kernahan, 2 Nott & M'Cord, 60; Davis v. Verdrier, 1 M'Cord, 320; Grimes v. Smith, 1 Marsh. Kent'y Rep. 205, 206; *post*, notes as to confessions; Vibbard v. Staats, 3 Hill, 144; Bennett v. Burch, 1 Denio, 141; Kelsey v. Bush, 2 Hill, 440; Delamater v. Pierce, 3 Denio, 315; Dorlon v. Douglass, 6 Barb. 451; Stephens v. Vroman, 18 Barb. 250;

Turner v. Yates, 16 How. U. S. 14; Franklin Bank v. Cooper, 26 Maine, 180; Roberts v. Gee, 15 Barb. 449; Wakefield v. Crossman, 25 Vt. 298.

The rule that a confession shall be taken together is correctly laid down in the text, with its qualification, that though it shall be received together, yet every part is not always entitled to equal weight. See note 122. The confession intended by the rule comprehends any one entire connected conversation or declaration, oral or written, or both; but not several distinct declarations or conversations at different times, though on the same subject (Galbraith v. Green, 13 Serg. & Rawle, 85), and in prosecuting the same negotiation. It is the time, not the subject or nature of the conversations, that determines their identity. Thus, in a suit by the plaintiff against a town for supporting W. as a pauper, the defendants, to show that W. was not a pauper, proved that their agents applied to the plaintiff and negotiated with him to deliver them a note, which the plaintiff admitted to belong to W. To rebut this, the plaintiff offered to show that, in pursuance of the previous negotiation and a short time afterwards, he delivered the note to the agents, declaring it was not W.'s. This was permitted at Nisi Prius; but on motion for a new trial, held inadmissible. Stewart v. The Inh. of Sherman, 5 Conn. Rep. 244. It has repeatedly been held that what a party says at one time cannot be used by him to explain what he said at another. Per Colden, Senator, in Murray v. Coster, 4 Cowen's Rep. 630; Blight v. Ashley, 1 Pet. C. C. Rep. 15; Patton v. Goldsborough, 9 Serg. & Rawle, 55, per Tilghman, C. J.; Martin v. Root, 17 Mass. Rep. 227. Thus in dower, where the defence is that previous to the marriage, the lands had been given by the deceased husband to his son, held that the declarations of the deceased that he had not so granted the land, were not admissible to rebut evidence of his declarations that he had, unless they were a part of the same conversation given in evidence. Galbraith v. Green, 13 Serg. & Rawle, 89, 92. Again: on trial of an action of trespass, q. c. f., it becoming material to ascertain whether the lot in question had been drawn as a proprietors' lot, the plaintiff, who claimed it as a drawn lot, read from their records. The defendant offered to read from the same records the proceedings of an adjourned meeting of the same proprietors to explain away the first. Held inadmissible, as not being of a transaction at the same time with that first recorded; and therefore not coming within the principle that an admission or paper shall be taken together. Pike v. Dyke, 2 Greenl. 213, 216, 217. But in an action for a fraud in the sale of a deceased negro, the defendant, to show the plaintiff considered the negro sound, proved that he wrote a letter and sent it by the negro to C. K., offering him the negro for a sound price. The plaintiff offered to show that the negro had a wife at C. K.'s, and wished to go to him; and that the plaintiff told a witness, at the time of writing the letter, that he would fix a price which C. K. would not give, wishing to deceive the negro and prevent him from absconding, through fear of being returned to the defendant. Held admissible. Duvall v. Medtart, 4 Har. & John. 14. In ejectment, the plaintiff claimed under Smith, against his executors, and gave in evidence his admissions identifying the lot granted to the plaintiff's ancestor. The defendants, to do away those admissions, offered in evidence Smith's subsequent admissions (statements on paper) in explanation. Held inadmissible. Per Tilghman, C. J.: "When a confession is given in evidence, the whole is to be taken together; but a confession made at one time cannot be rebutted by a declaration at another time, because, if that were permitted, a man might destroy his confessions by subsequent declarations to the contrary." Patton v. Goldsborough, 9 Serg. & Rawle, 47, 55. So, in ejectment, the defendant claimed that a warrant for the land which was taken in his wife's name (the daughter of H.) was for her use, and proved H.'s acknowledgments that this was so. The plaintiffs offered other conversations of H., asserting that the warrant was for his own use. Held inadmissible. M'Pheake v. Hutchinson, 5 Serg. & Rawle, 295, 297. But where a person was examined as to his books (they being absent) before commissioners of bankruptcy, as to his dealings with the bankrupt, and by his consent, the accountant to the commission making extracts from them, held that these extracts could not be used as evidence against him, without also reading his examination. Yates v. Carnsew, 3 Carr. & Payne, 99. In an action by a woman for a breach of marriage promise, the defendant, to mitigate damages, asked the plaintiff's physician if he, in attending her, had not prescribed for a disease other than pregnancy, who answered he had; and the only knowledge he had of it was from her information; and here the defendant insisted on stopping. But the plaintiff's counsel were allowed to show that in the same conversations she declared the disease to be the venereal,

which was communicated to her by the defendant himself. Withers v. Richardson, 5 Monroe, 94, 95.

The rule that confessions or declarations shall be taken together is confined to them as such and not where they are themselves the very grievance complained of. Thus, in an action for a libel or slander, the defendant's declaration of its truth at the time is not evidence; for so no action would lie for a libel or slander, without, in the first place, showing the falsity; whereas, it lies with the defendant, if he would justify, to show the truth. Rice v. Withers, 9 Wend. 138.

Where, taking the confession together, the branch making against the party is completely avoided, qualified or explained away by another branch, and there is nothing beside, either intrinsic or extrinsic the latter branch to render it questionable, the first is neutralized; and the whole is considered by the cases as not weighing a feather against the party. Thus, in assumpsit for goods sold, the defendant's confession that he had bought the goods, but paid for them, is not sufficient to entitle the plaintiff to recover. Smith v. Jones, 15 John. Rep. 229. So, where the defendant admitted he had received goods, but accounted for them, held the whole should be taken together. Benedict, Adm'r v. Nichols, 1 Root, 434. So, "I have received a dollar; but it was my due." Carver v. Tracy, 3 John. Rep. 427. "You did services for me; but I did not employ you, and am under age" (Wailing v. Toll, 9 Id. 141); so "I want to sell the horses, for I have offered them to F., who refused them;" the latter being material to do away the effect of a simple offer to sell (Fenner v. Lewis, 10 Id. 38); so "I killed your dog; but it was because he assaulted me in the night in the highway" (Credit v. Brown, Id. 365); so, on a question of non-joinder of plaintiffs, "I and H. gave our note; but he signed as surety, and we were not jointly interested in the subject of the suit." Hopkins v. Smith, 11 Id. 161. The defendants pointed out twenty-five small hogsheads, less than the usual size, and delivered a bill of these to the plaintiffs as a performance of a contract before made, to deliver hogsheads of the common size; but which previous contract was void by the Statute of Frauds. The plaintiffs accepted those of the small size, which made a valid contract; and then would have used the whole transaction as evidence to show a previous contract to deliver those of the common size. But, *per Cur:* "It is not competent, in our opinion, for the plaintiffs to accept this acknowledgment of the defendants, by a specification of twenty-five hogsheads ready for the plaintiffs, as the performance of the bargain acknowledged on their part; and then to use this evidence as the means of proving another and different contract. Where you rely upon a confession, you must take it all together; and the rule is peculiarly necessary to be observed where the confession is in a form of evidence essential to the establishment of the contract to be proved, as in this case. Whitwell v. Wyer, 11 Mass. Rep. 6, 16. The defendant admitted his contract with the plaintiff's intestate, but said it was in writing (a specialty). The action being assumpsit, it was correctly put to the jury, that if they believed the latter part of the confession, they must find for the defendant, for assumpsit would not lie. Holley's Adm'r v. Christopher, 3 Monroe, 16. In assumpsit for the freight of certain tobacco shipped by the defendants in the plaintiffs' vessel, which tobacco the defendants purchased of S. C., to show the quantity, the plaintiffs proved that T., one of the defendants, said they had forty hogsheads of S. C., which were shipped in the plaintiffs' vessel. The defendants offered to show that T. said, at the same time, that the tobacco was damaged in the transportation. This being overruled, the judgment was for that reason reversed on appeal. Turner v. Jenkins, 1 Harr. & Gill, 161. In assumpsit, where the plaintiff relies on the defendant's acknowledgment to take his case out of the Statute of Limitations, as if the defendant use words implying that the debt is due, but say he don't consider himself indebted because the plaintiff was negligent in not collecting certain securities, and ought not to look to him, the whole must be taken together, and the plaintiff cannot disprove any part, as that the debt is due because there was no neglect, &c. Oliver v. Gray, 1 Har. & Gill, 204, 219, 220. See also *post*, notes.

The rule applies to written as well as oral admissions; a very common illustration of which is found in the accounts of the party. These being used as evidence against him, are also evidence for him. Jones v. Jones, 4 Hen. & Munf. 447. Thus, where on a bill filed by one partner against the administrators of another for discovery and account, a balance was allowed against the intestate on credits taken from his books, without allowing the debits on the same books, for this reason and others, the decree was reversed; and the reversal sustained in the Court of Appeals, who say both sides, credit and debit, should have been taken together. Waggoner v. Gray's Adm'rs, 2 Hen. & Munf. 603. Again: in assumpsit, the plaintiff had, before suit, delivered a

large account, but on the trial proved only one item, £230. The defendant selected one item of credit in the same account exceeding the £230, relying on it as an admission. The jury, under the direction of the court, that by relying on the credit side the defendant must be holden to admit all the debit side, found for the plaintiff; and, on motion for a new trial, the court held that a defendant, being called on to render an account in order to sustain a plaintiff's demand, which the latter is obliged to rely on in order to charge the former, is entitled to be discharged by it. They said, if a defendant is called on to state whether a particular sum of money be due, and he state it was to be paid on a condition not performed, you must take the acknowledgment all together. An account is composed of items, and they are placed on the debit and credit side. If the defendant produce the account, you can no more take the items on the credit side to charge him, and reject the debits, than, in the case supposed, you can take the acknowledgment of what was agreed to be paid, and reject what he states with respect to the condition. New trial denied. Morris v. Hurst, 1 Wash. C. C. Rep. 433. Again: in assumpsit, the defendants produced an account, in the handwriting of one of the plaintiffs, crediting the defendants with $663.37, December, 1817. This was introduced to show a claim of so much in their favor. But the same account contained a charge against them, under date of February, 1817, of a balance of $4,405.20, in the plaintiffs' favor. Held, that the whole must be taken together; and so was evidence in favor of the plaintiffs. But it was said the defendants might, notwithstanding, impeach the account, so far as it was in favor of the plaintiffs. But they did not do it. Walden v. Sherburne, 15 John. Rep. 409, 413, 424; Turner v. Child, 1 Dev. 134, S. P., per Taylor, Ch. J. Again: in an action on an open account current, originating in New York, for cash lent, stock sold, and the balance of an interest account upon the items, the defendant relied on this account to show his credits, and the jury found for the plaintiffs with the interest, though an offer by the plaintiffs to prove that interest was allowable in New York on such an account, had been overruled by the court, on the defendant's objection. The defendant appealed; but the judgment was affirmed on the ground that, as the defendant relied on a document produced by the plaintiffs, it must be taken all together; and that would warrant the allowance of interest. Wakeman v. Marquand et al., 5 Mart. Lou. Rep. (N. S.) 265, 272. "The books of merchants cannot be given in evidence in their favor; they are good evidence against them; but if used as evidence, the whole must be taken together." Civil Code of Louisiana, 2244. The rule was applied very liberally to a sheriff's return, that he had levied of the defendant's goods and chattels $52.03; but paid for rent due from the defendant to M. N., and costs demanded by her attorney, $23.37 1-2; and that $6.40 had been recovered of him by D. & H., on account of selling the goods. In a suit by the plaintiff in the execution against the sheriff's administrators for the money, he relied on the return; and it was held, that the sheriff was protected by the matter in avoidance; and the balance only should be recovered. Griffith v. Ketchum's Adm'rs, 12 John. 379. So in ejectment, a writing introduced by the lessor of the plaintiff, signed by the defendant, admitting the title of the lessor, but stating that the defendant had been in possession seven years under color of title (the North Carolina limitation), being introduced by the plaintiff, was held evidence for the defendant of title by an adverse possession; but the court said it would have been otherwise if the admission had been made before the limitation had completed running; for then it would have destroyed the character of the adverse possession; but here it asserted a title. Doe ex dem. The Trustees of the University of North Carolina v. Roe, 2 Hawks, 370. An admission of the plaintiff's account by the defendant, at the same time producing and claiming one of equal amount against the plaintiff, must be taken together; and is, therefore, *per se*, no admission of the plaintiff's claim, even to take it out of the Statute of Limitations. Jacobs v. Farrall, 2 Hawks, 570. A writing admitting the survivorship of the wife, and that she is still alive, but asserting that she has released her dower, being used to prove the former, held, that it must also be taken to disprove her right of dower. Shaller v. Brand, 6 Binn. 435, 438. The defendant offered to prove an extract from the plaintiff's letter, the original being lost. The court would not permit this, saying the whole letter must be given in evidence, though the witness would swear that the extract contained everything pertinent. Dennis v. Barber, 6 Serg. & Rawle, 420, 425, 426. The plaintiffs sued on bills of exchange drawn on them by the defendant, and paid for his account. The defendant interposed a defence of payment; and to show this, relied on the books of the plaintiffs (produced under a notice), crediting him with various sums received; but there were also in the same books countervailing charges, debits of money

The same principle applies to statements in writing; if a portion of the statement is used against a party as an admission, the counsel for the party may insist on having the whole read. If a part of an answer in chancery is read in evidence, the other party is entitled to have the whole read;(1) and if, on exceptions taken, a second answer has been put in, the

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paid, which, however, the plaintiffs could not claim under their declaration, as this went upon the bills specially, and contained no count for money paid. The defendant, therefore, claimed the credits in his favor; and contended that the debits could not be allowed to affect him. Washington, J., said: "The principle of law is, that if the defendant is not prepared to prove credits, but relies for their proof on the plaintiff's account, the plaintiff can call on him to admit, *prima facie*, the debits; but it is competent to the defendant to show, by evidence, that the debits were not properly made. In this action the plaintiffs cannot recover on the debits, but only on the bills." But he allowed that the credits might be considered as payment applied to the debits, within the rule that payments may be applied by the creditor, if not directed by the debtor at the time; and so far the credits be rendered unavailable to the defendant. Bell et al. v. Davidson, 3 Wash. C. C. Rep. 328.

The cases are by no means uniform upon the extent to which one's book becomes evidence for him when introduced by the opposite party, some of them taking the whole of the countervailing debits, or statements in other parts of the books, and others narrowing the evidence down to the single charge. In one case, the defendant claimed the benefit of a credit of ten cords of wood at $2.50, given in the plaintiff's testator's day-book; and held, that he could not have this benefit without all the charges in the handwriting of the testator against the defendant contained in the same day-book, also going to the jury as evidence to prove the charges, though at other times than the date of the credit. King v. Maddux's Ex'r, 7 Har. & John. 467. In another case, in an action of assumpsit, commenced in May, 1812, for work and labor, the defendant produced his day-book on notice, by which the labor was credited to the plaintiff, on different pages, before suit brought. The defendant then insisted on reading an entry on a different page of the same book, made in November of the same year, 1812. But this was disallowed, on the ground that the entry was after suit brought; though the court admitted that ordinarily any entry might be read by a defendant under these circumstances necessarily connected with those used by the plaintiff, which his book contained at the time when the suit was brought. Withers v. Gillespy, 7 Serg. & Rawle, 10. Otherwise, it seems, if the plaintiff merely inspects the books, without using them in evidence. Id. In another case, where the plaintiff read an entry from the defendant's day-book, the latter then insisted on reading other entries from the same book, in other parts, and not connected with the one read. Held inadmissible, though Abbott, Ch. J., said he was entitled to have the whole of the particular entry read. Catt v. Howard, 3 Stark Rep. 3. And see Pike v. Dyke, *supra*, cited from 2 Greenl. 213, 216, 217.

We have seen in Withers v. Gillespy (*supra*), that charges made after suit brought shall not be received. It has also been held, that where one party is bound in duty to furnish an account, the credits may be used against him without regard to the debits. Thus, where a partner called on to account, did so, but made a countervailing charge in the account, of $250, as stock brought into the partnership by him, held that this was properly rejected, there being no proof beside the account. Smith v. Harrathy, 5 Mart. Lou. Rep. (N. S.) 319. So where the administrator of an executor being ordered by chancery to account with legatees, produced the account-books of his intestate, and insisted that the whole should be taken together, debits as well as credits; and the commissioner took the account on this principle, reporting a balance in his favor, which was confirmed on appeal. This was disallowed on further appeal, and the court said the rule that where a party relies on an account furnished by his adversary, he is bound to take the whole together, does not apply to an account furnished by an executor or other trustee. They are bound to furnish the *cestui que trust*, with the means of charging them; and must discharge themselves by vouchers, or means independent of the account itself. Robertson v. Archer, Adm'r, 5 Rand. 319.

(1) By Holt, C. J., in Lynch v. Clarke, 3 Salk. 153; Bath (Earl) v. Battersea, 5 Mod. 9; Gilb.

defendant may insist on having that also read, to explain what he swore in his first answer.(1) If a defendant makes out a written statement of what he considers to be the plaintiff's claim upon him, and on the same paper draws out a counter claim on his own part; if the plaintiff seeks to make use of the statement as evidence against the defendant, the latter is entitled to have the counter claim also laid before the jury.(2)

But although the whole of the document should be laid before the jury, it will be presently seen, that it by no means follows, that they are bound to give the same degree of weight to every portion of it.(3)

Documents referred to.

If a person, in making an admission against his own interest, refers to a written paper, without which the admission is not complete, the contents of the paper ought to be shown, before the statement can be used as evidence against the party.(4) Thus, where a letter, written by the defendant, was put in by the plaintiff, it was held, that the defendant had a right to have read what had been written on the back by the plaintiff.(5)

Ev. 44. The whole of a recital in a deed must be taken together. 2 Ventr. 171; 1 Com. Dig. tit. Evidence, b. 5.

(1) R. v. Carr, 1 Sid. 418; B. N. P. 237; Gilb. Ev. 50.

(2) Randle v. Blackburn, 5 Taunt. 245.

(3) NOTE 119.—It was offered by the plaintiff to prove that, after he commenced his suit, the defendant admitted he was tenant of A. This was objected to on the general principle that evidence of anything that happens after the suit is not admissible. But, per M'Kean, Ch. J.: "I recollect but one case in the books upon this point; and that is, that an acknowledgment of a debt after suit, takes it out of the Statute of Limitations. Let the witness proceed." The reply of the plaintiff's counsel was, that the acknowledgment proposed was of a fact existing *previous* to the suit. Morris's Lessee v. Vanderen, 1 Dall. 64, 65. And see Gosling v. Birnie, 1 Mood. & Malk. 531. The defendant on being arrested, expressed his surprise that the plaintiff's debt had not been paid before by P., and promised to meet the plaintiff and settle the claim if he would give him time. Held sufficient to take the case out of the Statute of Limitations. Sluby v. Champlin, 4 John. Rep. 461. In assumpsit on an account stated, the plaintiff acknowledged, after suit brought, that he had reviewed his accounts with the defendant, to whom a balance was found due, for which he gave a note. Held admissible evidence; and that the note was admissible. This was not evidence of a set-off; but proof of an admission, and acts showing that nothing was ever due to the plaintiff. Marshall v. Sheridan, 10 Serg. & Rawle, 268.

(Statements made by a party after suit brought, or *post litem motam*, are received with great caution. Wetmore v. Mell, 1 Ohio State R. 26; Cole v. Cole, 33 Maine, 370. And there is a wide distinction between an admission of a fact and an admission made under a misapprehension of its extent. The admission is admissible as proof of the truth, and not on the ground that it concludes or estops the party making it. Wakefield v. Crossman, 25 Vt. 298. Hence he may give testimony explaining it, or showing that the admission was not true. Pecker v. Hoit, 15 N. Hamp. 143; Duffield v. Cross, 12 Ill. 397; Stephens v. Vroman, 18 Barb. 250.)

(4) See by Lord Kenyon, C. J., in Jacob v. Lindsay, 1 East, 462. By Lord Ellenborough, C. J., in Smith v. Young, 1 Campb. 439. See, also, Falconer v. Hanson (1 Campb. 171), where a log-book was referred to in a deposition of a witness examined upon interrogatories.

(5) Dagleish v. Dodd, 5 C. & P. 238. See, also, Richards v. Frankum (9 C. & P. 221), as to an indorsement upon a promissory note.

NOTE 120.—The following cases should be compared with what is laid down in the text:

The same rule applies to an interrogatory referring to a letter; so that if the party producing the interrogatories refuse to produce the letter, he must abandon the whole of the interrogatories, and not merely that one which refers to the letter.(1) Where commissioners in bankruptcy send for a party, and compel him to produce documents and answer questions, it has been ruled that secondary evidence of the documents cannot be given, without proof of the examination which accompanied their production.(2)

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that where a confession refers to a written paper, such confession is not complete, and cannot be received without proof of the paper. In the first, it was held that the declaration of the party referring to books, adopted and made them evidence against him, as a part of the confession. The action was on notes against A. and others, to fix them as partners, and the plaintiff proved A.'s declaration denying that he was a partner, in respect to the notes in question; but saying he had at one time been interested, and received a dividend in 1815, when his interest ceased; that the dividend was entered in the books on that day. The plaintiff then offered the books. Held admissible, and that A. had made them a part of his confession. The court said that the part of the declaration denying himself to be a partner might be disbelieved by the jury on testimony *aliunde*. Beside, the book might show a connection of such a nature that, if the plaintiffs had no notice of the dissolution, A. might still be liable. Thommon v. Kalbach, 12 Serg. & Rawle, 238 to 240.

In the following case the principle in the text was held to mean that the confession must, in the first instance and on its face, show the reference to be to a writing; if not, the party cannot himself explain the reference to mean a writing, and then call for its production. The plaintiff, claiming premises under M., showed the defendant's confession that he held under M. by lease, and rested. The defendant proved that the lease was in writing, and then insisted that the plaintiff should produce it, in order to show that it had expired. Held, that this lay with the defendant; and this not being done, it should be intended from the omission that it had expired. Jackson ex dem. Witherell v. Jones, 9 Cowen's Rep. 182.

A confession was in one case thus allowed to be connected with a writing by a very loose and remote implication, to explain the equivocal word *gift* as used in a confession. Thus, in detinue for negroes, the plaintiff proved that the defendant said he had given them to the plaintiff's wife, who was the defendant's daughter. The court allowed the defendant to show that he had made his will (whereby he had given them to his daughter) on the very day when the declaration was made, in order to explain what was meant by giving the negroes. Morisey v. Bunting, 1 Devereux, 3.

In one case at Nisi Prius, it was held that where a party referred to a writ in his confession, by which he partially did away its effect against him, he was yet put to strict proof of the writ. This was in Grey v. Smith and another, Sheriff, 1 Campb. Rep. 387. The plaintiff, to charge the defendants with taking goods, gave in evidence a warrant executed by one of the defendants, the sheriff, to his bailiff, as an admission that the bailiff acted as his agant. The same warrant recited the writ, and the defendants claimed that the whole admission must be taken together, and the writ therefore as proved. But Lord Ellenborough denied this, and said the defendants must prove the writ as a part of their justification; and this although it was contended that the writ itself should be produced by the plaintiff. But the contrary has been holden, and that, even in false imprisonment, proof of the defendant's admission that the plaintiff was arrested and handcuffed by his order, but he had a warrant for this, must be taken together; and thus would justify him. Rogers v. Wilson, 1 Alab. 407, 409. And see Shaller v. Brand, 6 Binn. 435, 438; Dennis v. Barber, Id.; Griffith v. Ketchum's Adm'rs, Id.; Bristol v. Warner, 19 Conn. 7; Knight v. New England Worsted Co., 2 Cush. 271; Mims v. Sturtevant, 18 Ala. (N. S.) 359.

(1) Wheeler v. Atkins, 5 Esp. 246.

(2) Holland v. Reeves, 7 C. & P. 36. See, also, Yates v. Carnsew, 2 C. & P. 99.

NOTE 121.—The proof of an admission by letter, is by proving the letter itself the same as

If a letter refers to other letters or papers inclosed, and refers to them in such a way, that it is necessary to incorporate them with the body of the letter, in order to make it intelligible, or to complete the sense, the inclosures must be read with the letter.

But independent papers merely inclosed in a letter and not referred to by it, are not thereby rendered admissible together with the letter.(1) And where documents are adduced in evidence, which are referred to in an examination or answer, but are entirely independent and unconnected therewith, this does not render it necessary to put the examination or answer also in evidence. Thus, in the case of Long v. Champion,(2) on a trial of an action at law, a copy of a letter written by the plaintiff's agent, and referred to by the plaintiff in his answer to a bill in chancery, and the original of which letter, instead of being filed in the master's office, had, by consent of parties, been deposited for inspection with the plaintiff's clerk in court in the chancery suit, was held to be admissible evidence on the part of the defendant at law, without reading the answer in chancery. Lord Tenterden, C. J., in giving the judgment of the court, observed: "Whether it is necessary in every instance to read an answer in chancery, for the purpose of making any documents evidence which may be annexed to it, we do not now decide. I should at present think it a very strong proposition to say that the answer must at all events be read, though having no connection with the case in which the documents are produced. But here, at least, we think the copy in question was admissible without the answer."

But where a bill of discovery had been filed by A. against B., upon

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any other instrument in writing. Thus, the defendants in answer to an action against them for transporting whiskey, produced a letter to them from one of the plaintiffs, admitting that they had converted a part of the whiskey while on the road to their own use. The body of the letter was written by one of the defendants himself, but he proved that the subscription was in the plaintiff's handwriting. The court below rejected the letter, because there was no subscribing witness; and it was not shown that the plaintiff had heard the letter read or the contents explained. But this was holden erroneous. The court above said a letter must be proved like any paper contract. The proof of signature was enough in the first instance. If there was fraud or mistake, it lies with the signer then to correct it. Holmes et al. v. Ketlinger, 4 Yeates, 532.

On the trial, the defendant, to show an admission of the plaintiff, offered to prove the extract of a letter from the plaintiff. The original letter was shown to be lost; and the witness would swear that it was the only part of the letter relating to the matter in controversy. The plaintiff was a merchant, and the matter in dispute was a mercantile transaction. The court said, the plaintiff being a merchant should be presumed to keep a letter-book; and due notice should have been given to him to produce it. That would have been the next best evidence. The notice for that purpose being short, oral evidence could not be given; and an extract of a letter cannot be received. The whole must be regularly proved, or no part is evidence. Dennis v. Barber, 6 Serg. & Rawle, 420, 425, 426.

An account-book containing entries by A. & B., may go to the jury as evidence of their being partners. Champlin, Ex'r v. Tilley, 3 Day, 303, 307.

(1) By Lord Kenyon, C. J., in Johnson v. Gilson, 4 Esp. 21.

(2) 2 B. & Ad. 284. See, also, Sturge v. Buchanan, 10 A. & E. 605.

which there had been a decree and order that B. should bring into court all letters written by A. respecting a certain debt, it was held that these letters could not be read in an action at law brought by B. against the sheriff for a false return to a *fi. fa.* against the goods of A. without first putting in the bill and answer;(1) for, it was said, the answer might contain such a contradiction or explanation of parts of the letters, as might wholly neutralize their effect.

Limits to the general rule.

It is proposed now to consider what limits have been imposed on the reception of a party's statement in his own favor, upon the ground of its accompanying an admission made against his interest.

It has been decided, that although a defendant is entitled to have the whole of a particular entry in a book read, where part of it is used against him, yet he cannot insist upon reading distinct entries in different parts of the book.(2) Thus, where the plaintiff gave the defendant notice to produce a letter-book, containing copies of certain specified letters, which was produced accordingly; it was held that the defendant had no right to read, in his own behalf, other letters upon the same subject, copied in the same book, but not referred to in those read by the plaintiff.(3) Lord Denman, C. J., in giving the judgment of the court in this case, remarked, that the book contained "a series of copies of letters written from time to time—in principle exactly the same thing as if they had been kept in a counting-house on a file. That the rest of the correspondence may throw light upon these parts of it, is true; but the light may be a false one. The plaintiff is not bound to know whether it would or not; nor whether any other statements were made as they appear in the book, or, if made, were true."(4) Upon the same principle, where attempts have been made to put in evidence bundles of proceedings in bankruptcy, or all the entries in corporation books, merely because one paper or entry has been read by the opposite party, they have always been rejected.(5)

Conversations.

The same principle applies to admissions made in conversation; although

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(1) Hewitt v. Piggot, 5 C. & P. 75, 77. See, also, Ludlow (Mayor) v. Charlton, 9 C. & P. 242. And see Temperley v. Scott (5 C. & P. 341), as to reading cross-interrogatories which are part of a case.

(2) Catt v. Howard, 3 Stark. R. 5.

(3) Sturge v. Buchanan, 10 A. & E. 598.

(4) Id. 605.

(5) Id. 601.

The books of a bank are not evidence in its favor, or in favor of its receiver, in a suit brought to recover a balance due on account. White v. Ambler, 4 Seld. 170. The person who made the entries should be called (Monroe v. Culver, 2 Hill, 535); unless he be dead or insane. Brewster v. Doane, Id. 557; Union Bank v. Knapp, 3 Pick. 97. The pass-book is evidence against the bank. Jermain v. Denniston, 2 Seld. 276.

it was at one time laid down, and by very high authority, that if part of a conversation was given in evidence against a party as an admission, he was entitled to have the whole conversation repeated. In The Queen's Case,(1) Abbott, C. J., in delivering the opinion of the majority of the judges, that if a witness was asked in cross-examination as to some statement made by him in a conversation with a third party, he could not be re-examined as to the whole of that conversation, took occasion to remark: "I distinguish between a conversation which a witness may have had with a party to the suit, whether criminal or civil, and a conversation with a third person. The conversations of a party to the suit, relative to the subject matter of the suit, are, in themselves, evidence against him in the suit, and if a counsel chooses to ask a witness as to anything which may have been said by an adverse party, the counsel for that party has a right to lay before the court the whole which was said by him in the same conversation, not only so much as may explain or qualify the matter introduced upon the previous examination, but even matter not properly connected with the part introduced upon the previous examination, provided only that it relate to the subject matter of the suit; because it would not be just to take part of a conversation as evidence against a party, without giving to the party, at the same time, the benefit of the entire residue of what he said on the same occasion."

This doctrine was much discussed in the Court of Queen's Bench, in the case of Prince v. Samo.(2) That was an action for malicious arrest, on a false suggestion that money was lent by the defendant to the plaintiff, when, in fact, it had been given. The plaintiff called his attorney as a witness, who happened to have been present at the trial of a prosecution for perjury, instituted by the plaintiff against a witness in the action wherein he had been arrested. The defendant's counsel inquired of him, in cross-examination, whether the plaintiff had not, on the trial for perjury, stated, that he himself had been insolvent repeatedly and remanded by the court. This question was not objected to. On his re-examination the same witness was asked, whether the plaintiff had not also on that occasion, given an account of the circumstances out of which the arrest had arisen; and what that account was, for the purpose of laying before the jury proof that the arrest was without cause and malicious. This question, expressly confined to that purpose, was, whether the plaintiff did not say, in the course of his examination, that the money was given, and not lent? To this question the defendant's counsel objected, upon the ground that the circumstance of the defendant having proved one detached expression that fell from the plaintiff when a witness, did not make the whole of what he then said evidence in his favor. Lord Denman,

(1) 2 B. & B. 297, 298.
(2) 7 A. & E. 627.

C. J., at the trial was of opinion, that the witness might be asked as to everything said by the plaintiff, when he appeared on the trial of the indictment, that could in any way qualify or explain the statement as to which he had been cross-examined; but that he had no right to add any independent history of transactions wholly unconnected with it. The court afterwards held that the line had been correctly drawn by his Lordship at the trial.

In this case, the *dictum* of Abbott, C. J., in The Queen's Case, just referred to, was cited, and Lord Denham, C. J., in giving the judgment of the court, observed, with regard to that *dictum:* "We forbear from entering into a detailed examination of the doctrine there laid down. We have considered it repeatedly with all the diffidence inspired by such an authority, but we cannot assent to it. We will merely observe, that it was not introduced as an answer to any question proposed by the House of Lords,(1) and may, therefore, be strictly regarded as extra-judicial; that it was not necessary, as a reason for the answer to the question that was proposed; that it was not in terms adopted by Lord Eldon, C., or any other of the judges who concurred; that it was expressly denied by Lords Redesdale and Wynford; and that it does not rest on any previous authority. We ought to add that, in our opinion, the reason of the thing would rather go to exclude the statements of a party making declarations which cannot be disinterested."(2)

Upon a review, therefore, of the authorities, the correct rule seems to be as follows: That where a statement, forming part of a conversation, is given in evidence, whatever was said by the same person in the same conversation, that would in any way qualify or explain that statement, is also admissible; but detached and independent statements, in no way connected with the statement given in evidence, are not admissible, and that there is no difference in this respect between statements made in conversation by a party to the suit, and those made by a third party.

Correspondence by letters.

It was held in one case, that letters written by a party are evidence against him without producing copies of those to which such are answers;(3) as the adverse party may himself produce the original letters to which those put in are answers, if he thinks them necessary to explain the transaction.(4) But in a late case, where it was proposed on the part of the plaintiff to give in evidence a letter written by the defendant's attorney, which purported to be an answer to a letter written to him by the plaintiff's attorney, Pollock, C. B., ruled, that if the plaintiff's counsel put

(1) The question had reference to the re-examination of a witness for the purpose of letting in the whole of what he himself had stated in a conversation. See 2 B. & B. 294, 296, and *supra.*

(2) 7 A. & E. 634.

(3) Lord Barrymore v. Taylor, 1 Esp. 326.

(4) By Lord Kenyon, C. J., Id.

in the first-mentioned letter, he ought also to call for and put in the one to which it was an answer, and not leave it to the defendant to put in the letter of plaintiff's attorney as his evidence.(1)

A defendant, who puts in evidence a correspondence, consisting of several letters between himself and the plaintiff, has a right to give in evidence one written by him to the plaintiff in reply to the plaintiff's last letter, as forming part of the correspondence.(2)

Writ containing return.

Where, in an action against the sheriff for an escape,(3) a copy of the writ is given in evidence by the plaintiff, and the document contains also a copy of the sheriff's return, the defendant is not entitled to have the copy of the return read as part of the document, as the writ is perfectly distinct from the return.

Other parts of judicial proceedings.

When an answer in chancery is offered in evidence, as an admission of party upon oath, or for the purpose of contradicting a witness, the interrogatory part of the bill must also be read; and if the party against whom the answer is produced insists upon it, the narrative part of the bill also must be read.(4)

Where the whole of admissions are received, it often happens that they contain statements favorable to the party against whom the admissions are used, and in many instances they are found to contain hearsay evidence of facts. The principal ground for receiving the whole admission appears to be, that, by comparison of the several parts with each other, the true meaning and extent of the admission may be more clearly understood. On this ground, there does not appear to be any sufficient reason why those parts of the admission, in favor of the party, should be applied to any other purpose by the jury than that of explaining the parts used against him.

But although the principal ground upon which admissions are received in evidence is, because it may be presumed that a person would not speak or make a statement, if not true, against his own interest, and though the reason for receiving the whole admission is only for the purpose of ascertaining whether the person has in fact spoken against his own interest, and, if so, to what extent, and with what qualifications: yet, it may be collected from authorities, that the effect of receiving the whole admission amounts to something more. The using in evidence of an admission of

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(1) Watson v. Moore, 1 C. & Kir. 626.

(2) Roe v. Day, 7 C. & P. 705.

(3) Adey v. Bridges, 2 Stark. R. 189.

(4) Pennell v. Meyer, 2 Moo. & R. 98; S. C., 8 C. & P. 470. In general, an answer to a question cannot be read without showing the question to which it relates. R. v. Picton, 30 How. St. Tr. 466.

the adverse party, seems to have been considered a waiver of any objection to his testimony as to all matters contained in it. The presumption or probability that those portions of a party's statement which are against his interest are true, is supposed to give credit to other parts of the same statement, with respect to which there is no such presumption, but perhaps a contrary presumption. A statement, therefore, received for the purpose of proving facts therein stated by him against his interest, is not to be excluded with respect to other facts stated which are in his favor.(1) It is, however, to be understood, that the several parts of a statement are not necessarily entitled to equal credit; the jury may believe one, and reject the other.(2)

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(1) See Beckham v. Osborne, 6 M. & G. 771.

(2) See by Lord Mansfield, C. J., in Berman v. Woodbridge, 2 Doug. 788. See, also, R. v. Clewes, 4 C. & P. 221.

NOTE 122.—We intimated, in the introduction to note 118, that every part of the confession is not always entitled to equal weight. This will be found fully illustrated in the cases which we now proceed to state, and still more strikingly when we come to speak of confessions in criminal cases, *post*, notes. The jury are not always bound to give implicit faith to the whole or any part of the confession (Smith v. Hunt, 1 M'Cord, 449, and the cases there cited); and said it may be weighed by the character, interest and appearance of the party confessing. Id. And where the party, to substantiate a credit in his favor, produces an account made out by the opposite party, though he renders it evidence in the first instance to prove the debits against himself in the same account, yet this is not conclusive, and he will still be at liberty to disprove the debits (Walden v. Sherburne, 15 John. Rep. 409; Turner v. Child, 1 Dev. 134, S. P.); or impeach them by showing them erroneous on their face. Jones v. Jones, 4 Hen. & Munf. 447. And where, in an action for the price of one-half of a steamboat sold, the defendant admitted he purchased, but said he had paid for it, the plaintiff was allowed to disprove the latter branch of the confession by circumstances; and the jury thinking it was overcome, the court refused to disturb the verdict. And *per Cur.*: "Confessions must be taken together; but when extra-judicial, as in this case, the weight of evidence, by which they may be rebutted, depends on all the circumstances of the case, as disclosed by testimony." Quick v. Johnson, 6 Mart. Lou. Rep. (N. S.) 532, 533. And see Thommon v. Kalbach, 12 Serg. & Rawle, 238, 240. So, where the evidence in assumpsit for money lent, was that the defendant said, "I borrowed the money, but I paid it;" it was put to the jury that the confession must be received all together; but they were not bound to credit the assertion of payment; and they found for the plaintiff, owing to some slight evidence which tended to repel the assertion of payment. Newman v. Bradley, 1 Dall. 240. In an action for wages, as mate of a vessel against the master, the latter said he was captain, but never engaged the plaintiff, who was employed by the owner. Shippen, president, told the jury they must take the whole together, unless the part in his favor was inconsistent or improbable. The defendant had a right to choose his mate, though employed by the owner; and the mate had a three-fold remedy; one against the master, the same as a common sailor had; and gave the opinion of the court, that if the plaintiff served with the defendant's permission, he was liable. Verdict for plaintiff. Farrel v. M'Clea, Id. 382. In assumpsit, the plaintiff proved that he presented his account to the defendant, who said, "It is just, but I paid it by a man in Petersburgh; and had I time, I could prove it." *Per Cur.*: "The rule is, that a confession shall be taken all together; but if there are circumstances mentioned in the confession, which when examined into, disprove the matter alleged in discharge, or where that matter can be disproved, the jury are to reject it, and go upon the other part of the confession only; as where he says the account is just, but I paid it before such persons; and they know nothing of the payment; or at such time and place, and it be proved that at that time he was not at the place, but at another far distant; or if he says the account is just, but I will prove it paid if I have time; and he is

In Smith v. Blandy,(1) in an action for goods sold and delivered, one of the plaintiff's witnesses stated, upon cross-examination, he had heard the plaintiff say, that the goods were sold under a written contract, which the plaintiff at the time showed the witness: a broker's note was then produced by the plaintiff's counsel, which the witness said was the paper spoken of. It was objected, that the broker's note ought not to be received as evidence of the contract, unless the broker was called to prove it. But

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allowed that time, and called upon to make that proof, and does not; in such and the like cases, the matter in discharge will be rejected." Verdict for plaintiff. Barnes, Ex'r of Kay v. Kelley, 2 Haywood, 45. In stating an account, the creditor charged (*inter alia*) $150 for a wagon, which was the only item proved, and made the balance due to him $84, after giving several credits. He, at the time of stating the account, admitted that the wagon had been paid for, which, if he had not been allowed his other charges, would have made a balance the other way. The jury considered the written statement and confession all together, and discredited the latter, allowing the balance as struck. Held well. The court said the jury must judge what credit is due to any part of a statement, written or oral. Turner v. Child, 1 Dev. 133, 134. The defendant confessed he had committed a homicide by shooting at the vital parts of a negro, declaring at the time he intended to hit his legs; but other proof showed him within ten feet of the negro when he shot, so that he might have hit his legs if he had chosen. In trespass by the owner of the negro, held, that the jury might reject the latter part of the confession and act on the first. Arthur v. Wells, 2 Rep. Const. Court S. C. 314.

On a reference to take an account, the defendant claimed to have allowed to him credits for large disbursements contained in an account produced against him by his adversary. But the account did not say to whom nor for what the payments were made, nor did it give particulars of time; several items were discredited, and one had been allowed in another and distinct account. Chancellor Kent, on hearing exceptions to the master's report, said: "There is no doubt of the general rule, that when one party exhibits a paper in proof to charge his opponent, his opponent is entitled to use it in his discharge. But it does not follow that each part is entitled to the same credit. The charge may be so clear and specific as to be conclusive, while the discharge is so loose and defective as to deserve no credit. We have seen that those discharges are inaccurate in some instances, that they have no precision or certainty as to place or circumstance, that we have evidence of the allowance of part on other proof, and of the *positive* injustice of other parts; and we are justified and bound, upon all sound principles, to reject the whole." Method. Ep. Church et al. v. Jaques et al., 3 John. Ch. Rep. 115 to 117.

Though, where a confession or declaration is given in evidence, a court and jury may, on sufficient ground, believe part and disbelieve another part, yet such parts must be distinct and relate to different matters or facts; as, "I acknowledge that *I borrowed the money*, but I *repaid it*." Whereas, a negro saying, "I was manumitted," is a different case. This cannot be used to show that he was once a slave, and rejected when invoked to show that he had become free. Fox v. Lambson, 3 Halst. 255, 256, 257.

(When an account is presented to a party, containing items on both sides, and showing a balance against him, and he answers, "It is correct, but I have an offset;" this is sufficient to authorize a verdict for the balance admitted to be due, no other evidence of the set-off being given. Delamater v. Pierce, 3 Denio, 315. The whole conversation relating to the admission may be given, that which tends to discharge the party making the admission, as well as that which tends to charge him. Dorlon v. Douglass, 6 Barb. 451; Coon v. The State, 13 S. & M. 246, 471; Duffield v. Cross, 12 Ill. 397; Roberts v. Gee, 15 Barb. 449; 1 Parker C. R. 11; Id. 241; 18 Barb. 250.)

(1) Ry. & Mo. 257; Cray v. Halls, cited Id.; where Abbott, C. J., left the whole of a conversation to a jury, to consider whether the facts, asserted by a party, in his own favor, were not true, as well as those against him. And see Remmie v. Hall, Manning's N. P. Dig. (2d ed.), 376, cit. 3 M. & G. 834.

the objection was overruled, and it was held by Best, C. J., that the whole of what a party says at the same time must be given in evidence, though what he says in his favor must not on that account be taken as true, but must be left, with all the circumstances, for the jury to consider whether they believe it or not. And in Randle v. Blackburn,(1) it was held, that where a person admitted a claim, but at the same time set up a counter claim, the statement of the counter claim was admissible to prove not only its existence but also its truth and correctness.

Answer in chancery.

Where in an action by an executor for money lent by his testatrix, to which the defendant had pleaded the Statute of Limitations,(2) it was proved that within six years before the commencement of the suit the plaintiff filed a bill of discovery against the defendant, and the latter in his answer admitted the payment by him to the testatrix of half-yearly payments down to a period within six years; but alleged, that they were paid, not as interest upon a debt, but by way of security; it was held, that the jury were at liberty to reject the latter part of the statement, and that the answer might be construed by them merely as admitting the payment of the money, and that the appropriation of it, as interest upon the debt sued upon, might be proved by other evidence.

Bill in chancery.

It has been seen, that if an answer in chancery is put in evidence, the whole of the bill, if required, must also be put in;(3) but in that case the jury will be warned by the judge, that the statements in the bill are not to be considered as admissions of the facts so stated; for it is notorious that allegations, not corresponding with the facts, are frequently introduced into bills for the purpose merely of eliciting the truth from the other party.(4)

With respect to the case of an admission containing hearsay evidence, some remarks were made on the subject in the case of Roe on the demise of Pellatt agt. Ferrars,(5) where the defendant gave in evidence an answer in chancery by the lessors of the plaintiff. Chambre, J., observing upon the degree of positive proof which the lessors of the plaintiff had drawn from the answer in their own favor, expressed himself thus:—"It is true that the answer was introduced into the cause by the defendant, on whose

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(1) 5 Taunt. 255. And see Thompson v. Austen, 2 D. & R. 361; Fletcher v. Froggatt, 2 C. & P. 569; Green v. Dunn, 3 Campb. 215; Smith v. Young, 1 Campb. 439; Barrymore v. Taylor, 1 Esp. 325; Com. Dig. tit. Evidence, B, 5; 12 Vin. Ab. tit. Evidence, A, 23: 2 Ventr. 171; Cooper v. Smith, 15 East, 103.

(2) Baildon v. Walton, 1 Exch. R. 617.

(3) *Supra*, p. 417.

(4) By Tindal, C. J., in Pennell v. Meyer, 2 Moo. & R. 99.

(5) 2 B. & P. 548.

behalf some parts of it were read: but in those parts on which the lessors relied, they speak only to 'what they have *heard* as truth.' I think that was not admissible evidence; for it appears to me, that where one party reads a part of the answer of the other party in evidence, he makes the whole admissible only so far as to waive any objection to the competency of the testimony of the party making the answer, and that he does not thereby admit, as evidence, all the facts which may happen to have been stated by way of hearsay only, in the course of the answer to a bill filed for discovery. This point, he added, does not indeed appear to have been contested at the trial; had it been contested, I should have thought the court bound to send the case down for a new trial."(1)

In discussing the effect of admissions made by a party to the suit, it becomes necessary in some measure to anticipate the consideration of a very important rule, which requires that the best evidence shall always be given.(2) A leading instance of the application of this rule is, that where a written document is in existence and accessible, it must itself be produced in evidence, and no secondary evidence of its contents, whether by a professed copy or a verbal statement, will be admissible, unless when the opposite party, having it in his possession, does not produce it after notice to do so.

It must be taken, therefore, as an exception to this rule, that in some cases an admission by a party to the suit, as to the contents of a written instrument, may be given in evidence against the admitting party without proof of notice to produce the instrument.

Thus in Goss v. Quinton,(3) the defendant, in his examination before commissioners of bankrupt, admitted having taken property belonging to the bankrupt; upon cross-examination he stated that he purchased the property under an agreement, which he produced, and a copy of the agreement was entered as part of his answer. In an action by the assignees of the bankrupt to recover the property in question, they put in the examination of the defendant to prove that he had taken the property; and it was held that they thereby made the cross-examination evidence, and that, therefore, there was some evidence of the existence of the agreement, without producing or accounting for the absence of the original document.

So in Bessey v. Windham,(4) which was an action of trespass against a sheriff for seizing the plaintiff's goods, the plaintiff having put in the sheriff's warrant to his officer, to prove the seizure of the goods, which warrant recited a writ at the suit of a judgment creditor, it was held that

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(1) See also Lord Trimleston v. Kemmis, 9 Cl. & Fin. 780, 784.
(2) *Post.*
(3) 3 M. & G. 825.
(4) 6 Q. B. 166.

this was some evidence of the existence of the writ, so as to show that the sheriff acted under legal authority.(1)

Verbal admissions.

Where the admission has been made verbally, and consequently has to be proved by oral evidence, there appears to be a difference of opinion upon the question whether it can be received as evidence of the contents of a written instrument.

In the following cases such evidence has been admitted.

In Doe d. Lowden v. Watson,(2) Lord Ellenborough, C. J., ruled that a declaration, made by the lessor of the plaintiff, that he had assigned the lease to a third party, was admissible evidence on the part of the defendant.

In Sewell v. Stubbs,(3) Gifford, C. J., ruled that a statement made by one of the plaintiffs, as to the contents of a promissory note, was evidence on behalf of the defendant.

In Earle v. Picken,(4) Park, J., ruled that a statement by the defendant, as to the contents of a written agreement, were admissible on behalf of the plaintiff. His Lordship there said: "What a party says is evidence against himself, as an admission, whether it relate to the contents of a written agreement or to anything else."

In Newhall v. Holt,(5) the Court of Exchequer held that a parol admission of a debt by the defendant is evidence against him under a count for an account stated, though it appears that there was a written agreement relating to the subject matter of the goods. And Parke, B., in this case, repeated the doctrine he had laid down in Earle v. Picken.

In Slatterie v. Pooley,(6) which may be considered as a leading case

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(1) See also Haynes v. Hayton, 6 L. J., K. B. (O. S.), 231, cit. 6 Q. B. 169.

(2) 2 Stark. R. 231, A. D. 1817.

(3) 1 C. & P. 73, A. D. 1824.

(4) 5 C. & P. 542, A. D. 1833.

(5) 6 M. & W. 662, A. D. 1840, T. T.

(6) 6 M. & W. 664, A. D. 1840, M. T. In Newman v. Stretch (M. & M. 338, A. D. 1829), Park, J., ruled at Nisi Prius, that the declaration of a bankrupt, that he had absented himself to avoid a writ against him, was evidence of an act of bankruptcy, without any other proof of the existence of the writ. But this case seems to have turned upon the principle, that statements of a bankrupt are admissible when they are explanatory of an act done; *vide supra*. The ruling in this case is supported by the decision in Rouch v. The Great Western Railway Company, 1 Q. B. 51. See also Ex Parte Bamford, 15 Ves. 449; Robson v. Rolls, 9 Bing. 648.

(The parol admission of a party has been held inadmissible to prove a fact directly in issue, where parol evidence is not admissible (Jameson v. Conway, 5 Gilman, 227; Bivens v. McElroy, 6 Eng. 23; 22 Ala. (N. S.), 529; 18 Barb. 250); or where the admission involves a general conclusion, as that the suit must go against him. Crockett v. Morrison, 11 Mis. 3. The parol admission of a collateral fact, such as the recovery of a judgment in another action, may be proved. Smith v. Palmer, 6 Cush. 513. The plaintiff, in a suit for work and labor, admits verbally that the claim has been referred to an arbitrator who found nothing due to plaintiff; and this admission may be proved. Murray v. Gregory, 5 Exch. R. 468.)

upon this subject, the same court laid down the rule that a parol admission by a party to a suit is always receivable in evidence against him, although it relates to the contents of a deed or other written instrument; and even though its contents be directly in issue in the cause. Parke, B., in that case, observed: "The reason why such parol statements are admissible, without notice to produce or accounting for the absence of the written instrument, is, that they are not open to the same objection which belongs to parol evidence from other sources, where the written evidence might have been produced; for such evidence is excluded from the presumption of its untruth, arising from the very nature of the case, where better evidence is withheld; whereas, what a party himself admits to be true may reasonably be presumed to be so." And Lord Abinger, C. B., though he had not been present at the argument, said he concurred in what was said by Parke, B., and stated that he had always considered it as clear law, that a party's own statements were in all cases admissible against himself, whether they corroborate the contents of a written instrument or not.

The authority of this case has been recognized by the Court of Common Pleas, in the case of Howard v. Smith,(1) where it was held that, upon the issue of a tenancy in replevin, the verbal statements of the plaintiff as to the terms of his tenancy were admissible in evidence, although the tenancy was created by adopting the terms of a former demise in writing.(2)

Authorities against admissibility.

On the other hand, in Bloxam v. Elsee,(3) Abbott, C. J., distinctly laid it down as a rule, that a witness could not be asked what a party to the suit had said as to the contents of deeds executed by such party, without giving him notice to produce the deeds or accounting for their non-production. And according to one report of this case, his Lordship added: "I give my opinion distinctly, in order that it may be reviewed by a bill of exceptions, or in any other mode the counsel for the defendant may think proper."(4) And though a motion was afterwards made for a new trial upon other grounds, it does not appear that this objection was renewed in the court above.(5) This case, however, was cited in Slatterie v. Pooley, and was referred to by Parke, B., in his judgment; and it must be considered to be thereby overruled.

But the principles laid down by the Court of Exchequer, in the case of Slatterie v. Pooley, have since been much discussed by the judges in the

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(1) 3 M. & G. 254, A. D. 1841.

(2) See also Bethell v. Blencowe, 3 M. & G. 119, and Id. 256.

(3) Ry. & Moo. 187; S. C., 1 C. & P. 558, A. D. 1825. See also Fox v. Waters, 12 A. & E. 43.

(4) Ry. & Moo. 188.

(5) S. C., 6 B. & C. 169. See also 1 C. & P. 565.

Irish case of Lawless v. Queall,(1) and disapproved of in rather strong terms. Pennefather, C. J., observed: "The doctrine laid down in that case is a most dangerous proposition; by it a man might be deprived of an estate of £10,000 per annum, derived from his ancestors through regular family deeds and conveyances, by producing a witness, or by one or two conspirators, who might be got to swear that they heard the defendant say he had conveyed away his interest therein by deed, or had mortgaged, or had otherwise incumbered it; and thus, by the facility so given, the widest door would be opened to fraud, and a man might be stripped of his estate through this invitation to fraud and dishonesty."

It would seem, however, that these observations would apply to the weight due to such testimony, rather than to its admissibility. It is to be observed that there is no positive law that excludes parol evidence of the contents of a written instrument, except where a written instrument is required by law. Such evidence, in other cases, is excluded by one of those rules which have been laid down by the courts as best calculated for ascertaining the truth. The party against whom such evidence is given may object to it, because oral testimony as to a written document is not the best means of ascertaining its contents. A verbal statement of the contents of a writing may not be true. But the party who is entitled to the benefit of the rule may waive it, if he thinks proper—as, for instance, when he believes that the witness will state truly the contents of the document. If the party were in court, by himself or his counsel, to make an admission as to the contents of a document, with the contents of which he must necessarily be acquainted, and upon the production of which he might insist, this would amount to a waiver of its production, and his admission would be taken as true. If he made a similar admission out of court, but for the purposes of the cause, it would operate in a similar manner. Again, if it can be proved, by clear and satisfactory testimony, that he has made such an admission, though not for the purposes of the cause, although it may not be regarded as a waiver of the production of the document, it is surely receivable, as a declaration made by him against his own interest, and which, as he knows the truth, he must be presumed to have made consistently with the truth. The credit or weight to be given to such testimony must, of course, depend upon the circumstances of the case. There is, undoubtedly, in the case of verbal declarations, always the *possibility* of fraud or perjury on the part of the witness who repeats the declaration. There is the same possibility in every instance where a witness speaks to any fact that he professes to have seen. Such testimony is not rejected, but is to be sifted by the best means the adverse party may have in his power. In the case of verbal declarations there is also a possibility—and often a probability—of misapprehension or of inac-

(1) 8 Ir. Law Rep. 382.

curate recollection on the part of the witness, and the judge will always point out this to the jury.

Parke, B., has several times observed that too great weight ought not to be attached to evidence of what a party has been supposed to have said;(1) and the same learned judge observed, in the case of Slatterie v. Pooley:(2) "The weight and value of such testimony is quite another question; that will vary according to the circumstances, and it may, in some cases, be quite unsatisfactory to a jury."

Written admissions.

The foregoing observations have reference merely to verbal admissions of the contents and effect of written documents. When such admissions are themselves in writing, there seems never to have been any doubt as to their admissibility.(3)

Thus, where a copartner signed a notice that the partnership had been dissolved, it was ruled to be evidence against him that it had been dissolved by competent means, and, therefore, was evidence of a dissolution by deed, if a deed were essential to such dissolution.(4)

So, letters of the plaintiff, in which he admitted himself to be a shareholder, on a certain day, in a joint stock company established by deed, were held to be proof of that fact, without proof that he had even executed the deed.(5)

Where the defendant put in evidence the plaintiff's answer to a bill in equity, in which answer the plaintiff stated that he had conveyed certain property by deeds of lease and release, it was held that the answer was evidence of the conveyance, without notice being required to produce the deeds.(6)

Where admission will not dispense with calling attesting witnesses.

It will be seen, hereafter, that it is a rule as to the proof of private writings, that if the execution has been attested by a witness, that witness

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(1) See 5 C. & P. 542, n., *post.*

(2) 6 M. & W. 664, 669.

NOTE 123.—One word as to the manner of proving verbal confessions. A witness, one Lenox, called to prove a conversation with a party, said he could not recollect the expressions used, but would give his impressions as to the substance of the conversation. This mode of giving the conversation was objected to, but held admissible. Snell v. Moses, 1 John. Rep. 99, 103.

But though the witness be uncontradicted and unimpeached, if the declarations happened a considerable time before he testifies to them, the precise words being important, and he, though confident, not positive, a new trial will not be granted, because the verdict is against his testimony. Harding v. Brooks, 5 Pick. Rep. 244.

(3) See Goss v. Quinton and Bessey v. Windham, *supra*, p. 421.

(4) Doe d. Waithman v. Mills, 1 Stark. R. 181; S. C., 4 Camp. 373.

(5) Harvey v. Key, 9 B. & C. 356.

(6) Ashmore v. Hardy, 7 C. & P. 504.

must be called to prove the execution;(1) and this rule operates as an exception to the principle now under consideration; for instance, if it is proposed to prove an actual conveyance, an admission of its execution, even made upon oath in an answer in chancery, will not dispense with calling the subscribing witness; this, however, depends on the principle upon which that rule is founded, namely: that the subscribing witness may be acquainted with facts not within the recollection of the parties to an instrument.(2) But an admission of the execution of a document expressly made for the purpose of the suit, or under a judge's order,(3) stands upon a different footing, and dispenses with the necessity of calling the subscribing witness.

Parol admissions as to documents or records.

A parol admission is not receivable for the purpose of contradicting documentary evidence. Thus, where a person was proved to be seized of certain lands, by documents produced in the cause, his declarations, to the effect that he had a less estate than a fee-simple, were rejected.(4)

A parol admission will not dispense with the production of a record; as where, to prove the discharge of the plaintiff under an insolvent act, it was proposed to give in evidence his admission to that effect; the evidence was held to be insufficient, and it was thought necessary to call the clerk of the peace, and to give in evidence the order of the Quarter Sessions, by which the discharge was effected.(5)

Admission made *without prejudice.*

Another rule, defining the legal nature of an admission, is that an offer by a party, either verbal or in writing, expressly stated to be made without prejudice, to pay money by way of compromise, and with a view to buy peace, is not evidence of a debt by way of admission.(6) The ground

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(1) *Post*, Vol. II.

(2) By Le Blanc, J., in Call v. Dunning, 4 East, 53; Abbot v. Plumbe, Doug. 216; Cunliffe v. Sefton, 2 East, 183; Bowles v. Langworthy, 5 T. R. 366.

(The admission of a party showing the execution of an instrument, that may be legally executed without a subscribing witness, is admissible without calling such witness; as in the case of a promissory note. Hall v. Phelps, 2 John. R. 451; Shaver v. Ehle, 16 Id. 201; Henry v. Bishop, 2 Wend. 575; Pentz v. Winterbottom, 5 Denio, 51. And the English statute of 1854 provides that "it shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite; and such instruments may be proved by admission or otherwise, as if there had been no attesting witness thereto." 17 & 18 Vict. c. 125.)

(3) *Vide infra.*

(4) Harrison and Wife v. Moore, Nott. Spr. Ass. 1837; by Littledale, J., who observed, that in the cases where such declarations had been received, the declarant's title had rested merely on the fact of possession.

(5) Scott v. Clare, 3 Camp. 236. So, before Ld. Denman's Act, in order to prove the incompetency of a witness on the ground of infamy, his own admission of having been convicted was held not sufficient, and an examined copy of the record of his conviction was required to be produced. R. v. Teal, 11 East, 309; Rounds v. Thomas, 5 M. & S. 244; R. v. Castle Careinion, 8 East, 78.

(6) Cory v. Bretton, 4 C. & P. 462; Healey v. Thatcher, 8 C. & P. 388; Jardine v. Sheridan,

for the rejection of the evidence does not seem very clear. It is generally considered that an admission made *without prejudice* is not receivable, on the ground of policy, in protecting such confidential overtures.(1)

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2 C. & Kir. 24. See also by Lord Kenyon, C. J., in Turner v. Railton, 2 Esp. 474, and in Gregory v. Howard, 3 Esp. 113. As to the application of the rule in equity, see Harman v. Van Hatton, 2 Vern. 717; Turton v. Benson, 1 P. Wms. 497; Underwood v. Lord Courtown, 2 Sch. & Lef. 67.

(1) See B. N. P. 236, where it is said, "If A. sue B. for £100, and B. offer to pay him £20, it shall not be received in evidence, for this neither admits nor ascertains any debt, and is no more than saying he would get rid of the action:" but the reason seems to apply rather to the *effect* of such evidence, than to its *admissibility*. In Rouse v. Redwood (1 Esp. 155), Lord Kenyon, C. J., rejected an admission, as being made to a bailiff on the arrest of the party.

NOTE 124.—The rule as established by all the cases, with one exception, is, not that an *admission* made during, or in consequence of, a treaty of compromise is inadmissible against the party; but that *an offer to do* something by way of compromise, as to pay sums of money, allow certain prices, deliver certain property, or make certain deductions and the like, shall be excluded. These cannot be called admissions, which can only be predicated of existing facts; but are unaccepted *propositions to do*. They lie in feasance, and rather negative the present existence of what they offer. They might be used, perhaps, as implied admissions, were not this effect taken away by the circumstance that they are plainly brought forward with the view to a compromise, and then, in favor of peace and against litigation, they are privileged. Even this privilege seems to be construed strictly; for if the proposition is not made expressly without prejudice, or, at least, if it do not plainly carry on its face the character of a peace offering, the privilege is gone.

Thus a statement and unqualified admission of an account, on being called on for a settlement, is admissible. Hyde v. Stone, 7 Wend. 354. And again, after an action of assumpsit upon a charter party was commenced, the defendants offered a specific sum to the plaintiffs, and a friend of the plaintiffs went to the defendants and advised them to increase their offer, which the defendants refused, saying, "We shall lose enough by the charter party as it is." The witness added that nothing was said about this communication being without prejudice; but an objection was made that, as the transaction appeared to have been a negotiation for a compromise, it must be understood to be without prejudice. Lord Tenterden received the evidence as *prima facie* proof of liability, because *it was not said to be without prejudice;* and an offer of compromise may very well be made without any restriction as to confidence. Wallace v. Small, 1 Mood. & Malk. 446. Similar evidence was admitted in Watts v. Lawson (1 Mood. & Malk. 447, note), which was a case for a newspaper libel. The attorneys met for the purpose of adjusting a recanting article, and agreed on one to be inserted in the defendant's newspaper, which was not done. This was allowed as evidence for the plaintiff in aggravation of damages.

In general, however, both in England and America, the nature of the negotiation has been looked to; and that the offer was intended to be without prejudice, has been inferred from its being plainly an offer with a view to compromise. As observed by a learned judge (Mills, J.): "Offers of sums, prices or payments made during an attempt to compromise, are not admissible, if not accepted." Otherwise, as to the existence of a fact; *e. g.* in slander, the plaintiff's admission of the fact that the defendant had not originated, but only repeated the slander. Evans v. Smith, 5 Monroe, 363, 364. And it was lately made a question in England, whether an agreement by the defendant in respect to a pending suit, to pay the claim of the plaintiffs, with part of the costs, and actually paying the claim, but omitting to pay the costs, was in nature of a compromise, and therefore inadmissible as evidence against the defendant. Bayley, J., thought it should have been left to the jury to say whether what passed was an offer to purchase peace, or the admission of a general liability. Holroyd, J., said the agreement was with a view to compromise, and he considered it inadmissible for that reason. But a nonsuit was ordered on other grounds; the other judges omitting to express themselves as to the effect of the negotiation for a compromise. Lofts v. Hudson, 2 Mann. & Ryl. 481, 483, 484. The most, if not all of the American cases, have, like a

large majority of the English, gone on the intrinsic character of the transaction, without requiring an express declaration that the communications should be without prejudice. This will be seen, among other distinctions, by the cases which we now come to state.

In trespass, the defendant offered in support of a motion for a new trial, a paper containing an offer by the plaintiff, before suit brought, to accept a certain sum as his damages, which was not acceded to by the defendant. The court said this would not be evidence, even at the trial. Herr v. Slough, 2 Browne's Rep. 111, 112, and note *b*. In a penal action, the plaintiff offered to show that the defendant had sought to have a compromise proposed. This was rejected as not being competent to prove guilt. Slocum v. Perkins, 3 Serg. & Rawle, 295. A surety, being discharged by the conduct of the creditor, offered to take a loan of money of the creditor, and secure him on his estate, and also for the sum yet due from his principal, from which he was discharged in equity. But the proposition was not accepted by the creditor. On bill filed, the proposition being urged against him, the court denied it any weight, saying it was a rejected proposal for compromise, which is never received as evidence. Baird v. Rice, 1 Call, 18, 26. The defendant wrote a letter to the plaintiff, offering to give up certain property; but the proposition was not accepted. On a bill filed in respect to that property, the court held that the letter tending to a compromise, it was inadmissible as establishing any claim to the property. Williams v. Price, 5 Munf. 507, 510, 538. A proposition to give the plaintiff twenty-five dollars to settle his demand, was held inadmissible, even to take a case out of the Statute of Limitations; the court say, because it was a mere peace offering. Laurence v. Hopkins, 13 John. Rep. 288. It was held that after twenty years' adverse possession, this giving a title, the defendant's offer to purchase of the plaintiff was inadmissible as affecting his title; but this would rather seem to go on the Statute of Frauds. Smith v. Morrow, 5 Litt. Rep. 217, 220. The defendant offered a written statement of the contract, which the plaintiff admitted, for the purpose of having it go to arbitrators then about to be chosen by the parties; but refused to sign lest it should be evidence against him. The arbitration having fallen through, held not admissible against the plaintiff. Wilson's Adm'r v. Hines, 1 Alab. Rep. 255; S. C., *post.*

The Supreme Court of the state of New York has gone farthest in excluding admissions made during a negotiation for compromise. Thus, at the trial, the plaintiff offered his attorney as a witness. To exclude him as incompetent on the ground of interest, the defendant proved that he sent to the plaintiff to learn on what terms he would settle the suit. The plaintiff said he could not propose terms without seeing his attorney, who was interested, as owning part of the demand. Held inadmissible, as being drawn out by an offer to compromise. Williams v. Thorp, 8 Cowen, 201. This exclusion of an independent fact disconnected with, and not necessarily making any part of a proposition to compromise, is contrary to the whole current of English and American authorities. It seems not sustainable upon Turner v. Railton (2 Esp. Rep. 447), or Waldridge v. Kennison (1 Id. 143), cited and mainly relied upon by the learned judge who delivered the opinion of the court; though the dictum of Lord Kenyon in the latter cause is certainly broad enough for the purpose. This dictum might have been a better ground of reliance, however, were it not fearfully shaken by the very decision which followed in the same cause; and utterly overthrown by the subsequent decision of the same learned judge in Turner v. Railton. These two English cases go with the others cited by our author; and the same thing had been before held by several learned judges in New York, and by the Court of Errors itself in that state. Thus, in an action for a breach of marriage promise, the defendant sent a witness to compromise with the plaintiff; and in the course of authorizing the negotiation, admitted the promise of marriage to the witness, his agent. Held, that the plaintiff might show this; and per Thompson, C. J., "The communications made between the parties at the time of an attempted compromise, are alone privileged. The witness was not an authorized agent for both parties; and there has been an admission of a fact independent of the compromise." Mount v. Bogert, Anth. N. P. Rep. 190; 3 S. C., C. H. Rec. 193. It was remarked in the Court of Errors by a senator, "I am not prepared to admit that what a party may state as a fact, though the statement may be made in the course of negotiation for a compromise, or may be connected with an offer to purchase peace, will not be as binding as if the fact had been disclosed in any other way. If a man says to me, 'I do not admit that I owe you anything: but rather than be sued, I will give you a hundred dollars,' it would be most unjust to suffer me to avail myself of this offer, to recover against him. But if one tells me, 'I justly owe you a hundred dollars, and

will give you fifty if you will give up your debt,' I apprehend there is no rule of law so absurd and unjust as to prevent my availing myself of my debtor's confession, because he connected with it an offer of compromise." Murray v. Coster, 4 Cowen's Rep. 635, per Colden, Senator. In this case, it was held that an answer in chancery admitting the debt, but insisting on the Statute of Limitations, did not come within the rule which excludes offers of compromise; and that, accompanying a plea of the statute or standing alone, it is unavailable as destroying its own professed object. 20 John. Rep. 576; S. C., 4 Cowen, *supra.* The case as presented in the 20 Johnson, certainly goes farther, and seems to decide most plainly that an admission of a fact, though made in the course of a negotiation for a compromise, is receivable. The bill was to recover the plaintiff's share of the proceeds of goods sold by the defendants, being in nature of an action for money had and received, wherein the defendants may have a right to, and in this case did attempt to set up the Statute of Limitations. But it appeared by their answer that they had, in order to avoid litigation, offered to pay the plaintiffs their share without interest; but reserved ths right to plead the statute, if the offer was refused, and insisted they were discharged by lapse of time. Held, "that this was such an *acknowledgment* and *admission* of the debt as defeated the operation of the statute." 20 John. Rep. 576. Such is the marginal note; and that such is a correct abstract will be seen by consulting the opinion of Spencer, Ch. J., at pp. 586 to 590. Here, then, is an *admission* made avowedly and expressly with a view to compromise, to prevent litigation, and as a *peace admission*, though not a *peace offer or proposition;* and it was held receivable, and not privileged because it was an *admission of a fact.* We shall now see, by a brief abstract of the other American cases, and comparing them with the English, as presented in the text, that the distinction established in Murray and Coster is sustained by all, with the single exception of Williams and Thorp, *supra.*

In an action on an agreement for the defendants with the plaintiffs, to make a drawbridge, the plaintiffs offered to show that one of the defendants admitted to one of the directors of the plaintiffs that the draw was not made pursuant to the contract; and in the same conversation it appeared the defendant had asked for terms of compromise. The admission being therefore rejected, on motion for a new trial, Hosmer, Ch. J., said:—"The law on this subject has been often misconceived; and it is time that it should be firmly established. It is never the intendment of the law to shut out the truth; but to repel any inference which may arise from a proposition made, not with design to admit the existence of a fact, but merely to buy one's peace. If an admission, however, is made *because it is a fact*, the evidence to prove it is competent, whatever motive may have prompted to the declaration. In illustration of this remark, it may be observed, that if A. offer to B. £10, in satisfaction of his claim of £100, merely to prevent a suit or purchase tranquility, this implies no admission that any sum is due; and therefore testimony to prove the fact must be rejected, because it evinces nothing concerning the merits of the controversy. But if A. admit a particular item in an account, or any other fact, meaning to make the admission as being true, this is good evidence, although the object of the conversation was to compromise an existing controversy. The question to be considered is, what was the view and intention of the party in making the admission—whether it was to concede a fact hypothetically, in order to effect a settlement, or declare a fact really to exist? There is no point of honor guarded by the court, nor exclusion of evidence, lest it should deter from a free conversation. But testimony of admissions or declarations, taking facts for granted, not because they are true, but because good policy constrains the temporary yielding of them to effectuate a greater good, is not admissible—truth being the object of evidence." Hartford Bridge Company v. Granger and others, 4 Conn. Rep. 142. So, in a suit to charge the defendant with the maintenance of a bastard child, it was offered to show that, on the mother charging him with being the father, he told her that if she would not sue him, but keep the matter secret, he would give her some money, &c., held admissible, within the case in 4 Conn. Rep. 142. Fuller v. The Town of Hampton, 5 Conn. Rep. 416. *Vid.* p. 426. So, in an action on a promise by the defendants (attorneys) to indemnify the plaintiff against arresting L., who had recovered against him for false imprisonment in making the arrest, which suit was defended by the defendants as attorneys, the plaintiff offered to show that, while he and the defendants were together trying to effect a compromise, one of the defendants told him that he had charged him nothing for defending the suit brought by L. This was offered as a ground of inference that the defendant was a joint promisor to indemnify. The evidence was held admissible, as tending to the admission of a

Admissions of this nature are generally made by the attorneys of the parties in negotiations before the commencement of a suit. But they are treated of in this place because they are considered as the acts of the parties themselves, and may, in fact, directly emanate from them. And the same principle is applicable whether they are made by the parties or their attorneys.(1)

Where a communication, "without prejudice," had taken place between the attorneys of the plaintiff and the defendant, and the plaintiff's attorney three months afterwards called on the defendant to explain why an earlier answer was not given to a proposition made in the course of the prior communication, it was held that the evidence of what passed on the second occasion was inadmissible.(2) And where a letter has been written "without prejudice," the answer to it, though not guarded in a similar manner, will not be admitted.(3)

The rule under consideration seems to apply to any admission or confession made by a party respecting the subject matter of the action, obtained while a treaty is depending under faith of such treaty, and into which the party may have been led by the confidence of a compromise taking place;(4) but it does not apply where admissions are made not under

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fact, or item, independent of an offer of compromise. Marsh v. Gold, 2 Pick. 285, 290. So, in an action for money had and received, it was offered to show that the defendant gave B., who applied to him in behalf of one of his creditors, between whom and the defendant a compromise was pending, a memorandum of the money due to the plaintiff; but it was to be confidential, and not to be shown to the creditors. It was objected that here was a compromise pending. The court disallowed the objection. They said the rule is, that an offer to pay a sum of money to compromise a pending controversy is inadmissible; but this is confined to the mere offer of compromise. Any indepedent facts admitted during the treaty of compromise may be given in evidence as confessions. Gerrish, Adm'r, v. Sweetser, 4 Pick. 374, 377. Again:—"*Ellery* opposed the introduction of testimony to prove admissions made while a compromise was in contemplation. *Livingston, contra.* '*Proposals* made while a compromise is on the carpet, do not bind; but *conversations in which a fact is disclosed* may be admitted to prove it.' Of this opinion was the court." Delogny v. Rentoul, 2 Mart. Lou. Rep. 175. Again: the plaintiffs claimed that the defendant had bound himself by his agent, Davis, to convey to the plaintiffs' ancestor the legal title of certain land; and the defendant proposed terms of compromise not complied with; but in the same proposition admitted that Davis was his agent. Though this was the only evidence of the agency, yet the court received it, saying it was the admission of a fact no way connected with a mere offer of compromise, nor necessary to a compromise. Church v. Steele's Heirs, 1 Marsh. Ky. Rep. 328. So in crim. con., the defendant, with a view to compromise, admitted to the plaintiff that he had been guilty of the imputed intimacy with his wife, and offered to take and bring up one of his children. Held, that intimacy was an independent fact, and might be given in evidence against him; that the offer, had it stood alone, would not be so; but following, as it did, the first admission, and appearing to be grounded on it as a consequence, the whole was receivable as a connected admission of the fact. It was like an express admission that $20 are due, and an offer to pay that sum. Sanborn v. Neilson, 3 N. H. Rep. 501, 508, 509.

(1) *Vide Post.*

(2) Collin's Ex'rs v. Wright, Midl. Spr. Cir. 1837; by Lord Abinger, C. B.

(3) Paddock v. Forrester, 3 Scott N. R. 834.

(4) By Lord Kenyon, C. J., in Waldridge v. Kennison, 1 Esp. 143, 144. See also by Bayley, J., in Thompson v. Austen, 2 D. & R. 361.

the condition of their being *without prejudice*, or not under the faith of any treaty for a compromise ;(1) or where an agreement, though purporting to be a compromise, has been finally concluded (as, where it has been signed by the parties and executed),(2) or where the admissions were made before an arbitrator.(3) In this last case, though the proceedings are said to be before a domestic forum, yet the parties are, at the time, contesting their rights as adversely as before any other tribunal.(4) The fact of a person having made an offer to compromise a suit, is admissible, and may be material, as some evidence of liability,(5) although it may not be proper to inquire into the terms offered :(6) but an offer to pay a less sum than that demanded, is not a sufficient acknowledgment of a debt, to support a count upon an account stated, as it merely amounts to an offer to purchase peace.(7)

Admission of collateral or indifferent facts during treaty.

A distinction, also, is to be made on this subject, between an admission of some fact connected with the merits of the cause, and an admission of an indifferent fact. Thus, on the trial of an action, which had been once withdrawn under a treaty between the parties, Lord Kenyon, C. J., allowed proof of the defendant's having admitted his acceptance on a bill of exchange, though the admission had been made during the treaty ;(8) he held, that any admission by the party, respecting the subject matter of the action, pending a treaty on the faith of which it was made, could not be received to his prejudice ; but added, such a fact as that of the party's handwriting, not being connected with the merits of the cause, and capable of being easily proved, stood on different grounds, and that an admission of this fact might be received.

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(1) Wallace v. Small, 1 M. & M. 446 ; Hill v. Elliott, 5 C. & P. 436.

(2) Frognell v. Lewelyn, 9 Pr. 122, 128. See also Collier v. Nokes, 2 C. & K. 1012.

(3) Westlake v. Collard, B. N. P. 236 ; Gregory v. Howard, 3 Esp. 113 ; Slack v. Buchanan, Peake N. P. C. 5 ; Harman v. Van Hatton, 2 Vern. 717 ; 1 P. Wms. 497.

(4) Doe d. Lloyd v. Evans, 3 C. & P. 219. The admissions may be proved by the arbitrator. Gregory v. Howard, 3 Esp. 113.

When an offer is made to admit facts with the view to an arbitration, which falls through, the offer being accompanied with a refusal to sign a written statement of the facts for fear it might be used as evidence, the admission or offer is inadmissible. Wilson's Adm'r v. Hines, 1 Ala. Rep. 255. No reservation being made in an offer of compromise, the offer may be proved, where it takes for granted the execution of a note. Grubbs v. Nye, 13 S. & M. 443. As previously stated, an offer to do or to admit a given thing in a negotiation for a compromise is not admissible, while a statement of a fact relating to the subject matter of dispute may be proved. Cole v. Cole, 33 Maine, 542 ; Marvin v. Richmond, 3 Denio, 58.

(5) Wallace v. Small, M. & M. 446 ; Watts v. Lawson, Id. 447, n ; Nicholson v. Smith, 3 Stark. R. 128.

(6) Harding v. Jones, 1 T. & G. 135. See also Thomas v. Magan, 2 C., M. & R. 496.

(7) Wayman v. Hilliard, 7 Bing. 101.

(8) Waldridge v. Kennison, 1 Esp. 143. See also by Lord Kenyon, C. J., in Turner v. Railton, 2 Esp. 474.

Admissions on examinations.

With respect to the question, whether an admission, to be receivable in evidence, must be voluntary, there appears to be a distinction between civil and criminal cases. It has been considered that, on the trial of civil actions, admissions are receivable in evidence, provided the compulsion, under which they are given, be legal: if the party were imposed upon, or under duress, he would not be bound by them.(1) Thus, it has been held, that an examination before commissioners of bankrupt was evidence against the party making it;(2) and this, notwithstanding the party might have objected to the questions, as exposing him to penalties;(3) or though the questions had been improperly put to him, and were unconnected with the interests of the bankrupt's estate, and had even been put with a view to procure evidence in an action pending against him;(4) or though part only of his deposition was taken down in writing and signed by him.(5) In like manner, testimony given in court, admitting a particular fact, may be used as an admission of the fact, though the persom examined was prevented from entering into an explanation of the circumstances under which the fact took place, as being irrelevant to the matter in issue upon the former occasion.(6)

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(1) See by Lord Ellenborough, C. J., in Stockfleth v. De Tastet, 4 Camp. 10.

(2) Robson v. Alexander, 1 M. & P. 448.

(3) Smith v. Beadnell, 1 Camp. 30.

(4) Stockfleth v. De Tastet, 4 Camp. 10. The remedy of the party so improperly examined is by application to the Lord Chancellor to have the examination taken off the file: by Lord Ellenborough, C. J., Id.

(5) Milward v. Forbes, 4 Esp. 171.

(6) Collett v. Keith (Lord), 4 Esp. 212.

NOTE 125.—(Testimony given on a coroner's inquest *voluntarily*, is admissible against the witness on trial for crime (The People v. Hayers, 1 Parker C. R. 595; Id. 406); not so when given involuntarily. People v. McMahon, 15 N. Y. Rep. 384. Statements of facts made by a party, or by his counsel with his assent, in one cause, are admissible against him in another. Truby v. Seybert, 12 Penn. State R. 101. But in general, the remarks of counsel in the trial of a cause are not to be construed as an admission determining the rights of his client (McKeen v. Gammon, 33 Maine, 187); though an admission by an attorney of the amount collected, may be shown in evidence against his client. McRea v. Ins. Bank of Columbus, 16 Ala. 755. See Underwood v. Hart, 23 Vt. 120; Thomas v. Kinsey, 8 Geo. 421).

See Robetaille's Cases, stated in a subsequent note. So where a witness answers questions upon a legal investigation before the House of Commons, tending to criminate himself, and to which he might have demurred, his answers may be used against him as admissions upon his own trial, for the crime which they tend to prove. Rex v. Merceron, *Cor.* Abbott, J., 2 Stark. Rep. 366. In Rex v. Gilham (Ry. & Mo. Cr. Cas. 203), on Rex v. Merceron being cited, Lord Tenterden said: "I think there must be some mistake in that case; the evidence must have been given without oath, and before a committee of inquiry, where the witness would not be bound to answer." So on a trial (4 Stark. Ev. 39), the examination of one as a witness on oath, is evidence against him in another cause. Benedict, Adm'r, &c. v. Nichols, 1 Root, 434. So what he confessed in a criminal prosecution against him. Eno v. Brown, Id. 528. So penitential confessions voluntarily made to members of the same church, in a course of discipline. Commonwealth v. Drake, 15 Mass. Rep. 161. So a confession in respect to an indictment, is evidence against him in a civil cause. Eno v. Brown, 1 Root, 528. So what the plaintiff confessed, on a

Admissions of this kind are evidence in favor of parties who were strangers to the former proceedings; thus, in an action on a bill of exchange, an admission in an answer to a bill, filed by other creditors against the defendant, may be read as evidence against him.(1)

An admission, however, made by a party under examination before commissioners of bankruptcy, that he had received money, on behalf of the bankrupt, after an act of bankruptcy, has been held not to be evidence of an account stated with the assignees, as it was not an admission of a subsisting debt payable to them.(2)

The admissibility, in criminal trials, of admissions made in examinations upon oath or otherwise, will more properly be considered in the next section, which treats of the admissibility of confessions.

Indirect or implied admissions.

There is a species of admissions, wherein the existence and truth of the fact to be proved is assumed in the expressions which are given in evidence. The expressions, in such cases, are received as an admission of the fact, though they were used for some other purpose, and though the admission is only implied; and, as an admission, they are allowed to supersede the necessity of producing more explicit evidence.(3)

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hearing before commissioners to examine the claims against an estate represented insolvent. Fitch v. Hyde, Kirby, 258, 259. So what the party admitted before the justice, may be proved on the trial upon appeal. Reed v. Rocap, 4 Halst. 346, 352. So what he admitted before arbitrators, may be received against him on trial. Doe ex dem. Lloyd v. Evans, 3 Carr. & Payne, 219, stated *post*. So B.'s deposition, on examination upon oath before a magistrate, against A., to prove a forgery, was held admissible against B., on trial of a charge of the same forgery upon him. Rex v. Haworth, 4 Carr. & Payne, 254. So examinations of parties before commissioners of bankrupt are evidence in actions against them by the assignees, unless such examinations were obtained by imposition, or under duress. Robson v. Alexander, 1 Moor & Payne, 448. And *vide* Tucker v. Barrow, 1 Mann. & Ryl. 518.

In certain cases in New York, the statute compels witnesses to give evidence tending to criminate themselves; but it disallows what they say, as after evidence against them. Among these cases, are the testimony of attorneys, solicitors and counsel, as to the illegal purchase by them of a chose in action for the purpose of prosecution. 2 R. S. 289. So of persons other than the parties prosecuted under the gaming statutes. 1 R. S. 663, § 18.

(1) Grant v. Jackson, Pea. N. P. C. 203. See also Ashmore v. Hardy, 7 C. & P. 501.

(2) Tucker v. Barrow, 7 B. & C. 623; by Bayley, J. Littledale, J., expressed an opinion that an admission, obtained under a compulsory examination, is not evidence at all of an account stated.

(3) NOTE 126.—The mere admission of a debt shall not charge the defendant with the whole of the plaintiff's demand; but he must prove the amount. Quarle's Adm'rs v. Littlepage, 2 Hen. & Munf. 401. Such an admission will not authorize a jury to find any particular sum. Douglass v. Davie, 2 M'Cord, 218. Not even nominal damages, on a count upon an account stated. Bernasconi v. Anderson, 1 Mood. & Malk. 183. And where the defendant, on being arrested, said the debt due the plaintiff was just, and he would pay it; and the jury, on proving this, found for the plaintiff the amount sworn to in the plaintiff's affidavit to hold the defendant to bail, which affidavit was attached to the writ; the court set the verdict aside, saying the confession was not sufficiently definite to warrant the finding. Harrison v. M'Kinney, 2 Bay, 412. But the confession of a debt is always considered the best of evidence, so far as it goes. Hendrickson,

Where an auctioneer advertised for sale the property of J. S., a bankrupt, this was held to be evidence of the title of the assignees in an action against the auctioneer.(1) The evidence in this case was said to be conclusive, on the ground that it imported an authority from the assignees; for the bankruptcy would have put an end to every authority which the bankrupt might have given to sell the goods.(2) In a case where a defendant had paid money into court, and pleaded that the plaintiff had sustained no greater damages, a judge's summons, taken out by the defendant two days before the trial, to allow him to pay a larger sum into court, was admitted in evidence for the plaintiff, although the latter summons was abandoned, and no order made upon it.(3) A statement upon an appeal, that those against whose acts the complaint is made, are justices, is an admission of their jurisdiction.(4)

There is another species of implied admission—where a party has assumed a particular character, or where, by his conduct or language in the transaction in question, or in previous transactions of a similar nature, he has recognized the existence of a title, upon which the opposite party relies. In speaking of cases of this latter description, Lord Ellenborough, C. J., observed:(5) "I take it to be quite clear that any recognition of a person standing in a given relation to others, is *prima facie* evidence, against the person making the recognition, that such relation exists."

On an information against a military officer for making false returns, it is sufficient to prove that he acted in the character alleged in the charge, without direct evidence of his appointment.(6) In an action for penalties against a collector of taxes, proof of his collecting the taxes is sufficient evidence of his being a collector, though his appointment is by warrant under an act of Parliament.(7) In an action against a clergyman for non-

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Adm'r v. Miller, 1 Rep. Const. Ct. 296. And a letter to a creditor, "that four bales of cotton will pay the amount," was held to admit a debt to the value of such bales. Douglass v. Davie, 2 M'Cord, 218. Again, in assumpsit for goods sold, a witness for the plaintiff stated that he called upon the defendant to execute a bond to the plaintiff for £126. The defendant replied that he expected to receive money for land which he had sold, in about six weeks, when he would go down to the plaintiff and settle the account with him, and pay it off. The witness believed that he showed the defendant the account (but of this he was not certain), and that the defendant did not then examine the account (which was composed of a large number of items), but made no exceptions to it. On demurrer to this evidence, the Superior Court gave judgment for the defendant; but on appeal, this judgment was reversed—the Court of Appeals holding the evidence sufficient to sustain the action. Dunbar v. Beale, 5 Munf. 24.

(1) Maltby v. Christie, 1 Esp. 340, commented on in 16 East, 193.

(2) See, also, Ledbetter v. Salt, 4 Bing. 626; Harmar v. Davis, 7 Taunt. 577, *infra*.

(3) Domett v. Young, C. & Marsh. 465.

(4) R. v. Fisher, Cald. 135. As to indirect admissions made by the attorney in the cause, see *infra*.

(5) In Dickenson v. Coward, 1 B. & A. 679, recognized by Lord Lyndhurst, C. B., in Inglis v. Spence, 1 C., M. & R. 436. See, also, James v. Biou, 2 Sim. & Stu. 606.

(6) R. v. Gardner, 2 Camp. 513.

(7) Lister, q. t. v. Priestley, Whitew. 67.

residence, the acts of the defendant as parson, and his receipt of the emoluments of the church, have been considered good evidence against him of his being parson, without formal proof of his title.(1) Upon an indictment for embezzlement against a letter carrier, proof that he acted as such is sufficient, without proof of his appointment.(2) Proof that A. B., as the proprietor of a newspaper, had given security for the payment of duties on advertisements, and had from time to time applied to the Stamp Office concerning duties on the paper, is evidence of his being the publisher.(3)

The fact that a party did a particular act in an official capacity may be proved, not only by showing that he exercised the office before or at the period in question, but also by evidence (limited to a reasonable time) that he exercised it afterwards.(4)

In an action for penalties under the Post-horse Act, brought by the plaintiff as farmer-general, proof of his appointment was dispensed with, the defendant having previously accounted with him as farmer-general.(5) In an action for subtraction of tithes, proof of the defendant's former acknowledgment of the plaintiff's title to the tithes was thought to be sufficient evidence of title, as against the defendant, a wrongdoer.(6) In an action by the clerk of the trustees of a turnpike road, brought against one of the trustees, the fact that the plaintiff had acted as clerk, and that the defendant had acknowledged him as such, is evidence of the plaintiff's appointment.(7) In an action by the assignee of a bankrupt, proof that the defendant had attended a meeting of the commissioners, and exhibited an account between him and the bankrupt, claiming certain deductions, and that he afterwards made a part payment to the plaintiff, was held to be *prima facie* evidence of the plaintiff's title to sue as an assignee.(8) In like manner, proof that the defendant had written letters to the solicitor under a commission of bankrupt, acknowledging the title of the plaintiffs as assignees, was held to be *prima facie* evidence of their title to sue as assignees, even though notice to dispute it had been given by the defendant.(9)

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(1) Bevan, q. t. v. Williams, 3 T. R. 635, n. *a*; where the evidence is spoken of by Lord Kenyon, C. J., as *decisive*. See by Chambre, J., in Smith v. Taylor, 1 N. R. 210. See, also, R. v. Kerne, 7 How. St. Tr. 714; R. v. Bromwich, Id. 722; R. v. Atkins, Id. 728, as to proof of officiating as a Popish priest under 27 Eliz. c. 2; repealed by 7 & 8 Vict. c. 102.

(2) R. v. Berrett, 6 C. & P. 124.

(3) R. v. Topham, 4 T. R. 126. See Cross v. Kaye, 6 T. R. 663, as to a party having acted as an attorney.

(4) Doe d. Hopley v. Young, 8 Q. B. 63.

(5) Radford, q. t. v. Mackintosh, 3 T. R. 632.

(6) Chapman v. Beard, 3 Anstr. 492. And see 1 N. R. 210; 3 T. R. 635; 4 T. R. 366.

(7) Pritchard v. Walker, 3 C. & P. 212.

(8) Dickinson v. Coward, 1 B. & A. 679.

(9) Inglis v. Spence, 1 C., M. & R. 432; Crofton v. Poole, 1 B. & Ad. 568. See R. v. Barnes, 1 Stark. R. 243; Clarke v. Clarke, 6 Esp. 61; Like v. Howe, 6 Esp. 20; Mercer v. Wise, 3 Esp. 219; Havelock v. Cook, 5 T. R. 655; Pope v. Monk, 2 C. & P. 112; Walker v. Burnell, Doug.

In an action against the defendant for slander in charging the plaintiff with being a swindler, and threatening that he would have him struck off the roll of attorneys, the court was of opinion that the defendant's threat amounted to a distinct acknowledgment that the plaintiff was an attorney and dispensed with further proof of that fact.(1)

Upon the principle of the above-mentioned cases, two of the judges of the Court of Common Pleas were of opinion that the plaintiff was entitled to recover in the case of Smith v. Taylor.(2) That was an action for defamation, in which the plaintiff averred, that he was a physician, and exercised the profession, and that the words were spoken concerning him as a physician. It appeared, that the words did not impute want of qualification by degree, but only want of skill in practice; and that the defendant called the plaintiff "*Dr. S.*," when he spoke the words: and, further, the defendant, as an apothecary, had followed the directions of the plaintiff as a physician, in the business out of which the cause of action arose. These circumstances were considered by two of the judges, against the opinion of the other two, as sufficient *prima facie* evidence of the plaintiff's qualification.(3)

On the other hand, if the words imply a charge that the plaintiff was not qualified to act in the particular character which he assumed, it has been held that the qualification ought to be proved, and that it will not be sufficient to show his acting in that capacity.(4)

In the preceding cases, the admissions were in the form of written or verbal statements made by parties to actions, or of acts done by them. In some cases, it is allowable to give evidence of written or verbal statements made, or of acts done, by others, and then to show how the party who heard or read the statements, or saw the acts done, was affected by them, for the purpose of using his conduct, expressions, or demeanor, as evi-

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303. See, also, Mott v. Mills, 3 C. & P. 197, on the effect of 6 Geo. IV, c. 16, as to bankrupt petitioning for his discharge.

(1) Berryman v. Wise, 4 T. R. 366, recogized in Pierce v. Whale, 5 B. & C. 39.

(2) 1 N. R. 196.

(3) By Lord Mansfield, C. J., and Heath, J.; but Rock, J., and Chambre, J., were of opinion that the words did not admit the qualification.

(4) See the judgment of Lord Mansfield, C. J., in 1 N. R. 204, 207; Pickford v. Gutch, 8 T. R. 395, n. *a.* Where the words imply mere negligence or ignorance, without admitting the plaintiff to be qualified, and the plaintiff avers that he is qualified, he will be bound to prove his qualification. 1 N. R. 204, 207. And see Collins v. Carnegie (1 A. & E. 703), where it is said that a person, complaining of slander upon him in a particular character, must prove that he possesses that character, when the slander does not admit it. See, also, Lipscombe v. Holmes (2 Camp. 441, *infra*), where, in an action for work and labor as a surgeon, although the plaintiff had represented himself as a physician, and it was contended that he could not, therefore, maintain an action for his fees, it was held, that the payment of money into court by the defendant was tantamount to an admission of the plaintiff's right to sue as a surgeon.

dence against him by way of admission. The evidence in such cases is altogether presumptive in its quality and character.(1)

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(1) NOTE 127.—The cases cited by our author to illustrate the doctrine of implied or virtual admissions, are, 1. That a bankrupt contesting part of the items of a long account before the commissioners, which contested items are ticked off and a balance struck, may be used as an admission against him of the balance (2 Maul. & Sel. 265); that if a candidate use hustings erected by the returning officer, a promise on the candidate's part will be inferred to contribute to the expense of erecting them (1 Campb. 218); that a landlord, by receiving rent, waives the forfeiture of his lease (3 Taunt. 77); that the defendant's catalogue of sales as "the property of D." (the plaintiff's assignor), "a bankrupt," admitted his bankruptcy (1 Esp. Rep. 340, 341, cited 16 East, 193), and that a landlord standing by without objection, and seeing his tenant make alterations beyond his right, is evidence that the landlord means to be bound by his tenant's acts. 1 Esp. Rep. 364.

The object of this note shall be to inquire what amounts to an admission. The doctrine under this head most familiar with the legal profession is, that "What is asserted in the presence of a party to a suit, and not contradicted by him, is received as evidence against him, on the ground that his silence is an implied admission of the truth of what was said." Per Buchanan, J., in Batturs v. Sellers, 5 Har. & John. 119. Thus, a cash account shown to the defendant, and not objected to by him, was held sufficient evidence of his admission to go to the jury. Coe v. Hutton, 1 Serg. & Rawle, 398. Again; on motion for a new trial, the court say, by Cheves, J.:—"In this case, it was averred by the plaintiff repeatedly, in the hearing of the defendant, and in conversations addressed particularly to him, that he had received money belonging to the intestate, to the amount of $2,000; and he did not contradict it. If there had been no other evidence in the cause, if the question had been fairly submitted to the jury (and on that head there is no complaint), I should have been at a loss to say on what ground the verdict should have been set aside. If it had been for $2,000, I cannot say it ought to have been set aside. I readily admit such testimony may be equivocal, and should sometimes be received on the trial with cautious and reluctant credence; but at other times it will be acknowledged to be perfectly satisfactory. The discrimination can seldom be made but at the trial." Hendrickson, Adm'r v. Miller, 1 Rep. Const. Court, 296. The defendants bid off a bale of broadcloth; and the auctioneers made out and delivered a bill of parcels to them. Held, that standing by in silence and seeing their names placed in the bill as purchasers, was an assent that the auctioneers had authority to place it there, which made out a good note in writing, within the Statute of Frauds. Batturs v. Sellers, 5 Har. & John. 117, 119. Again: that a purchaser paid £50 to the seller, saying, "this is the amount of *T. tract;* it is mine now," is evidence of payment in full; that not being contradicted. Vincent v. Huff's Lessee, 8 Serg. & Rawle, 381, 389. And so if spoken to another in so loud a voice as to make it quite certain that the receiver heard what was said. Id. So a man being called by and answering to a certain name, or pleading to an indictment by a certain name, is evidence against him that the name pronounced is his true name. State v. Rawles, 2 Nott & M'Cord, 381. The plaintiff was present on application by the defendant to a judge at chambers, to be discharged on common bail. A witness was sworn, who died; and what he said was proposed to be proved on the trial of the same cause, the plaintiff not denying at the hearing what the witness swore. The court received it as they would any other statement in the party's presence, not denied; saying the maxim, *qui tacet consentire videtur*, applied. Jackson v. Winchester, 2 Yeates, 529. *Quere.* See Rex v. Appleby; and Melen v. Andrews, *infra, contra;* and see, also, Hovey v. Hovey, and Martin v. Root, *infra.* A physician's bill for attending a sick seaman was presented to the master of the ship, who made no objection to it. This was held evidence against the master in an action to recover on the bill. M'Bride's Ex'x v. Watts, 1 M'Cord, 384. So where one asserted the terms of a contract between him and A., to the latter, who did not contradict them; held proof of the terms as asserted (Wells v. Drayton, 1 Rep. Const. Court, 111); and the jury departing from this proof in the absence of anything to contradict it, a new trial was granted. Id.

The following cases will show the qualifications under which conversations of this kind are to be received.

In ejectment, the plaintiff offered to show that the defendant was along as chain bearer for a jury of view between other parties, who held a coversation in his presence relative to the locality of the tract now claimed by him. Held inadmissible. The court say there is no evidence that he stood so near as of necessity to hear the conversation. He was employed in a business which required all his attention. The reason why this species of evidence is given, is because the party, by his silence, is supposed to acquiesce. *Qui tacet consentire videtur.* That presupposes a proposition made to him which he is bound either to deny or admit. Such evidence ought never to be received unless it be of direct declarations which naturally call for contradiction; some assertion made to a man with respect to his right, which by his silence he acquiesces in. Moore v. Smith, 14 Serg. & Rawle, 388, 393. So, on the question whether the defendant had notice of the plaintiff's claim to the land in dispute, the defendant proved that he denied notice to the plaintiff; who did not say he had any, but talked of quieting the dispute. The court said this should not be received as evidence that the defendant had not notice; as the plaintiff being desirous to quiet the dispute, would in all probability avoid contradiction and irritating language. Rochester v. Anderson, Litt. Sel. Cas. 143, 145. The prisoner did not contradict a statement made by the solicitor for the prosecution, before the examining magistrate, and it was sought to be given in evidence on that ground as an admission of the prisoner. But the witness called to prove the statement, saying he believed it was taken down in writing, it was not received. Rex v. Hollingshead, 4 Carr. & Payne, 242. On this case, the learned reporters suggest that the testimony would not be admissible in any form, merely because not contradicted by the prisoner, no inference arising from his silence under the circumstances; and they rely on Rex v. Appleby (3 Stark. N. P. Cases, 33), and Melen v. Andrews (1 Mood. & Malk. 336). The first was where A. & B. being charged with a joint felony before a magistrate, A., on his examination before the magistrate, confessed in B.'s presence and hearing that the felony was joint by them, which B. did not contradict; yet, held not admissible against B.; and, in the latter, a deposition taken before a magistrate on a charge against A., where A. cross-examined the witness, but did not contradict what he said, was denied in evidence against A. See also Hovey v. Hovey and Martin v. Root, *infra.* In trover for a negro boy, the plaintiff offered to show that the defendant being applied to, to exchange the boy, said that the boy belonged to the plaintiff, and advised him to apply to the plaintiff, which he did; and the plaintiff replied that he would not make the exchange, "*that it would not suit him to exchange the boy for a man.*" The court rejected this response as inadmissible; for it could not add to the admission of the defendant, and so was not material; and beside, it would be allowing the plaintiff to manufacture testimony for himself. Talbot v. Talbot's Rep's, 2 J. J. Marsh. 4, 5.

In an action for an assault, what was said by the magistrate to the plaintiff, at a previous investigation of the circumstances before him, is not admissible for the defendant, unless the plaintiff replied; and per Best, Ch. J., on the question as to what the magistrate said being proposed: "A man may say, 'This is impertinent in you. I will not answer your question.' You are driving at the opinion of the magistrate, whereas it is for the jury to form their opinion." Child v. Grace, 2 Carr. & Payne, 193.

If it be doubtful whether the party heard or understood the proposition to which his silent assent is claimed, the jury may determine this. Thus, where on a trial for an assault and battery on F., a female, it appeared that she had in the same room with the defendant, stated her case sufficiently loud for any one there to hear it, and appealed to a third person for its correctness, who said it was correct; and the defendant being considerably intoxicated, said nothing to the statement; held, it was right to receive this in evidence against the defendant, putting it to the jury whether he heard and assented to what F. stated. State v. Perkins, 3 Hawks, 377.

Another fruitful ground of implied admission is, the receiving an account current of dealings between the parties, and suffering it to lie without objection. The doctrine of this and the like cases may be gathered from the authorities which follow.

Per Ld. Hutchins: "Amongst merchants, it is looked upon as the allowance of an account current, if the merchant that receives it does not object against it in a second or third post." Sherman v. Sherman, 2 Vern. 276. Again: "There is no absolute necessity that an account should be signed by the parties who have mutual dealings, to make it a stated account. Even

where there are transactions, suppose between a merchant in England and a merchant beyond sea, and an account is transmitted here from a person who is abroad, it is not the signing which will make it a stated account; but the person to whom it is sent keeping it by him for any length of time, without making any objection, shall bind him, and prevent his entering into an open account afterwards." Per Ld. Hardwicke, in Willis v. Jernegan, 2 Atk. 252. Again: "If one merchant send an account current to another in a different country, on which a balance is made due to himself, the other keeps it by him about two years, without objection, the rule of this court and of merchants is, that it is considered as a stated account." Per Ld. Hardwicke, in Tickel v. Short, 2 Ves. sen. 239. "It has been often held that if a party receives a stated account from abroad, and keeps it by him for any length of time (one case says two years), without objection, he shall be bound by it." Per Kent, Ch., in Murray v. Toland, 3 John. Ch. Rep. 575. "When one merchant sends an account current to another residing in a different country, between whom there are mutual dealings, and he keeps it two years without making any objections, it shall be deemed a stated account; and his silence and acquiescence shall bind him, at least so far as to cast the *onus probandi* on him." Freeland v. Heron, 7 Cranch's Rep. 147, 151, *per Cur.* by Duvall, J. In an action in behalf of the consignor against the consignee, evidence was given that an invoice accompanied the goods and remained many years without any objection being made by the latter; and Washington, J., held this to be evidence that all the articles had been received by the consignee; there being no proof to the contrary. Field's Assignees v. Moulson, 2 Wash. C. C. Rep. 155. In assumpsit, the question was whether the defendants were dormant partners of B. & A. To prove this, the plaintiffs offered the accounts of B. & A., rendered by them to the defendants, of joint purchases of goods. These accounts having been retained by the defendants without objection, the court held them admissible. Corps v. Robinson et al., 2 Wash. C. C. Rep. 388.

But this doctrine seems not in practice to have been received with regard to statements in writing, other than accounts, nor in any other than mercantile dealings. Accordingly, in assumpsit for money had and received, the plaintiff called for a letter written by him to the defendant, and offered it in evidence. He said certain things were stated in it which the defendant might deny by answering it; and submitted that it was evidence, the same as what might be said in his presence and not contradicted. But, per Ld. Tenterden, C. J., "I am slow to admit that. What is said to a man before his face, he is in some degree called on to contradict, if he does not acquiesce in it; but the not answering a letter is quite different; and it is too much to say that a man by not answering a letter at all events, admits the truth of the statements that the letter contains. I am of opinion that this letter cannot be read. You may have that single line read in which the plaintiff makes a demand of a certain amount; but not any other part which states any supposed fact or facts." Fairlie v. Denton, 3 Carr. & Payne, 103; Anthoine v. Coit, 2 Hall's Rep. N. Y. S. C., 40; stated *ante*, note 117, S. P. Again; the plaintiffs gave in evidence against the defendant their written statement before the New York Chamber of Commerce, in order to show that the defendant's answer contained an implied admission of their charge. This was on a submission of their dispute to the chamber, whose practice was that the party's answer should not be required until after he had seen the claim of his adversary, but held inadmissible, because no direct proof was given that he had seen the charge. La Farge et al. v. Kneeland, 7 Cowen's Rep. 456, 459. Nor, *semble*, would it then be admissible except to explain the answer. Id.

It is scarcely necessary to observe, that where the party himself furnishes an account making against him, it is very satisfactory evidence as an admission. Such account is an express admission, if signed; and where it was not signed, yet being proved to be in the defendant's handwriting, it was allowed to go to the jury against him. Jessup v. Cook, 1 Coxe, 434. So any paper written by a party is evidence against him, though it be signed by a third person. Best, C. J., said he would receive it as what the party writing it had said. The effect was another thing. Alexander v. Brown, 1 Carr. & Payne, 288.

The admission of the party is often implied from the state of the pleadings in the cause, as we shall see more at large in the subsequent pages, and when we come to treat of the rule that the substance of the issue must be proved, which are the more proper places for considering the effect of the pleadings in working a confession or denial. In one case this was carried so far, that going to trial without a rejoinder was construed into an absolute admission of the facts set

out in the replication; and a verdict for the defendant was set aside on this ground, though the attention of neither judge nor jury was called to the omission upon the trial. Porter's Adm'rs v. Kenut, 1 M'Cord, 205.

But a demurrer or plea to a bill in equity does not so admit the facts charged in it, as to be evidence against the defendant in a future action, even between the same parties, for the party may still answer; and the plea merely declines to answer. Tompkins v. Ashby, 1 Mood. & Malk. 32, 33.

The admission of the party is often implied from his acts, or those of his attorney or counsel in the cause, before, or in preparing for the trial, or from his or their conduct and management upon the trial.

Thus, in an action for money paid in defending a suit at the defendant's request, averring a judgment recovered against the plaintiff of £42, a *ca. sa.*, imprisonment and payment thereon, the plaintiff failed to prove any of the facts beyond the recovery of the judgment. But the defendant having taken out a summons to be permitted to pay the above sum in discharge of the suit, this was held an admission which dispensed with further proof. Williamson v. Henley, 6 Bing. 229. The defendant offered the plaintiffs, claiming as assignees of a bankrupt, a debt against the defendant, to admit on the trial every fact except the merits, saying all he wished to try was whether he was liable on his undertaking, to which the plaintiffs acceded, and according to a farther stipulation between the parties, forbore as a consideration to hold the defendant to bail. Held, that he could not, on trial, dispute the formal facts necessary to show the plaintiffs to be regular assignees. Davies v. Burton, 4 Carr. & Payne, 166.

An admission by the defendant's attorney, that the person of whom the plaintiffs claimed to be assignees, had been duly declared bankrupt, precludes any call for the proceedings under the commission, with a view to show that such person had not committed an act of bankruptcy. Perring v. Tucker, 3 Moore & Payne, 557. A bill of particulars, delivered under a judge's order, is an admission, and the defendant was allowed to use it as such, and adopt a credit therein as proof of part payment. Rymer v. Cook, 1 Mood. & Malk. 86, 87, note. But see Brittingham v. Stevens, 1 Hall's Rep. N. Y. S. C. 379, *contra.* In an action against the acceptor of a bill of exchange, where the defendant's attorney had given notice to the plaintiff to produce all papers relating to the bill in question (describing it), "which said bill was accepted by the said defendant," held that such notice was *prima facie* evidence of the defendant's acceptance. Holt v. Squire, Ry. & Mood. N. P. Rep. 282.

But one party cannot use, as evidence, his own deposition in another action, though it was taken at the request of the other party in this action; for it cannot be inferred from his procuring the deposition, that he admits the statement it contained, though it was intended to be used, and was filed by the other party in the former suit. Hovey v. Hovey, 9 Mass. Rep. 216. Nor would it be evidence as an admission against him, though he had used it in the other suit. Martin v. Root, 17 Mass. Rep. 222, 224, 227. See also Rex v. Appleby and Melen v. Andrews, *supra*, and *post*, of text.

On a former trial of this cause, the defendant gave in evidence a letter from the agent of the lessor of the plaintiff which contained facts, the legal effect of which were against the defendant. On a new trial, the plaintiff offered this letter as evidence, but the defendant objected. The court held, that an offer of the letter on a former trial was an admission of the facts contained in it, and received it on this ground. M'Clay's Lessee v. Work, 10 Serg. & Rawle, 194. So, where a book of field notes had at three several trials of the same cause in the same court, been given in evidence by the plaintiff as the book of G., without objection by the defendant that it was not G.'s book; but other grounds were taken against its admission. On its being offered by the plaintiff upon a fourth trial, the defendant objected that it should first be proved to be G.'s book. Held unnecessary, as the case came within the rule of practice, that what is not denied is admitted, and to specify some objections to evidence, waives all other objections not mentioned. Unger v. Wiggins, 1 Rawle, 231, 235. So, where the plaintiff claimed under and gave proof of title in C., the defendant insisted that the proof was not sufficient for that purpose; but then himself gave in evidence an act of attainder against C., by which he contended C. was divested of his title. Held, this was an admission that C. had a valid title, and the force of the attainder being afterwards done away, the plaintiff's title was complete. Jackson ex dem. Swartwout v. Cole, 4 Cow. 587. Again; in ejectment, the defendant at the trial claimed title by a

mortgage of the *locus in quo*, executed by one G., under whom the plaintiff also claimed. Held, that by the claim under the mortgage, the defendant admitted title at the date of the mortgage. Jackson ex dem. Hills v. Tuttle, 9 Cowen's Rep. 233. So, in ejectment, the plaintiff, in deducing his own title, produced a deed reciting a judgment, in virtue of which the defendant had a good defence, and it was held an admission of that judgment, so that the defendant need not produce the record. Garner's Lessee v. Johnston, Peck, 24, 26.

But calling on the trial for the defendant's account, for the purpose of proving it incorrect, and reading it to the jury with that view, is no admission of its correctness. Gracy v. Bailee, 16 Serg. & Rawle, 126.

After the trial, the case prepared as the ground of motion for a new trial, or the bill of exceptions for a writ of error, are not evidence, it would seem, even on an after trial of the same cause in which they are prepared, much less of another cause (Elting v. Scott, 2 John. Rep. 157, 162; Harrison's Devisees v. Baker, 5 Litt. 250, 252, 254; Bailor v. Smithers, 1 Monroe, 6, 7); though held, the latter may be used to discredit a witness on a second trial of the same cause. Bailor v. Smithers, 1 Monroe, 6, 7.

It remains to state some other acts and declarations which have been considered as confessions, or equivalent to confessions, and some to which this character has been denied.

In a cause by Smith, plaintiff, against Middleton and others, Middleton caused a plot or survey of the land in question to be made and returned favorable to the land claim of one Reeves. The latter brought an action of trespass *quare clausum fregit* against Middleton, and was allowed to give the plot in evidence as an admission of Middleton. Reeves v. Middleton, 2 Har. & M'Hen. 414. So, in an action against a sheriff for taking insufficient sureties in a replevin bond, held, that his having assigned it to the plaintiff, dispensed with proof of its execution. Edwards v. Etherington, Ry. & Mood. N. P. Rep. 268. A petition of the corporate stockholders for a statute appointing commissioners, is evidence of their assent to the statute. Com. of the Farm. & Mech. Bank of Shelbyville v. Jarvis, 1 Monroe, 4. And, *semble*, the bond of a guardian given to his ward, on his coming of age, is evidence as a confession of what is due on the former bond given by the guardian, with sureties. Hamlin's Adm'r v. Atkinson, 6 Rand. 574. Answers to lost interrogatories, in a bill or otherwise, may be read against the party as admissions, *i. e.*, as something said or written by him, though by the loss, some part of the answer may be unintelligible. Rowe v. Brenton, 3 Mann. & Ryl. 271. A man living on tract A. takes a deed of another tract, described as bounding on A.; this is evidence against him, in the nature of a confession, that tract A. did not cover any part of the last tract. Hathaway v. Spooner, 9 Pick. 23. Assumpsit for money lent, &c., was brought more than six years after the loan, but the defendant had given his note for the money to the plaintiffs, and within six years indorsed upon this note a promise to pay it. The note was void, as having arisen out of an illegal discount, but the loan was valid; and this indorsement on the note was holden a sufficient acknowledgment of the loan to take the case out of the Statute of Limitations. Utica Ins. Co. v. Kip, 3 Wend. Rep. 369, 373. In an action against a man as toll gatherer of a turnpike road, for improperly demanding toll, his shutting the gate and making the demand, is an admission of his office, and sufficient proof of it. Trowbridge v. Baker, 1 Cowen's Rep. 251. A man's confession that he is a British subject, is evidence against him to go to a jury that he is a British *born* subject. Rex v. Helsham, 4 Carr. & Payne, 438. In an action for striking the defendant's carriage against the plaintiff's cart, it was held that what any one (the ladies for instance) in the defendant's carriage answered, on inquiry as to the address of the owner, was admissible against him, but not a statement by them that any damage done would be paid for. Beamon v. Ellice, 4 Carr. & Payne, 585.

But a naked declaration that one intends to do an act, without any other proof of his having acted, is not admissible to show the act done. Bullock v. Beach, 3 Verm. Rep. 73. Nor is a party's admission that *he is now in possession of certain premises*, evidence of his possession at any antecedent day. Tindal v. Whitrow, 1 Carr. & Payne, 22. An agreement by the defendant to compromise a suit, by paying £100 and two-thirds of the plaintiff's costs; and paying the £100, but omitting to pay the costs, held not to amount to an admission of the original cause of action. Lofts v. Hudson, 2 Mann. & Ryl. 481. And what is set up as a mere excuse in a prisoner's examination, can never avail to support a substantive averment in the indictment. Heath's Cases, 2 C. H. Rec. 54, before Radcliff, Mayor. An admission that the defendant was

Effect of such evidence.

It very commonly happens, that evidence of the description referred to has the effect of misleading juries, who are frequently influenced by it, in consequence of giving credit to it as hearsay testimony, and are unable, notwithstanding any directions from a judge, to regard it solely as exhibit-

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the editor of a paper on the day when a certain libel was published, was held not to be evidence of the same fact, continuing even to a few days after. Macleod v. Wakely, 3 Carr. & Payne, 311. But, *quere*. This case is not in accordance with the rule, that the proof of a fact or relation, which is in its nature of a continuing or enduring character, shall be *prima facie* evidence of the existence of the same fact at a future day, and until a change shall be shown by the other side. This rule will be considered and illustrated when we come to the doctrines of presumptive and circumstantial evidence. But to continue. If a prisoner, in speaking of the testimony of a witness who had testified against him on a former trial, say, "what C. (the witness) swore was true, but he did not say all or enough," this is not admissible as a confession of the prisoner, nor does it lay any foundation for proving what C. did swear to. Finn v. The Commonwealth, 5 Rand. 701. On an issue of *devisavit vel non*, the defendants offered proof that one of the devisees had, by various discourse, *intimated* that he had procured the will to be made, and that it was read to him, and that he had given a reason why his brothers and sisters got so small a portion. Held, too loose an offer in not showing what was said. Testimony could not be given in the form offered. It would not amount to an admission of anything material or relevant. Miller v. Miller, 3 Serg. & Rawle, 267. A devise that all the testator's just debts shall be paid, will not take a particular debt out of the Statute of Limitations. Peck v. Bottsford, 7 Conn. Rep. 172. The wife's petition to the Court of Probates, with the authorization of her husband, to be received as beneficiary heir to her son, may be received to do away the effect of her plea of coverture to an action against her as such heir for a debt of her son, by proving her acceptance of the heirship with her husband's consent. Flower v. O'Conner, 8 Lou. Rep. (N. S.) 555.

The confession of a party as to the legal effect of his contract, *e. g.* that his agency under a certain arrangement contined to such a time, cannot affect him; and *a fortiori*, it cannot affect others bound for him in respect of the agency. Boston Hat Manufactory v. Messinger, 2 Pick. 223. So as to his legal rights in any respect. Polk's Lessee v. Robertson, 1 Tenn. Rep. 463; Craig v. Baker, Hardin, 231; Leforce v. Robinson, Litt. Sel. Cas. 22, 23; Moore v. Hitchcock, 4 Wend. 292.

Whether a man's deed delivered and remaining as an escrow, can be used against him as a confession of the facts recited in it? *Quere*. Lansing v. Gaine et al., 2 John. Rep. 300.

Where a cause was sought to be supported by conversations and admissions, so vague and unsatisfactory that a jury would have been authorized to found a verdict upon them, held, that the court were right in nonsuiting the plaintiff. Ward v. Vanduzer, 2 Hall's Rep. N. Y. S. C. 162.

But where the declaration is equivocal in its object, the jury may sometimes determine to what it refers. Thus, where a promissory note was signed by the defendant and one A., and A. gave, in renewal of it, a note in which the name of the defendant was forged, and a suit was brought upon the forged note, and the plaintiff gave in evidence declarations and admissions of the defendant, tending to show an adoption of this note, and to take it out of the Statute of Limitations, in one of which declarations he spoke of the suit having been commenced; held, that the service of the writ did not raise a presumption that the declaration related to the new note rather than the old one, without evidence that the defendant had knowledge of the new one or of the contents of the writ, and that the burden was on the plaintiff to prove such knowledge; and that it was proper for the jury to determine, upon the whole evidence, to which of the notes the declarations and admissions related. Phillips v. Ford, 9 Pick. 39. So whether a confession imports a joint or several debt. Accordingly, in an action for money as paid for another by one alone, letters from that other are admissible in evidence for the single claimant, although they indicate that the money was paid by him and another jointly; and it is for the jury to say whether they do not show a debt due to the claimant alone. Ash v. Patton, 3 Serg. & Rawle, 300.

ing demeanor and conduct. In many instances, especially where no observation has been made by the party on hearing it, the evidence is particularly liable to produce erroneous conclusions. An acquiescence in the truth of the statement is frequently inferred, though the inference may, from a variety of causes, be incorrect. Thus the evidence is not only fallacious with reference to its object, but in its collateral effect is prejudicial to the investigation of truth. The acquiescence of a party is still less entitled to consideration, where he has no means of personally knowing the truth or falsehood of a statement.(1)

This species of evidence is very commonly used in criminal cases, although it appears to be somewhat inconsistent to hold, that the prisoner's silence on hearing an accusation is evidence against him, when his denial of the charge upon such an occasion would not be evidence for him. On the principle that the evidence is received, not on the ground of credit given to the hearsay narrative, but on the ground of its apparent effect in the prisoner's demeanor, it has been held, that what is said in the presence of a prisoner by a third party, or even by his wife, is receivable in evidence against him.(2)

A notice to quit at a certain time is admissible as evidence that the tenancy commenced at that period, if the notice was served personally on the tenant, and if he made no objection to the time of quitting mentioned in the notice.(3) The circumstance of his not making such an objection has been considered as *prima facie* evidence of admission and acquiescence.

But if the notice were not served personally, or the tenant did not look at the notice, or could not read, there is no presumption of acquiescence.(4) Upon the same principle, upon an indictment for murder against A., for acting as second in a duel, wherein B. was killed, where a card had been given to a witness, either by the deceased or by another person, in the presence of the prisoner, but its contents were not shown to have been communicated to him, it was ruled that the card was not admissible in evidence.(5)

The demeanor and conduct of a bankrupt, pending the investigation of his accounts before commissioners of bankrupt, may amount to an admission of a petitioning creditor's debt, though what was done before the commissioners did not derive any authority from its being done before them as commissioners or as arbitrators.(6) It has been held that a trader,

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(1) See by Parke, J., in Hayslep v. Gymer, 1 A & E. 165, and by Patteson, J., Id.

(2) R. v. Smithies, 5 C. & P. 332; R. v. Bartlett, 7 C. & P. 832. See R. v. Swatkins, 4 C. & P. 548; 1 East's P. C. 357; B. N. P. 28.

(3) Doe d. Leicester v. Biggs, 2 Taunt. 109; Doe d. Baker v. Woombwell, 2 Camp. 559.

(4) Doe d. Ash v. Calvert, 2 Camp. 388, explained Id. 648; Thomas d. Jones v. Thomas, 2 Camp. 647; Doe d. Clarges v. Forster, 13 East, 405; Doe d. Leicester v. Biggs, 2 Taunt. 109.

(5) R. v. Douglas, C. & Marsh. 193.

(6) Jarrett v. Leonard, 2 M. & S. 269.

hearing himself denied and not coming forward, thereby commits an act of bankruptcy, if it be done with an intention to delay creditors; but not if done with a legitimate excuse, as that he was otherwise occupied in important business.(1)

A party's forbearing from acts of ownership, and neglecting to interpose whilst another person exercises such acts, or incurs expense in buildings or alterations which are inconsistent with a title afterwards claimed, is evidence for the jury in the nature of an admission of his own want of title.(2) But the merely lying by and witnessing, for a length of time, a breach of covenant, of which the landlord might avail himself as a forfeiture of the lease, does not of itself amount to a waiver of the forfeiture; some positive act of waiver, such as the receipt of rent, is necessary for that purpose.(3)

Although the silence of a party to whom, or in whose presence a statement affecting his interests is made by the other party, may not be worth much as evidence of acquiescence in the truth of such statement, still the evidence should not be excluded. Thus, in an action brought to recover bank notes delivered to the defendant by the plaintiff, the plaintiff proved that the defendant, who was the executor of a deceased person, having questioned the plaintiff as to her having possession of some property belonging to the deceased, the plaintiff handed over the notes to the defendant, stating that the deceased had given them to her; the defendant did not deny the statement, but had no means of knowing its truth or falsehood; it was held, that although such evidence of acquiescence in the truth of the statement was an admission entitled to very little weight, yet that it was properly submitted to a jury.(4)

In Fairlie v. Denton,(5) it was ruled by Lord Tenterden, C. J., that if the plaintiff write a letter to the defendant, which the defendant does not answer, the plaintiff has no right to have the contents read at the trial, as an admission from acquiescence. His Lordship observed, that what is said to a man before his face he is in some degree called on to contradict, if he does not acquiesce in it; but the not answering a letter is quite dif-

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(1) Smith v. Moon, M. & M. 460; Key v. Shaw, 8 Bing. 320.

(2) Doe d. Winckley v. Pye, 1 Esp. 364, 366; Neale v. Parkin, 1 Esp. 229; Stanley v. White, 14 East, 332. Concerning acts amounting to a recognition of lawful occupancy, such as will be a defence upon an ejectment, see Doe d. Rogers v. Cadwaller, 2 B. & Ad. 473, in which Doe d. Whitaker v. Hales, 7 Bing. 322, is doubted. As to cases between landlord and tenant, where subsequent acts amount to a waiver of a notice to quit, see Souch d. Ward v. Willingale, 1 H. Bl. 311; Jenner v. Clegg, 1 Moo. & R. 213; Goodright d. Charter v. Cordwent, 5 T. R. 219; Doe d. Brinley v. Palmer, 16 East, 53.

(3) Doe d. Sheppard v. Allen, 3 Taunt. 78. See also Roe v. Minshall, B. N. P. 96 (c); Doe d. Flower v. Peck, 1 B. & Ad. 428; Arnsby v. Woodward, 6 B. & C. 519; Goodright d. Walter v. Davids, Cowp. 803; Doe d. Cheney v. Batten, Cowp. 243; S. C., 9 East, 314, n.; Roe d. Gregson v. Harrison, 2 T. R. 425; Doe d. Nash v. Birch, 1 M. & W. 402.

(4) Hayslep v. Gymer, 1 A. & E. 162.

(5) 3 C. & P. 103. See also Draper v. Crofts, 15 M. & W. 166, 168.

ferent; and it is too much to say that a man, by omitting to answer a letter, admits the truth of the statements which the letter contains. It was held in the same case, that a line of the letter might be read which contained a demand of a certain amount, but not any other part which stated supposed facts. And, in a later case,(1) it was remarked by Lord Denman, C. J.: "It is a great deal too broad a proposition to say that every paper which a man may hold, purporting to charge [him] with a debt or liability, is evidence against him, if he produces it."

But if an account has been sent to a party, and kept by him for a length of time without making any objection, it will, in ordinary matters of business among merchants, raise an inference that the correctness of the account is admitted by the party receiving it.(2) And where an account was shown to a party, who raised an objection to one item of it, but made no remark with respect to the rest, it was held to be evidence of an account stated, as to those items to which no objection was made.(3)

There appears to be a distinction, also, as to statements made by persons interested in the subject matter, and those made by a mere stranger. It was stated by Best, C. J.,(4) that what is said by a party to a suit to the opposite party may be evidence, but not what is said by a third person, unless it draws forth an answer; and he said that the same distinction had been made by Gibbs, C. J. The party before whom such a statement was made might consider that it was impertinent, and that he was not called upon to answer it.

Where reply not expected.

This distinction will apply *a fortiori* where a statement is made before a party, upon an occasion where a reply from him could not properly be expected.

When the conduct or demeanor of a person is pressed against him as evidence of his admission or acquiescence, the situation in which he stood, and all the circumstances, must be taken into account. When a person is charged with a crime, and hears a deposition made against him, his silence is not evidence against him. In investigations of this nature, the person charged has not the same facility of interposing as he would have in a common conversation, and therefore the same inferences cannot be drawn from his silence or his conduct.(5)

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(1) Doe d. Frankis v. Frankis, 11 A. & E. 795.

(2) Willis v. Jernegan, 2 Atk. 252; Tickel v. Short, 2 Ves. sen. 239. See also Sherman v. Sherman, 2 Vern. 276.

(3) Chisman v. Count, 2 M. & G. 307.

(4) In Child v. Grace, 2 C. & P. 193.

(5) Melen v. Andrews, M. & M. 337; R. v. Appleby, 3 Stark. R. 33; Short v. Story, cit. Rosc. Ev. 38; R. v. Turner, 1 Moo. C. C. 347.

Hersey v. Barton, 23 Vt. 685; Lawson v. The State, 20 Ala. (N. S.) 65. If a direct statement of fact is made in his presence by a third person, relating to the matter in controversy, and he

So in an action of assault, what was said by a magistrate to the plaintiff, at a previous investigation of the circumstances before him, cannot be received at the trial on the part of the defendant, unless it drew any observations in reply from the plaintiff.(1)

But in an action for a libel contained in a handbill, offering a reward for the recovery of certain property, and stating that the plaintiff was suspected of having stolen it, evidence is admissible on behalf of the defendant, who had published the handbill, that he had followed it up by preferring a charge of the same nature against the plaintiff before a magistrate, and the statements made by the defendant on that occasion, in the presence of the plaintiff, are also admissible.(2) "The question," observed Tindal, C. J., "will be, what was the *animus* of the publication? and this evidence is tendered on the ground that it will show that the defendant, in publishing this placard, acted *bona fide*, for that he did afterwards prefer a charge of the nature contained in it. Whether the charge preferred will support this inference must depend on the particular nature of it; we must, therefore, hear its particulars to know how far it corresponds with the imputation in the handbill. It is for this purpose, and for this purpose only, that I receive it—not as evidence of the facts contained in the charge, for which purpose it was tendered in Melen v. Andrews."(3)

It will have been observed, that the exclusion of statements made in the presence of a party, in the cases just referred to, depends upon the fact that the party could not reasonably be expected to reply to them; and that the rule of exclusion is expressed with the limitation that the party does not, in fact, reply to them; if he does so, and his reply directly or indirectly admits the truth of the statements, they become, in connection with his reply, evidence against him.(4)

Entries in books accessible to party.

In some cases the possession of documents,(5) or the circumstance that a party has access to them, has been considered as a ground for affecting him with the admission of the facts stated in them. Thus, in an action by a tavern keeper, it appeared that the defendant belonged to a club, which was held at the plaintiff's house, and that, in a room where the club met, a book used regularly to be kept open, in which the plaintiff's servants entered the articles, as they were ordered by the members of the club,

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remains silent, it may be given in evidence against him. Boston & Worcester Railroad v. Dana, 1 Gray (Mass.) 83.

(1) Child v. Grace, 2 C. & P. 193.

(2) Finden v. Westlake, M. & M. 461.

(3) *Ut supra.*

(4) Child v. Grace, 2 C. & P. 193; R. v. Edmunds, 6 C. & P. 164; Jones v. Morrell, 1 C. & Kir. 266.

(5) See Hewitt v. Piggot, 5 C. & P. 77; Roe d. Brune v. Rawlins, 7 East, 290.

who had hereby an opportunity of inspecting and correcting the account. Lord Kenyon, C. J., admitted the book as evidence of the delivery of the articles, though it was not proved that the servants who made the entry were dead, nor was their absence accounted for, and only their handwriting was proved. The daily account in the book was in this case considered as tantamount to a bill delivered and admitted by the defendant.(1) So, after a person was proved to be a member of a society, the entries in a book containing a record of the proceedings of the society (the book being produced at the meetings, and open to the inspection of all the members) were held to be admissible against him.(2) Apparently, upon the same principle it has been held, that an entry in the books of the South Sea Company, of the minutes of a license granted by them, was admissible in evidence, without calling as a witness the officer who made the entry.(3)

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(1) Wiltzie v. Adamson, K. B. Sitt. after Mich. Term, 1789. And see Alderson v. Clay, 1 Stark. R. 405.

(2) Raggett v. Musgrove, 2 C. & P. 556.

(3) Hodgson v. Fullarton, 4 Taunt. 787.

NOTE 128.—Union Bank of Maryland v. Ridgely, 1 Harr. & Gill, 324, 430, 431. In an action for money had and received, by a bank against a depositor who had overdrawn, the books of the bank are competent evidence to show receipts and payments of money; and if the clerk who made the entries be dead, or insane, the book in which the entries are made is admissible, on proving his handwriting. The blank books are the more proper as evidence, because the bank furnishes copies to its depositors; and the officers are agents for both parties, and bound to submit the books to the depositor for inspection at all proper times. Union Bank v. Knapp, 3 Pick. 96, 108; Jermain v. Denniston, 2 Seld. 276. The officers are clearly agents of the bank, and their entries of deposits in a dealer's bank-book, made at the time of the deposits, are very strong evidence, if not conclusive, on the bank. But if the book be sent to be written up afterwards, the entry is not so strong as evidence; and may be more freely examined. In the former case, it is said to be an original entry, and conclusive on the bank. Per Spencer, J., in Manhattan Co. v. Lydig, 4 John. Rep. 389. But the officer, though the agent of the bank, is not the agent of the depositor for this purpose, who may, therefore, show a mistake, though the bank have a by-law requiring that the payment should be examined at the time. This cannot bind strangers. Mechanics and Farmers' Bank in the City of Albany v. Smith, 19 John. Rep. 115; White v. Ambler, 4 Selden, 170. And these cases are not incompatible with the Union Bank v. Knapp. The officers may well be considered the depositor's agents for the purpose of submitting their books to his inspection, but not such in the act of entering the deposit in his book. Because a man is agent for one purpose, it does not follow that he is so for another. Nor is an entry, though made by the party himself, in general conclusive upon him. Thus, though he charge articles on his books as sold to only one of two partners, he may yet show that they came to the use of the two as a firm, and recover of both. Richardson v. Humphreys, 1 Ala. Rep. 383. Again; on a question whether the undertaking of a third person to pay was original, or collateral, and therefore within the Statute of Frauds, it appeared that the plaintiff charged the goods in account to B., adding "guarantee of E." (the defendant), who had promised to be responsible for goods to be furnished to B. by the plaintiff. The court held this not conclusive that credit was given to B.; but that it should go to the jury in connection with other circumstances. Elder v. Warfield, 7 Harris & Johnson Rep. 391 And so, it is presumed, in general of a credit given on book even at the time of the payment. In the Manhattan Co. v. Lydig (*supra*), Spencer, C. J., agrees that this is generally so, though he puts a simultaneous entry of a deposit in a customer's

Though the rolls of a manor are accessible to all the copyholders, yet, in questions between them and the lord of the manor, it would seem that entries on the rolls of the manor are not generally evidence against them by way of admission.(1) But in questions as to manorial customs between copyholders, or between copyholders and strangers, it seems that entries on the rolls of the manor, besides being evidence of reputation, independently of any weight they may derive from being admissions, are also, upon this ground, entitled to some additional force.(2)

Writings in possession of prisoner.

The possession of letters and written papers by prisoners may affect them with the imputation of approving or acting in the matters contained

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bank-book, as an exception. The history and use of this bank-book is given in the case. The entries seem to be equivalent to a written receipt of the sum and a promise to pay, upon the faith of which the customer draws his checks, &c., or bills of exchange. The dictum is, however, in any view, a very strong one, when we reflect that even a promissory note may be impeached for mistake between the original parties, and destroyed or reduced, as the failure of consideration shall appear to be total or partial. The case does not appear to stand exactly on any of the grounds upon which erroneous admissions have been holden to conclude, though placed among that class of admissions, *post*, upon the strength of a dictum emanating from such a distinguished judge. See also, M'Dowall v. Lemaitre (2 M'Cord, 320), as to the force of a party's entry, when it conflicts with his receipt in full.

Again; "although the book of an individual is not evidence in his favor against others, yet, from the very nature of the case, the books of a partnership must be evidence between the partners themselves. Their situation is one of confidence. They agree to unite, and as to others to become one person; and the books of the firm are to speak their language and to record their joint transactions; and there is an understanding that these books are to be appealed to, to tell their true situation. To admit them as evidence, then, is only effectuating their agreement, and using their own criterion and test, to ascertain the truth. Such books, therefore, kept subject to the inspection of each, must be admitted as correct till the contrary is shown." Per Judge Mills, delivering the opinion of the court in Simms v. Kirtley, 1 Monroe, 80. These principles have often been acted upon, both in chancery, on taking an account between partners before referees or masters, where it is holden that the mere entries are *prima facie* evidence without vouchers or other proof (Fletcher v. Pollard, 2 Hen. & Munf. 544, 549, 550; Jordan v. White, 4 Mart. Lou. Rep. (N. S.) 335, 339; Heartt v. Corning, 3 Paige, 566); and before auditors in an action of account. Brickhouse v. Hunter, 4 Hen. & Munf. 363. And in trover for a boat purchased by the plaintiff of a retiring partner, in 1827, against the defendant, the acting partner of the firm, his own entry in the common book, dated in 1826, during the continuance of the partnership, charging himself with the boat, was allowed as evidence in his favor to prove a sale. Reno v. Crane, 2 Blackf. Rep. 217. The ordinary presumption is, that all the partners have access to these books, and know the entries which they contain. But this is a presumption from the ordinary course of business, and may be rebutted by circumstances leading to the contrary presumption, such as a distance of residence, or a peculiar course of business precluding access. United States Bank v. Binney, 5 Mason, 176, 188.

In one case, the plaintiff having proved that R. & S. were partners, which was the only question, by an out-door clerk of S., who had not made any entries in his book, the defendant was allowed to prove the books of S., in order to contradict and impeach the credit of the witness. Moyes v. Brumaux, 3 Yeates, 30.

(1) Ely (Dean and Chapter) v. Caldecott, 7 Bing. 433.

(2) See *infra*, as to the admissions of persons *in pari jure*. See also Gilb. Ev. 235; 1 T. R. 466; 3 Id. 162; 4 Id. 670; 5 Id. 26; 13 East, 10; 2 M. & S. 92; 3 Wils. 63; 10 M. & W. 218.

in them. But for this purpose it is necessary that the jury should be satisfied that the letters or other writings were in the possession of the prisoners previous to their apprehension.(1)

Admissions in civil cases.

In an action by a bankrupt against his assignees, depositions of persons enrolled by the assignees are not evidence against them as admissions by reason of the enrollment.(2) A feoffment having an indorsement of livery of seizin, is not evidence of the fact against the person producing the deed from his custody.(3)

Although partnership books are evidence against partners as their acts and declarations (the books having been under their superintendence,) yet the books of a corporate company are not admissible against a member of the company, as evidence of his contracting with the company; in that respect, he is to be regarded as a stranger.(4)

It may be laid down in general terms, that if a party for any purpose produces a document containing certain statements, such statements are, as against him, evidence of the facts which they contain.(5) Thus, if a party, on a motion before a judge, use the affidavit of another person, such affidavit is, on any subsequent occasion, admissible as evidence against him who so used it; even upon a trial when the person who swore the affidavit is present in court, and is not called.(6) The affidavit of an agent, used by the defendant for the purpose of putting off a trial, may be used against the defendant.(7) The making use of an affidavit is an admission, which supersedes the necessity of proving that it has been sworn or signed.(8)

A deposition, as to an act of bankruptcy, made by a person employed by the defendant's solicitor, and upon which the fiat issued, is admissible against the defendant (the petitioning creditor) in an action by the assignees of the bankrupt.(9) The deposition is evidence, as much as if it had been

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(1) See R. v. Tooke, 25 How. St. Tr. 120, 121, 123; R. v. Watson, 2 Stark. R. 140; S. C., 32 How. St. Tr. 349, 351; R. v. Barratt, 9 C. & P. 387.

(2) Chambers v. Bernasconi, 1 C., M. & R. 347.

(3) Doe d. Wilkins v. Cleveland (Lord), 9 B. & C. 870.

(4) Hill v. Manchester Waterworks Co., 2 B. & Ad. 545.

See Kearns & al. v. Kearns' Ex'r, 4 Harring. (Del.), 82. The books of a bank are not of themselves evidence against its customer White v. Ambler, 4 Seld. 170; Bank of Monroe v. Culver, 2 Hill, 535; Brewster v. Doane, Id. 557.

(5) By Patteson, J., in Brickell v. Hulse, 7 A. & E. 457.

(6) Brickell v. Hulse, 7 A. & E. 454. See also Sacheverell v. Sacheverell, Bac. Ab. tit. Evidence, 628; Vicary's Case, Id. 623; B. N. P. 238.

(7) Johnson v. Ward, 6 Esp. 47.

(8) Cameron v. Lightfoot, 2 W. Bl. 1190.

(9) Gardner v. Moult, 10 A. & E. 464.

made by the defendants themselves; they sent the person for the purpose of making it, and they adopted it.(1)

It must appear, however, that the party who uses an affidavit or deposition was, or might have been, aware of its contents at the time: otherwise they will not be evidence against him. Thus, depositions used by a party in an equitysuit, can not afterwards be produced against him on a trial, if the person making them might be called;(2) for a party who uses such depositions does not know beforehand what they are.(3) In like manner, the evidence of a party called at Nisi Prius does not bind the party calling him.(4)

It has been held, in an action of trespass, that the defendant may use as evidence the deposition of a witness, formerly called by the plaintiff, to prove his possession, in a proceeding before justices for an alleged trespass on the same close, even though the witness is still alive.(5) In this case, however, the witness was abroad, and his previous testimony would seem to be admissible upon a principle to be discussed hereafter, which regulates the reception of evidence given in a previous investigation of the same subject matter between the same parties.(6)

The inscription on a stage coach, of the name of the party licensed to use it, is evidence of ownership against the person so named, who uses the coach, as well in an action as on summary proceedings.(7) And, generally, whatever is written by a party may be used as an admission against him, though it be not signed by him.(8)

It has been held that, where a defendant signed an admission of a debt, to enable an attorney to prove it under a commission of bankruptcy then subsisting against him, it was not an admission of the delivery of a signed bill by the attorney, and did not dispense with the necessity of proof of the delivery of such a bill, in an action subsequently brought for the same claim,(9) because the bill might have been proved under the commission without being delivered.

The method in which parties have treated a subject frequently affords evidence, in the nature of an admission, when such treatment is inconsistent

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(1) By Littledale, J., Id., p. 468.

(2) Rushworth v. Pembroke (Countess), Hardr. 472.

(3) By Lord Denman, C. J., in Brickell v. Hulse, 7 A. & E. 457. See also R. v. Latchford, 6 Q. B. 567.

(4) By Lord Denman, C. J., and Coleridge, J., in Brickell v. Hulse, 7 A. & E. 457, 458; by Lord Denman, C. J., in Gardner v. Moult, 10 A. & E. 468. (Thompson v. Blanchard, 4 Comst. 303.)

(5) Cole v. Hadley, 11 A. & E. 807.

(6) *Post*, Vol. II, Chap. *Of the Admissibility of Depositions.*

(7) Barford v. Nelson, 1 B. & Ad. 571.

(8) Alexander v. Brown, 1 C. & P. 288. See Harding v. Crethorn, 1 Esp. 57, as to the effect of a signature as evidence of notice of the contents of a written instrument.

(9) Eicke v. Nokes, M. & M. 303.

with the claims asserted by them, although it be not (as in the cases before noticed) to be taken as an acquiescence in the acts of another person. Thus, in an action of debt, evidence that the plaintiff has taken the benefit of the Insolvent Act, and has not inserted the debt in question in his schedule, is an admission of its not being due.(1) Where a tradesman makes out an account for goods sold, in the name of a particular person, it must be taken that they were furnished upon the credit of such person, unless it be shown, by unequivocal evidence, that the credit was, in fact, given to another.(2)

A promise by the drawer of a dishonored bill to pay the same,(3) or an acknowledgment of his liability upon it,(4) is equivalent to an admission that he has received due notice of dishonor, and, in the case of a foreign bill, of its having been duly protested.(5) So, even if the drawer disclaims his liability upon the bill, but does not rest his defence upon want of notice, but upon a different ground, this may be taken as an admission that he had received notice.(6)

Upon the same principle, where relief has been given by a parish to a pauper while resident in another parish, it is evidence of an admission that he is settled in the relieving parish.(7) But relief to a pauper resident in the relieving parish is no evidence of a settlement therein, for the pauper would be entitled to relief even as casual poor.(8)

Where a party has acknowledged himself guilty of a nuisance in the carrying on a particular business in one place, this is evidence against him as an admission, upon the trial of an indictment for carrying on the same business at another place.(9)

In one case, an admission of a demand, made by a defendant when he was arrested, and when he might be supposed to be ignorant of his rights, or whether he was bound by law to pay the demand or not, was ruled by Lord Kenyon, C. J., not to be sufficient evidence to charge him.(10)

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(1) Nicholls v. Downes, 1 M. & Ro. 13. See Hart v. Newman, 3 Camp. 13.

(2) Storr v. Scott, 6 C. & P. 241; Thompson v. Davenport, 9 B. & C. 78, 86.

When the party to whom a detailed account is presented makes no objection to it, the account is, under ordinary circumstances, treated as being by acquiescence a stated account. Freeland v. Heron, 7 Cranch, 147; Bruen v. Hone, 2 Barb. 586; Lockwood v. Thorne, 1 Kernan R. 170.

(3) Lundie v. Robertson, 7 East, 231.

(4) Hicks v. Beaufort (Duke), 4 N. C. 229; Brownell v. Bonney, 1 Q. B. 39.

(5) Campbell v. Webster, 2 C. B. 258; Patterson v. Becher, 6 B. Moore, 319.

(6) Wilkins v. Jadis, 1 M. & Ro. 41; Curlewis v. Cornfield, 1 Q. B. 814.

Tibbetts v. Dowd, 23 Wend. 379; and Edwards on Bills & Notes, 650–655.

(7) R. v. Barnsley, 1 M. & S. 377, 380; R. v. Wakefield, 5 East, 335; R. v. Stanley, 15 East, 350; R. v. East Winch, 12 A. & E. 697; R. v. Yarwell, 9 B. & C. 894; R. v. Carnarvonshire, 2 Q. B. 325; R. v. Crondall, 2 Sess. Ca. 667. See also R. v. Edwinstowe, 8 B. & C. 671; R. v. Bedingham, 1 Sess. Ca. 114.

(8) R. v. Chatham, 8 East, 498; R. v. Trowbridge, 7 B. &. C. 252; R. v. Coleorton, 1 B. & Ad. 25.

(9) R. v. Neville, Peake N. P. C. 91.

(10) Rouse v. Redwood, 1 Esp. 155. According to the report, Lord Kenyon, C. J., said: "Such

When the matter involves *law* as well as *fact.*

Where admissions involve matters of law as well as matters of fact, they are obviously, in many instances, entitled to very little weight, and in some cases they have been altogether rejected. Thus, it has been held, that the discharge of a defendant by a court of quarter sessions, under an insolvent act, could not be established by proof of an acknowledgment of the discharge by the plaintiff himself, for the discharge might have been irregular and void, or might have been mistaken by the plaintiff.(1)

The question, whether an admission as to the status of marriage is receivable in evidence against the party making such admission, appears properly to depend, not only upon whether the party had means of knowing the fact, but also whether the admission was made deliberately and advisedly.

Admissions of marriage in prosecutions for bigamy.

Thus, upon an indictment for bigamy,(2) it was held that proof of the prisoner's cohabiting with and acknowledging himself married to a former wife then living, such assertion being backed by his producing to the witness a copy of a proceeding in a Scotch court, against him and his wife, for having contracted the marriage improperly (the marriage, however, being still good according to that law), was sufficient evidence of the first marriage; and upon such evidence, together with due proof of the second marriage, the prisoner was convicted. The point being reserved for the opinion of the judges, they all (with the exception of two who were absent) held the conviction proper. Two of them observed, that this did not rest upon cohabitation and bare acknowledgment, for the defendant had backed his assertion by the production of the copy of the proceeding; but some of the judges thought that the acknowledgment alone would have been sufficient, and that the paper produced in evidence was only a confirmation of such acknowledgment.

Where, also, it was proved that the prisoner, being charged with bigamy, had made a statement before a justice, in which he expressly declared that

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admission shall *not be allowed to be given in evidence* to charge him; the marginal note also states that an admission made under such circumstances is *inadmissible evidence* to charge the defendant; and the case is usually cited as an authority for that position. But it appears that the evidence was in fact admitted; and Lord Kenyon's observation must be understood as applying to its effect, and not to its admissibility.

(1) Scott v. Clare, 3 Camp. 236; Summerset v. Adamson, 1 Bing. 73; Morris v. Miller, Burr. 2057.

Wakefield v. Crossman, 25 Vt. 298; Crockett v. Morrison, 11 Mis. 3; Brewster v. Striker, 2 Comst. 19.

(2) Trueman's Case, 1 Russ., Cr. & M., by Greaves, 217, 218.

The mere confession of the prisoner is not sufficient evidence of the former marriage (The People v. Humphrey, 7 John. R. 314); nor is such confession sufficient when accompanied by proof of cohabitation and reputation. Gahagan v. The People, 1 Parker C. R. 378. As to what evidence is sufficient to prove a marriage in civil suits, see 15 New York State Rep. 345.

he had married his first wife, who was then present, Erskine, J., admitted the evidence, observing that this was not an incautious statement, made without due attention, but that the prisoner's mind was directed to the very point by the charge made against him.(1)

So, in a similar case, the prisoner's declarations, deliberately made, of a prior marriage in a foreign country, were held by Wightman, J. (after consulting with Cresswell, J.), to be sufficient evidence of such marriage, without proving it to have been celebrated according to the law of such country.(2)

Effect of admissions, estoppels.

With respect to the effect to be attributed to admissions, it is to be observed that proof of a party to the suit having made representations of facts for particular purposes and on particular occasions, may preclude him from relying on a case which is inconsistent with those representations; thus operating as an estoppel. The kind of representations which have been held to have this effect, seems, for the most part, to be where, on the faith of them, a court of justice has been induced to adopt a particular course of proceeding, or where other persons have, on the faith of the representations, been led to alter their condition. In some of the cases, the courts appear to have considered that the general rules respecting the qualities of estoppels did not apply to representations of the nature in question. In others, the representations have been treated, for some purposes at least, as a branch of estoppels, properly so called, and it has been held that, as being estoppels, they were not receivable in evidence, except between parties and privies.

The rule upon the subject has been laid down in these terms;(3) "The express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence against him; but he is at liberty to prove that such admissions were mistaken or were untrue, and he is not estopped or concluded by them, unless another person has been induced by them to alter his condition; in such a case, a party is estopped from disputing their truth, with respect to that person and those claiming under him; but as to third persons he is not bound."(4) In a recent case,(5) Lord Denman, C. J., in giving the judgment of the court, laid down the doctrine as follows: "The rule of law is clear, that, where one, by his words or conduct, willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring

(1) R. v. Upton 1 Russ., Cr. & M., by Greaves, 218.

(2) R. v. Newton, 2 Moo. & R. 503; S. C. *nom.* R. v. Simmonsto, 1 C. & K. 164. See the Chapter on Presumptive Evidence, *post.*

(3) In Heane v. Rogers, 9 B. & C. 577, 586.

(4) See also Graves v. Key, 3 B. & Ad. 318, n.

(5) Pickard v. Sears, 6 A. & E. 469, 474.

against the latter a different state of things as existing at the same time." And on a still later occasion,(1) his Lordship observed, that the principle

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(1) In Gregg v. Wells, 10 A. & E. 90, 97. See also Harrison v. Wright, 13 M. & W. 820.

NOTE 129.—This head of admissions ought not to be dismissed without a more direct and enlarged attention to their effect, as depending upon the manner, or the various circumstances under which they are made.

It will be obsreved, by looking at different heads of our author in this, his first volume, and the notes to those heads, that an admission is made *first*, with a view to evidence, *secondly*, with a view to induce others to act upon the representation, or *thirdly*, it is an unconnected or casual representation.

First, the rule hardly admits of an exception, that a party cannot contradict, by evidence at the trial, what the pleadings themselves admit in the very cause on trial; nor can the jury find any fact contrary to those admissions. This rule, with cases in which the pleadings are, and are not so framed as to work an admission, are considered, *post*, of the text, which see, in connection with the notes.

Another very common instance is a stipulation by the attorney on record, to admit certain facts upon the trial of the cause. The mode and effect of such admissions are considered by our author, *post*. It will be seen there that such an admission is conclusive. Alton v. Gilmanton, 2 N. H. Rep. 520, S. P. And where the defendant offered to the plaintiffs (at a private meeting) to admit on the trial all the formal proofs to entitle the plaintiffs to sue as assignees, in consideration that he should not be holden to bail, which was acceded to; held, that he was bound by such accepted offer, and could not, on the trial, retract it. Davies v. Burton, 4 Carr. & Payne, 166. The party, of course, comes unprepared with other evidence of the facts admitted; and to allow their existence to be controverted would be to entrap him. And it is the same with an oral admission of counsel on the trial of the cause. Thus, where the action was on a policy upon a ship, warranting that the assurers should take all risk of seizure on account of any illicit or prohibited trade, except seizure *in port for that cause;* on the trial, the counsel for the assurers admitted a seizure *at sea* (out of port), and the verdict was for the plaintiff. Afterwards, a motion for a new trial was made on the alleged discovery of new evidence that the vessel was seized *in port;* and it was argued that the admission at the trial ought not to conclude. One answer given by the court was: "It is expressly admitted in the case that she was seized *at sea*. This admission ought to conclude the party on this point." Vandervoort v. Smith, 2 Cain. Rep. 155. Note. The marginal note to this case is not qualified as it should be. It is thus: "Admissions in a case are conclusive against the party making them;" whereas it should be, "admissions made at the trial of a cause shall be taken as conclusive in that cause." The effect of such admissions in a case, is considered in notes 127, 141, and 148. In trespass *de bonis*, &c., the plaintiff's counsel disavowed claiming any damages by way of punishment or smart money; and the court held that this concluded him. Hoyt v. Gelston, 13 John. Rep. 141.

Indeed, instances in the reports are almost innumerable, where the mere silence of counsel on the trial, as omitting an objection to a defect in testimony, shall conclude his client, even in respect to the existence of records, documents or other testimony of the most important character. This is on the familiar ground that the silent concession has been acted on by the opposite party, or he has omitted evidence which he would otherwise have produced. *Vid.* among other cases, Beals v. Guernsey, 8 John. Rep. 451, and White v. Kibling, 11 John. Rep. 128.

Secondly. The larger class of cases arises under the rule we have already partially noticed, that a party is usually concluded by admissions or conduct upon which others have been induced to act; and where, if he were permitted to prove that such admissions or conduct were false, such permission would operate as an injury to the persons who were misled by them. Such admissions and conduct, although they cannot operate as a technical estoppel, which can be by deed or record only, are yet said to operate by way of estoppel; an estoppel *in pais*. Per Nelson, J., in Welland Canal Co. v. Hathaway, 8 Wend. 483. They are said in this case so to operate, were they are designed to influence the conduct of another, and to have that effect, and when a denial will injure the latter. In another case the rule is put broader, that the party shall be

estopped, where his intent was to influence the other, or derive a credit or advantage to himself. Tufts v. Hayes, 5 N. H. Rep. 453; Kingsley v. Vernon, 4 Sand. 361; 21 Wend. 172. But where he has not acted with this view, and there is no breach of faith in receding, he shall not be concluded. Id. The case will, we imagine, be found to satisfy these rules in their broadest construction.

Accordingly, where a man has cohabited with a woman, and treated her in the face of the world as his wife, he cannot deny this, and claim to be her servant in respect to her lands, which are taken in execution against him (Divoll v. Leadbetter, 4 Pick. Rep. 220); and he cannot object to a creditor who supplied her with goods during the cohabitation, that she was not his wife. Per Mills, J., in Jennings v. Whitaker, 4 Monroe, 52. And it is said in one case, this shall be so, whether the creditor know that she is his wife in fact or not. Watson v. Threlkeld, 2 Esp. Rep. 637. But this is now held otherwise, where the creditor has a clear knowledge that there is no marriage (Robinson v. Nahon, 1 Camp. 245), or where the credit is given after she is turned away, even where she has been treated as a wife for seventeen years. Munro v. De Chemant, 4 Campb. 215. Nor is the fact even of present cohabitation conclusive, where the reputed wife is introduced as a witness for her husband, or he for her, for here is no faith to be violated.

Again; the levy and sale of land by a sheriff, was left in doubt as to its extent by the terms of the deed; and L., the purchaser, declared that a certain island and other land was not included; these were afterwards purchased by S. Held, that if S. purchased in consequence of L.'s declaration, he and those taking from him by a deed subsequent, would be concluded; otherwise, if the purchase of S. was not made upon the strength of those declarations. In such case, L.'s declarations would be evidence, but not conclusive. Swartz v. Moore, 5 Serg. & Rawle, 257, 259, 261, 262, 265, 266.

On the same principle, where a tenant takes a lease of his landlord, and enters and enjoys, he cannot dispute the title of his landlord, either in an ejectment against the tenant after the expiration of his term, or in an action for the rent of the demised premises. See Vol. II, and the cases there cited with the notes; Repean v. Budden, 5 Barnw. & Ald. 626. So, though the tenant take the lease while he is in possession. M'Connell v. Bowdry's Heirs, 4 Monroe, 392. 400. So, if he enter, or continue his possession under a contract to purchase. Jackson ex dem. Norris v. Smith, 7 Cowen's Rep. 717; Jackson ex dem. Low v. Reynolds, 1 Cain. Rep. 444; Connelly's Heirs v. Childs, 2 Marsh. Ken'y Rep. 242: Logan v. Steele's Heirs, 7 Monroe, 104. Otherwise he would have the advantage of obtaining or keeping a possession which would enable him the better to contest the very title under which he takes. He must, therefore, in general, give up his possession, and then, if he have a paramount title, or can obtain one, he may bring it forward. Jackson ex dem. Shaw v. Spear, 7 Wend. 401. This obligation extends both to him and his successors. It was held, accordingly, that an acknowledgment by a person under whom the defendant in ejectment claims to hold the land, that he went into possession under the lessors of the plaintiff, should be conclusive against him as to the tenancy. Jackson ex dem. Vandeuzen v. Scissam, 3 John. Rep. 499. So, though the agreement to purchase be conditional. Thus, in ejectment, it appeared that on the lessor of the plaintiff telling the defendant that he claimed the land, the defendant being then in possession, admitted that he entered without title and agreed to purchase it of the lessor of the plaintiff, if the Onondaga commissioners should award it to him. This they did. The defendant now offered to show that a dissent had been entered to their award; but did not pretend any title in himself. The court said he was concluded, by his admissions, which recognized the lessor as his landlord. Jackson ex dem. Low v. Reynolds, 1 Cain. Rep. 444.

But the great strictness of this last decision, has not been uniformly maintained by the courts. For in another case, where the defendant having been in possession for a number of years, agreed, on a claim being interposed by the heirs of Sir Peter Warren, to take a lease of them; held, that he was not concluded. He was allowed to show a title out of the heirs who were the lessors of the plaintiff, and thus protect himself in his possession. The court said: "It does not appear that the defendant was put into possession by the lessors, nor that he ever paid rent; and the agreement for the lease appears never to have been carried into effect." Jackson ex dem. Southampton et al. v. Cooley, 2 John. Cas. 223; Jackson v. Cuerden, Id. 353; and Jackson ex dem. Shaw v. Spear, 7 Wend. 401, 404, S. P.

It has been held in numerous cases, that in the action for use and occupation, the possession of the defendant by the plaintiff's permission being made out, the former will not in general be allowed to dispute his landlord's title. *Post,* Vol II, and the notes. And several analogous cases have arisen upon dealings in respect to personal property. Thus, it seems that a receiptor of property to the sheriff who has taken it in execution, is estopped to question the sheriff's title, though he have suffered it to remain with another by whom it is eloigned; otherwise, if he be ousted by title paramount, or by force. Phillips v. Hall, 8 Wend. 610. And the statement of value by the receiptor in the receipt thus given is conclusive. Drown v. Smith, 3 N. H. Rep. 299. Again; the plaintiff in possession of land, was hired by the defendant to depasture his cattle on the land. In assumpsit for the price, the defendant was holden concluded, and could not with a view to invalidate the contract, show the land to be his own, and not the plaintiff's. Eastman v. Tuttle, 1 Cowen's Rep. 248. Again; one takes goods of another to return on a certain event. In trover after the event, the bailor will not be put to show a legal title. M'Neil v. Philip, 1 M'Cord, 392. Indeed, the defendant is estopped to set up title in a third, as he would be in an action for use and occupation. Manning v. Norwood, 2 Rep. Const. Ct. S. C. 374.

Nearly of kin to the same principle, will be found that which declares, that where the party interested has made statements in respect to the title of property in his hands, or that certain property exists in his hands, or is under his control, or admits both its existence in his hands and the title in another, he shall be holden responsible for the truth of such statements or admissions, though the supposed property had no existence, or the title should be altogether different from what he represented it; and he shall be subjected to an action as if his representations or admissions had been literally true. Thus, a wharfinger, having acknowledged certain timber on his wharf, to be the plaintiff's, knowing of an adverse claim of A., in trover for the timber, was held estopped to question the plaintiff's claim by setting up A.'s title. Gosling v. Birnie, 7 Bing. 339. And see Hawes v. Watson, 2 Barnw. & Cressw. 540, S. P.

The defendant gave L. a bill of parcels of 300 bbls. of beef, with a receipt in full as payment, and a certificate that he had received 300 bbls. of beef on storage for L., who assigned the beef for the benefit of his creditor. In trover by the assignees against the defendant, he would have shown that in truth there was no specific beef which could pass by the sale, and that the beef mentioned as on storage did not exist; but the court held, that this would not avail him. He was concluded by his acts and admissions. Chapman v. Searle, 3 Pick. Rep. 38. The court distinguished this case from Austin v. Craven (4 Taunt. 644), saying that was the case of a mere executory contract of sale; and they liken it to Stonard v. Dunkin (2 Campb. 344), where the plaintiff advanced £7,500 to K. for malt, and on his order, the defendants wrote an acknowledgment that they held the malt for the plaintiff. They were held to be concluded by this acknowledgment, and could not say the malt was not the plaintiff's. The court also cited Harding v. Carter (Park. on Ins., 7th ed. 4), where the defendants' clerk wrote the plaintiff that the defendants had effected two policies of insurance for him. In trover for the policies, it was held the defendants could not gainsay their representation; but were concluded, although in truth no policy was effected. *Vide* 3 Pick. 44. Again: a constable coming to levy on one Benedict's property, Stephens pointed out lumber, one-fifth of which he said belonged to Benedict, whereupon the constable levied on and sold it. Held, that Stephens, who originally claimed four-fifths, was concluded, and could not set up a right to the whole; and that Baird, the purchaser of the one-fifth at the constable's sale, might recover for the one-fifth of Stephens, who had converted the whole, although in truth Stephens had title to the whole. Stephens v. Baird, 9 Cowen's Rep. 274; Wallis v. Truesdell, 6 Pick. Rep. 455, S. P. So, though on his execution commanding him that if he cannot find property, he shall take the body, a constable is bound to search, yet, if the defendant in the execution declare that he has no property, this shall bind him, whether true or false; and the constable, having acted upon it and taken him, shall be protected. Per Sutherland, J., in Hollister v. Johnson, 4 Wend. 642. But where no injury arises from such a representation, it will not conclude. Thus, on levying an attachment (mesne process), the defendant told the officer that the goods belonged to a third person; on trial, he succeeded in the attachment suit, and then the officer sold the goods without authority. Held, that the defendant in the attachment suit was not precluded from recovering against the officer for the tortious sale. Wallis v. Truesdell, 6 Pick. Rep. 455. So where the sheriff, having a *fi. fa.* against Dukes, one Ufford,

who owned a negro, told the sheriff he belonged to Dukes, whereupon the sheriff levied upon the negro and sold him, but before the sale, Ufford explained to the sheriff that Dukes had no other title than to sell the negro and pay himself a debt due to him from Ufford; held, that the latter was not concluded. Ufford v. Lucas, 2 Hawks, 214. And *semb.* should an execution debtor, in truth owning but one cow, exempt from execution, tell the creditor or officer that he owns another, the debtor's cow may be taken, though the declaration be not true. Otherwise where the declaration is loose and casual, and made to third persons. Tufts v. Hayes, 5 New Hamp. Rep. 452. One who owned a slave stood by, and allowed him to work for another, who believed he had right, and to whom the former knew the slave had been bequeathed by A. as his slave, the owner not giving notice of his claim, was held to be concluded against an action by the owner for the slave's services. Demyer v. Souzer, 6 Wend. 436, 437. Again: in trover for goods, which the defendant procured of the plaintiff by a fraudulent purchase, it appeared that the plaintiff sold the goods, claiming them as the next of kin to a decedent; but no administration having been taken out, he then had no title; and the defendant, after sale, took letters of administration himself, and caused the sale to be proved and registered; so that he thus had the legal title, which he set up against the plaintiff; but held, that he was estopped to deny the legal title of the plaintiff; for his purchase of the goods and registry of sale admitted the plaintiff's legal right, and charged himself with the necessary assent as administrator, which should operate by relation to vest the legal title in the plaintiff from the beginning. Cross' Adm'rs v. Terlington, 2 Murph. 6. So where A. indorsed on a writ in his favor, that the suit was brought for the use of B., this was held conclusive; and that a payment to B., in any way he chose, bound the plaintiff. Clark v. Shields, 3 Hawks, 461.

Where the assignee of a chose in action purchases it, after a promise to him by the debtor to pay, or his acknowledgment to him, or in his hearing, of the debt, made before or at the time of the assignment, or where the debtor stands by, and silently sees the debt assigned, he shall be estopped to set up any defence as against the assignee. Thus, the debtor shall not be permitted to show that it was before paid. Buchanan v. Taylor, Addis. Rep. 155; Ludwick v. Croll, 2 Yeates, 464; Carnes v. Field, 2 Id. 541; Weaver v. M'Corcle, 14 Serg. & Rawle, 304; M'Mullen v. Wenner, 16 Id. 18; Morrison's Adm'r v. Beckwith, 4 Monroe, 73. Such an acknowledgment, made after the assignment is taken, shall not conclude. Ludwick v. Croll, 2 Yeates, 464. But where the admission precedes the assignment, it shall shut out a defence, even on the ground of illegality of consideration. Thus, the defendant having given a bond and warrant of attorney, to secure a gaming debt, the bond was offered for sale to S., whose attorney applied to the defendant, who said the debt was good, and would be paid when due; S. thereupon paid and took an assignment. After this, the defendant moved to set aside the judgment; but was held concluded on his representation, on which S. had acted. Davison v. Franklin, 1 Barnw. & Adolph, 142.

It was held in one case, that the maker of a note not negotiable, promising after assignment to pay the assignee, is concluded, and cannot set off any claim against the payee; for the assignee might have sued in his own name, when the set-off could not have been received, and suing in the name of the payee gives no greater right to the maker; the difference is merely in form. Wiggin v. Damrell, 4 N. H. Rep. 69. *Quere.* In Gould v. Chase (16 John. Rep. 226), a subsequent promise of this kind was holden not conclusive, but only *prima facie* evidence against the set-off, which might still be received on a satisfactory explanation how the promise came to be made, notwithstanding the apparent existence of the set-off; such a subsequent promise would clearly not shut out any other plain defence, for the promise itself would be *nudum pactum.* See Clay v. Johnson, 6 Monroe, 660, 661.

The voluntary conduct and declaration of a bankrupt, by which persons have been led to act in his affairs as a bankrupt, have often been held to conclude him, on the question whether he was in truth a bankrupt or not; as where he had voluntarily acquiesced in, and acted under a commission for a year and a half, he himself in the meantime petitioning in the name of a creditor for new assignees. He then brought trover against the assignees to unravel the whole affair, and insisted that he was not a bankrupt. The Lord Chancellor enjoined him against proceeding in the action, as he was a party who had drawn in the assignees to act, and had not merely submitted and surrendered himself under protest, to avoid the heavy penalties of the Bankrupt Law. Flower v. Herbert, 2 Vesey, 326. So where an alleged bankrupt had solicited the creditors to vote for the defendants as his assignees, and then brought an action against them for money had

and received, to disaffirm the proceedings under the commission, it was held by Sir J. Mansfield, C. J., that as the defendants were enabled, by being so chosen assignees, to obtain the money in question, the plaintiff was concluded, whether he was in truth a bankrupt or not; and he nonsuited him. Like v. Howe, 6 Esp. Rep. 20. So where a man was declared a bankrupt, and his goods put up for sale, and he brought trover against the assignees, insisting that he was not a bankrupt. In defence, it was proved that the plaintiff had himself introduced the auctioneer to the defendants, by whom the goods were sold, and recommended him for the purpose. Heath, J.—"How is this a tort or wrongful conversion? Why has he acquiesced in it?" Plaintiff's counsel—"It was an acquiescence he could not help. He was then declared a bankrupt, and bound to submit." Heath, J.—"He might submit to the commission, but he need not take any part in anything done under it, nor show his acquiescence in it. The action cannot be sustained; the plaintiff must be called." Plaintiff nonsuited. Clarke v. Clarke, 6 Esp. Rep. 61. See further, Havelock v. Cook, 5 T. R. 655; Goldie v. Gunston, 4 Campb. 381; Mercer v. Wise, 3 Esp. Rep. 219, and 11 Ves. 409.

But the mere surrender of a bankrupt shall not conclude him; for this is compulsory. Per Ld. Ellenborough, in Goldie v. Gunston, 4 Camp. 481. So in trover, by an alleged bankrupt, to try the validity of the commission, it appeared that he had assisted the assignees to recover goods which they had sold; had given them directions as to sales; had given notice to the lessor of his farm that he had become bankrupt; and was willing to give it up, which was done. Held, that the bankrupt was not estopped to question the commission, as his interference in respect to the goods was equivocal, and might be referred to his care of them; and the assignees were neither parties nor privies in respect to the surrender of the lease. Heane v. Rogers, 9 Barnw. & Cressw. 577.

Where an admission is made by a party, which, if true, entitles another, and induces him to bring an action against the party, he shall be bound, whether he spoke true or false; and the fact, with all its legal consequences, shall be taken exactly as the party stated it to be. A strong case under this rule was in detinue against the defendant, an executor of W., deceased, for deeds and writings. The plaintiff's attorneys, Watson & B., applied to W., in his lifetime, for the papers, he having formerly had the custody of them, as executor of one H. The defendant wrote to the plaintiff's attorneys, concerning a proposed interview on the subject, "I have no objection to submit the deeds to Mr. Watson's perusal, nor to his taking extracts," &c. Another letter prescribed conditions, and said the deeds would not be forthcoming unless the conditions were fully complied with. It was objected, that the defendant was not guilty of a tort, he having had the deeds for a short time, in order to produce them at a proposed interview. Best, Ch. J.—"If the defendant said that he had the deeds, and thereby induced the plaintiffs to bring their action against him, I shall hold that they may recover against him, although the assertion was a fraud on his part. It appears by his letter that he did say so; and therefore, I am of opinion that the verdict must be for the plaintiffs." His Lordship then left it to the jury, to give such damages as would compel the defendant to deliver up the deeds; they accordingly found their verdict for £450. Hall et ux. v. White, 3 Carr. & Payne, 242.

So, where the defendant in ejectment, in a conversation before suit brought, and with a view to being made a defendant, and trying the title, declared that he was in possession; and the action was thereupon brought against him; held that he was concluded, though in truth he was not in possession. Den ex dem. Mordecai's Heirs v. Oliver, 3 Hawks, 479. So in separate ejectments against landlord and tenant for adjacent lands in possession, either of the tenant or both, the landlord by denying his possession, obtained a verdict; but the verdict passed against the tenant for the whole; and execution was executed; when the landlord would have obtained restitution of part, on the ground that in truth he was in possession; but held that he should not be heard, on account of his denial in the former action, which had gone upon that ground, in his favor. Crockett v. Lashbrook, 5 Monroe, 530, 544. Though as the trial did not go to the title, it should not conclude him in an action of trespass; but should be taken in respect to that, like any other confession against him. Id. 544, 545. Again; the defendant in ejectment, a tenant, on the bailiff coming to distrain, denied that any sufficient distress was upon the premises, whereupon the bailiff immediately served him with a declaration in ejectment, at the suit of the landlord, upon the clause of re-entry for non-payment of rent, and insufficient goods for a distress. On the trial, the defendant was allowed to show that there was in truth sufficient goods for a dis-

tress at the time when the bailiff came, and the verdict was for the defendant; but a new trial was granted, though the tenant was a mere holder at sufferance, his lease having expired; and his immediate lessor would thus be ousted without any fault of his. The Trustees of the First Incorporated Presbyterian Congregation in Salem v. Williams, 9 Wend. 147, 8 Wend. 483; S. C., cited and stated at large by Nelson, J. Again, the claimants and their agents being uninformed as to the commencement of the defendant's tenancy, the agent applied to the latter for information; and he informed him it began at Lady-day. Thereupon the agent sold the premises; and gave the regular notice to quit at Lady-day. This not being heeded, the agent brought ejectment, when the tenant set up a holding from a different day. But Lord Kenyon would not allow him to show that he was even mistaken in his admission, for he was concluded. No matter whether the misrepresentation was mistaken or designed; for it had equally the mischief of leading the landlord into an error. He had acted by bringing his suit to recover the term, on information furnished by the defendant himself. Doe ex dem. Eyre v. Lambly, 2 Esp. Rep. 635.

So where the party holds himself out as being owner of a vessel, he shall be liable as such, though he be, in truth, the mere mortgagee. Thus, where the mortgagee of a vessel took out a register in his own name as unconditional owner, and the vessel went to sea with this register as a part of her papers; held by four judges against three, that the mortgagee thus made himself conclusively liable for supplies, disbursements and repairs procured by the master. The court put it on the ground that, though in other cases, and as between other parties, the register would be, at most, *prima facie* evidence of ownership, yet, in respect to creditors who might have acted on the register, in furnishing supplies, &c., the register should conclude; and they likened it to the usual case of a man being bound by the character or relation which he puts himself before the world as holding; and that, if he intended to save himself from such a consequence, he should have indorsed his claim as mortgagee on the register. Starr v. Knox, 2 Conn. Rep. 215. See Champlin v. Butler, 18 John. Rep. 169. So the defendants being owners of a vessel in unequal shares, the minor owner chartered his share of the vessel to the major owner, for a voyage, with which the former would have nothing to do. But the ship's papers stood in both names, and the master, on representing both as owners, procured on their credit funds to prosecute a claim for the vessel (which was captured) in a foreign court of admiralty. Held, that suffering the ship to go forth with such papers, bound and concluded both owners in an action for the funds supplied on their credit. Williams v. Kelley & Sanger, 2 Conn. Rep. 218, note *a*.

A man is often concluded by allowing his name to go forth and be used as a partner in a mercantile firm, whether this be true or not.

So one using the goods of the deceased shall not be allowed to say he is not an executor; and so it would seem an infant who obtains credit or advantage by representing himself to be of full age, shall not be allowed to set up his infancy. Per Mills, J., in Jennings v. Whitaker, 4 Monroe, 51 to 53.

So the act of a man's general agent shall bind, if within the scope of his apparent agency, though contrary to the secret instructions of the principal. 1 Liv. on Ag. 120, *et seq.* and the cases there cited.

A man has often been concluded by his acts and declarations in respect to his name. Thus, a man put in special bail by a wrong name, upon which the plaintiff was proceeding against him by that name, when he pleaded a misnomer. The plaintiff replied the act of putting in bail as an estoppel; and on demurrer, the court said, putting in bail was the defendant's act; and he was concluded. Meredith v. Hodges, 5 B. & P. 453. Here was a technical estoppel; but a man may, by his admission, equally work an estoppel *in pais*. Thus, in trespass for distraining the plaintiff's goods, on process from an inferior court issued against him by the name of *John*, he proved his name to be *William*, though he once had a sign up with the name of *John*. On being asked whether his name was *John*, with a view to have the process right, he said it was, and they might distrain upon him and be d—d. Lord Ellenborough said, here the party was known as well by one name as the other. "But, besides that, I think the plaintiff is barred, by having said that his name was *John*, when interrogated before the process was issued. He shall not be allowed to avail himself of the mistake which he himself occasioned. Price v. Harwood, 3 Campb. 108. Again, the plaintiff's indorsees declared against the acceptor, on a bill drawn by "Ellis, Needham, Jr. & Co.," payable to "our order;" and set it forth as being drawn by several persons, under a firm of that name; whereas, in truth, it was drawn by one person only, who

traded under that name. And the court held the drawer concluded by his acceptance, as an admission that there were several persons, the bill having that appearance and holding that language. Bass v. Clive, 4 Maul. & Selw. 13. So a man may be convicted by a false name by which he calls himself; and shall be estopped, though by his conduct he has made it merely doubtful whether it be his true name. He may be sued by the name of his initials, where he is in the habit of using only initials for his Christian name. City Council v. King, 4 M'Cord, 487; Petrie v. Woodworth, 3 Cain. Rep. 219. And if he holds out a false name, by which a sheriff arrests him, though by a writ in truth against another, he cannot subject the sheriff for false imprisonment. Per Lord Ellenborough, C. J., 1 Barnw. & Ald. 650. So a defendant who allows his name to continue painted on a cart, and over the house of business where the cart belongs, is concluded; and in an action against him for another's negligent driving and injuring the plaintiff, cannot set up that he had before parted with all his interest. Stables v. Eley, 1 Carr. & Payne, 614.

A man may conclude himself in the same way, as to his calling, profession or office. Thus, where the plaintiff sued as surgeon, but it appeared on the trial that he was called "doctor," and signed himself M. D., to his prescriptions in the course of the services sued for; held, that he was concluded by this, and could not deny that he was a physician; and therefore, by the law of England, not entitled to sue for fees. But the defendant having paid money into court, was held estopped to deny that he was a surgeon, and so he might recover. Lipscombe v. Holmes, 2 Campb. 441. So a person acting in a certain office (*e. g.* as deputy sheriff) is estopped to deny that he is such officer. Hughes v. James, 3 J. J. Marsh. 700.

The following miscellaneous cases may serve still farther to illustrate the principle we are upon: A man stands by, and suffers his name to be put down at an auction as the purchaser by direction of the bidder; he is estopped to deny that he is the bidder. Jenkins v. Hogg, 2 Const. Rep. S. C. 821. So a surveyor running land and bounding it on one of his own land lines, is concluded against saying the land surveyed was his, as to one who had built a mill on the tract surveyed. Tarrant's Lessee v. Terry, 1 Bay, 239. A bill of lading signed by the captain, stated that freight was paid at Bengal, and was indorsed by the London consignees to another for value. Held, that the owners were concluded as to the assignee, though the statement as to freight was a mistake. Howard v. Tucker, 1 Barnw. & Adolph. 712. The owner of an ancient mill permitted the defendants to lower the bank of the river on their land, and to make a weir above the mill, whereby less water than before flowed to it. Held, that both the owner and his heirs were concluded, and could not sue the defendants for that act nor revoke the license. Liggins v. Inge, 7 Bing. 682. A sheriff's indorsement of the time when he received a *fi. fa.* is conclusive against him, as between him and the creditor, as to the time. Williams v. Lowndes, 1 Hall's Rep. N. Y. S. C. 579. The recital of a fact in a deed is generally an estoppel as between the parties, and especially if the one who claims the benefit of the recital has acted upon the fact recited, as by paying money, &c. Peddicord v. Hill, 4 Mon. Rep. 370, 373; Hill v. The Proprietors of the Manchester and Salford Waterworks, 2 Barnw. & Adolph. 544. The plaintiffs had sold goods to the defendants, who sent them a check for the balance, with an account stated. One of the plaintiffs objected that the balance was too small, but received the check; and, having said nothing to the defendants for several months, sued them for an alleged deficiency. Held, that the plaintiffs were concluded as to the amount of the balance by receiving the money as payment of it. Davenport et al. v. Wheeler et al., 7 Cowen's Rep. 231. The inventory of an executor returned to the ordinary, is conclusive against him as to the amount of assets. Wright v. Wright, 2 M'Cord Ch. Rep. 196, *Curia*, per Nott, J. If the supposed maker of a forged note pay the money to an innocent holder, *semb.* the former cannot recover the money back. *Semb.* He is concluded by his admission, both parties being innocent. The Salem Bank v. The Gloucester Bank, 17 Mass. Rep. 1, 27.

We have already seen it repeated several times incidentally in the course of the cases, that the estoppel or disability to contradict an act or assertion, prevails only in favor of the person who has acted upon or been drawn in by the false act or representation; not as to others who could not have been imposed upon. And see per Mills, J., in Jennings v. Whitaker, 4 Monroe, 51 to 53; Tufts v. Hayes, 5 N. H. Rep. 452. This may be farther illustrated by a few cases. Thus, where a party gave his receipt to an alleged corporation by its supposed corporate name, it was held not to be such an admission as should estop him from denying the corporate character, and putting the company to strict proof of their charter. The Welland Canal Company v. Hatha-

way, 8 Wend. 480. Otherwise, where he accepts an office under the supposed corporation, and obtains money in that capacity. All Saints Church v. Lovett, 1 Hall's Rep. N. Y. S. C. 191.

The consideration of a few other instances will show that acts or confessions not influencing the conduct of others, or coming within some of the principles which we have been exemplifying, although very deliberately made, are yet not conclusive. Being untrue, this fact may, if there be counter evidence to that effect, be shown; and such is the rule in regard to all such confessions as we are to bring forward under the third head of this note. My agent declares that the goods delivered are according to contract, having, according to the custom of the foreign port, examined only a sample. This shall not conclude me against showing his mistake. Gilpins v. Consequa, 1 Pet. C. C. Rep. 85, 88; S. C., 3 Wash. C. C. Rep. 184. An offer, or even tender, of the money, will not conclude as an admission of the tenderee's right, if it be not accepted by the tenderee, nor paid into court by the tenderor, upon an action being brought. Jackson ex dem. Ballou v. Campbell, 5 Wend. 572, 577. An acknowledgment by subscribing an account current, is yet liable to be corrected or rebutted by competent proof; as that the money advanced for which the balance was struck at $1,500, was in truth only about $300. Nichols v. Alsop, 6 Conn. Rep. 477. A plea to an indictment, *e. g.* for a breach of law relating to retailers, of *nolo contendere*, though equivalent to a plea of guilty, with a protestation of the defendant's innocence, will not conclude him in a civil action, from disputing the facts charged in the indictment, *e. g.* in *sci. fa.* on a recognizance, for breach of the same law. Commonwealth v. Horton, 9 Pick. 206. A certificate signed by A. that he had purchased a vessel of B., was held not to conclude A., in an action drawing the sale in question; but held that A. might show an agreement at the time that a bill of sale was to be executed in order to complete the purchase. Higgins v. Chessman, 9 Pick. 7. In debt for money lent, it was stated that the plaintiff had attempted to obtain the benefit of the Insolvent Act; and sworn to his schedule of all debts due to him, in which the present one was not inserted, though as the plaintiff now claimed, it must have been then due. Lord Tenterden intimated, at first, that the omission was conclusive against the plaintiff. On further debate, he said that at all events it was strong evidence for the jury; and some further evidence being given of the plaintiff's admission, that he in truth owed the defendant, a nonsuit was ordered. Nicholls v. Downes, 4 Carr. & Payne, 330. Though the decision of an arbitrator be conclusive, as implying an exercise of judgment, it is not so with any fact which he may state or refer to, though appealed to by the parties to state the fact, and they agree to abide by his statement. Williams v. Wood, 1 Dev. 32. I deliver part of certain goods to one who wrongfully claims title to the whole, this shall not estop me to deny that he has title to the residue. Stone v. Swift, 4 Pick. 389. As to admissions by entries of deposits in bank-books; "If the dealer's book accompany the deposits, and the credit be then given, when the deposit is made, it becomes an original entry, and would be conclusive on the bank; if, however, the book is sent to be written up afterwards, it is not an original entry, and may be examined into." Per Spencer, J., Manhattan Co. v. Lydig, 4 John. Rep. 389. An entry by a *teller* or clerk of a bank, of the amount of a deposit in the bank-book of a dealer with the bank, being the act only of the agent of the bank, and not of both parties, is not conclusive. If, therefore, the dealer can afterwards prove that there was a mistake in the entry, he may recover, in an action for money had and received, the sum not credited, even though the bank have a by-law that all payments made and received must be examined at the time; for corporate by-laws shall not affect strangers. Mech. & Farm. Bank v. Smith, 19 John. Rep. 115. See farther the last head of this note, as to the character of other confessions in point of conclusiveness.

On the question whether the party can relieve himself by showing a mistake in a confession upon which another has acted, the following case has been decided. The plaintiff claimed under Minor, who held a mortgage dated at the same time, with a mortgage to one Wright, both from the same mortgagor of the same land; but Minor's was registered five minutes before Wright's. Minor signed a paper agreeing that the registry was a mistake, and that neither mortgage had any preference. Then the plaintiff acquired Minor's rights under the mortgage. Then the defendant having first inquired of, and been told by the plaintiff, that there was no preference between the mortgages, and that Minor had stipulated that this was so, took a conveyance of all Wright's interest in his mortgage. Yet, held, that the plaintiff might show that Minor's mortgage, in truth, had a priority of record, and so oust the defendant of his claim under Wright; it appearing that the plaintiff was mistaken in his admission. Beers v. Broome, 4 Conn. Rep.

247; S. C., 2 Conn. Rep. 467, by the title of Beers v. Hawley. *Quere*, whether a mistake could be shown in such a case, and see Howard v. Tucker, 1 Barnw. & Adolph. 712; Doe ex dem. Eyre v. Lambly, 2 Esp. Rep. 635; Carnes v. Field, 2 Yeates, 541.

With regard to oral admissions in general, and as to the third class of admissions in particular, viz: unconnected and casual representations, they have occasionally met with great disfavor, as a dangerous kind of evidence, receivable with great caution (Myers v. Baker, Hardin, 549), with suspicion, and the jury were admonished to see that it was the intention of the party to admit a fact from being satisfied of its truth (Polk's Lessee v. Robertson, 1 Tenn. Rep. 463), as dangerous when adduced to establish a resulting trust, unless confirmed by circumstances. Per Sutherland, J., in Malin v. Malin, 1 Wend. 625, 648, 649, and 653, 654. Again; the judge speaking of an important fact, says: "It was attempted to be proven by the most dangerous species of all evidence: parol proof of the admissions of the party." Perry v. Gebreau, 5 Mart. Lou. Rep. (N. S.) 18, 19. The admissions should be received with becoming caution; and where the judge, while charging the jury, refused to allow a witness to correct the language in which he had testified of a confession; and which language left its import doubtful, this was held a right exercise of a discretion which the court possessed in such matter. Law v. Merrils, 6 Wend. 268. Even when proved against a party, they are the weakest of all evidence deemed admissible in law. Per Underwood, J., in Gilmore v. Morgan, 2 J. J. Marsh. 65. Again; admissions, though receivable on questions of boundary, are yet to be taken with some allowance, and are never conclusive. Loose statements should weigh nothing, especially where much time has elapsed from the making of them. Per Peck, J., in Payton's Lessee v. Dixon, Peck, 148, 150. The confessions of a party is a species of evidence, which of all others, should be weighed with the greatest caution, as proof of a mistake in a bond by one of the obligors (on bill filed to rectify) coming from strangers only, and made since the bond, when there is a subscribing witness to the bond, whose evidence might, for anything appearing, be produced, they (the strangers) proving too that the other party understood the contents, especially if there be a discrepancy in their statements as to the confessions. Such evidence cannot overcome the express denial of the answer. Stone v. Ramsay, 4 Monroe, 236, 240, 241. In trover for a negro, a witness, whose credit was impeached on his cross-examination, swore to the defendant's confession, that W. sent off the negro to Texas; the truth of which testimony was essential to make out the case. On a verdict for the plaintiff, a new trial was granted; the court saying the species of confession sworn to, is, in itself, the weakest and most unsatisfactory of all testimony, on account of the facility with which it may be fabricated, and the difficulty of disproving it if false. Allen v. Young, 6 Monroe, 136. And see Snelling v. Utterback, 1 Bibb, 611; and Morris v. Morris, 2 Bibb, 311; and per Underwood, J., in Bernard v. Elpurnoy, 4 J. J. Marsh, 101.

On the other hand, it is said, that though "evidence of confessions is to be received with great caution, yet when made and satisfactorily proved, they are the best species of evidence, better than the direct testimony of one who should testify that he saw the accused set a lighted torch to the building. In the latter case, doubts may arise as to the identity of the person, or the intention with which he did the act, or of the veracity of the witness; but in the case of a voluntary confession by one of sufficient intelligence to know the nature and consequences of his crime, no such doubt can exist." Per Putnam, J., in Commonwealth v. Knapp, 9 Pick. 508, adopting the language of Parker, Ch. J., on Clark's trial for arson.

An admission by a party of what the law is, has no effect, and is never noticed. Polk's Lessee v. Robertson, 1 Tenn. Rep. 463. So of the legal effect of his contract, *e. g.* that his agency under a certain arrangement continued to such a time. A *fortiori* it cannot affect others bound for him, in respect to the agency. Boston Hat Manufactory v. Messinger, 2 Pick. 223. Accordingly, where the complainant applied to the defendant, who admitted the title of the former, which depended on the question whether he had made a good entry within the laws of Kentucky, and on a bill filed, the defendant admitted his former concession, and that he would have abandoned his claim for one dollar, but insisted on a mistake; and in truth it turned out that there was a mistake, the defendant having a good title; the court said a better estate could not be defeated, released or extinguished by a mistake of opinion, or confession of law, or expressions of intention not to prosecute the right. Craig v. Baker, Hard. Rep. 281, 283, 284, 289. So, where a man voluntarily and without consideration agreed in writing to convey land to another, and often admitted that the land belonged to the other. On his filing a bill to compel performance,

these admissions were held for nothing, for the right depended on a question of law, as to which, confessions are not evidence, but only of fact. Leforce v. Robinson, Litt. Sel. Cas. 22, 23. So admissions of a party under a misapprehension of his legal rights do not affect him; as where one admitted payment of a debt for him by another; whereas, that other had merely agreed to pay the debt. So where a mechanic, who made brick for another, admitted that he had no lien on them. Moore v. Hitchcock, 4 Wend. Rep. 292, 298, 299.

Having said so much in general as to the nature and effect of these admissions, I shall proceed to the more practical task of stating several of the cases calculated to illustrate their particular nature and effect, when applied to their legitimate subjects, *facts* and not *law*.

The declarations of an intestate that a contract was made without fraud, are not conclusive against his administrator, in an action on the contract. Duncan v. M'Cullough, 4 Serg. & Rawle, 483. Letters written by a party are evidence against him. Fowle v. Stevenson, 1 John. Cas. 110. Letters addressed by a debtor to two others, one of them acknowledging the favor they had done him by raising the money in question for him, may go to the jury, to say whether they prove a joint contract to pay the money to both or one, and which; but are not conclusive of a contract with the two jointly. Ash et al., Adm'rs v. Patton, 3 Serg. & Rawle, 300. An acknowledgment by a shipmaster by signing a bill of lading, that the articles shipped are in good order, is not conclusive, though it is strong *prima facie* evidence that they were so at the time. But he may show the contrary in an action against him by the consignees for not delivering them in good order. Otherwise, it seems, where the goods are open to inspection, and there is no fraud or imposition. Held, in respect to a case of velvets consigned to the plaintiffs from Liverpool, such cases not being usually opened and inspected by the master. Barrett v. Rogers, 7 Mass. Rep. 297. An admission by the maker of a promissory note, that he signed it, is not conclusive against him. To repel such confession, he may go into proof of his handwriting. Hall et al. v. Huse, 10 Mass. Rep. 39; The Salem Bank v. The Gloucester Bank, 17 Id. 1. Evidence of admissions can be received in respect to boundaries as well as in other cases, but they should be clear and unequivocal to have any effect. Polk's Lessee v. Robertson, 1 Tenn. Rep. 456, 457, and 463. Oral admissions were received to show a tenancy. Andrews' Lessee v. Fleming, 2 Dall. 93. And *vid.* Jackson ex dem. Burr v. Shearman, 6 John. Rep. 19. In an action of dower, the defendant admitted that he held the land in question under one who claimed to hold as devisee, under the will of the man who conveyed the land to the complainant's husband. Held, a recognition of the title under which the demandant's husband claimed. Embree v. Ellis, John. Rep. 119. Original locations of patents made by the proprietors, should have great weight in settling the boundaries. Indeed, where the description in the patent is not precise and certain, such a location should be holden conclusive. Jackson ex dem. Van Slyck v. Vedder, 2 Cain. Rep. 210. A man repeatedly confessing that a girl's mother was free, but detaining the girl as a slave, was held sufficient to establish her freedom, and entitle her to damages against his estate on his death. Pepoon, Guardian of Phebe, v. Clarke, 1 Rep. Const. Court, 137. Where the execution of a will requiring two witnesses is directly sworn to by only one, the declarations of the testator that he had made a will, given in evidence in order to supply the defect of a second witness, must point directly to the paper spoken of by the first witness, or the will cannot be allowed. Reynolds v. Reynolds, 16 Serg. & Rawle, 82. The acknowledgment of the maker of a lost note suffices to prove its execution. Latapie v. Gravier, 8 Mart. Lou. Rep. 316. Though one have a deed conveying negro slaves, yet his admission, made subsequent to the deed, that he did not own them, may be received; and accompanied with a long adverse possession of the negroes (in this case eleven years) by the grantor, will prove the title of the latter; for slaves are a chattel, and may pass without a deed or writing. Bigger's Adm'r v. Alderson, 1 Hen. & Munf. 54, 60. Oral admissions are competent only where the fact admitted is the subject of parol evidence. Thus, a contract with, or receipt to a corporation, naming it, cannot be received to prove the existence of the corporation; for this can be done ordinarily by record only. Welland Canal Co. v. Hathaway, 8 Wend. 480, 484.

Admissions by a father that he had given slaves to his daughter were received as sufficient evidence of a perfect gift, and the word *given* as implying actual delivery, so as to make the gift complete. Hatton v. Banks, 1 Nott & M'Cord, 223 note *b*; Davis v. Davis' Ex'rs, Id. 225. So, that he had given a lottery ticket. Grangiac v. Arden, 10 John. Rep. 283.

(For a further illustration of the doctrine of estoppel, see Copeland v. Copeland, 28 Maine, 525;

of that case might be stated even more broadly than it was there laid down. A party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving.

It has been determined that a bankrupt was not estopped from bringing an action against his assignees, by having given up his lease to his lessors, on the ground that the assignees were not parties or privies to the transaction.(1)

If a party has taken advantage of, or acted voluntarily under, the bankrupt or insolvent laws, he will not be permitted afterwards to dispute their validity, as against parties to the proceedings.

Thus, in Watson v. Wace,(2) which was an action of trespass to try the validity of a commission of bankruptcy issued against the plaintiff, where it was proved by the defendants, that the commission issued against the plaintiff in custody at the suit of the petitioning creditor, who was one of the defendants, and that the plaintiff had afterwards applied to the Court of King's Bench, under the 49 Geo. III, 121, § 14, on the ground that he had become bankrupt, and that his detaining creditor had proved under the commission, it was held, that the plaintiff could not dispute the validity the commission. Abbott, C. J., said that "the estoppel arose by matter of evidence, and the question was, whether a party having availed himself of the commission for one purpose, could afterwards be allowed to assert to the same judges, before whom he took the benefit of the commission, that the commission was invalid. Lord Ellenborough, C. J., gave his opinion to the contrary,(3) and that has never since been questioned.

A petitioning creditor, who has sued out a commission of bankruptcy upon an affidavit stating the fact of bankruptcy, has been held to be afterwards estopped from questioning that fact. And it was said by the court. that those who had treated a party as a bankrupt, should not afterwards be allowed to gainsay their own assertions.(4)

Middlesex Bank v. Butman, 29 Id. 19, 369, 490; Starr v. Anderson, 19 Conn. R. 338; Smith v. Wait, 4 Barb. 28; Averill v. Wilson, 4 Id. 180; Id. 495; 6 Id. 589; Brewster v. Striker, 2 Comst. 19; 5 Denio, 154, 159; 4 Harring. 521; West v. Tilghman, 9 Ired. 163; Davis v. David, 1 Iowa, 427; Van Rensselaer v. Kearney, 11 How. U. S. 297; 20 Conn. 18, 90; 1 Rhode Island, 393; Crocker v. Pierce, 31 Maine, 177; Norton v. Norton, 5 Cush. 524; 7 Gratt. 476; 13 How. U. S. 307; 32 Maine, 127, 305; 4 Cush. 433; Hall v. Fisher, 9 Barb. 17; Id. 500, 615; 9 Geo. 23; 4 Florida, 23; 3 Texas, 93; 10 Humph. 298; 6 Foster (N. H.) 401; 1 Gray, 195; 17 How. U. S. 437; 7 Foster (N. H.) 503; Hooper v. Stewart, 25 Ala. 408, 440.)

(1) Heane v. Rogers, 9 B. & C. 577.

(2) 9 B. & C. 153. And see Id. 586, 587.

(3) In Goldie v. Gunston, 4 Camp. 381.

(4) Ledbetter v. Salt, 4 Bing. 626. And see Groves v. Western Canal Company, 5 M. & S. 76; Harmar v. Davis, 7 Taunt. 577; Like v. Howe, 6 Esp. 20; Clarke v. Clarke, Id. 61; Mercer v. Wise, 3 Esp. 219; Flower v. Herbert, 2 Ves. sen. 326. In Dowden v. Fowle (4 Camp. 38), an

If a person having a right to property, whether real or personal, permit or encourage a purchaser to buy such property of another, the person who has the right is estopped from disputing the title of the purchaser.(1)

In an action for tolls, where a defendant had accounted with the plaintiff, and received credit from him as collector of certain turnpike tolls, though he had not been legally appointed, it was held that, after such an admission of the plaintiff being a person to be accounted with for the tolls, the defendant should not be permitted to dispute his title to recover the balance of the account.(2) The case was compared by Lord Ellenborough, C. J., to that of a tenant disputing his landlord's title.(3) But in another case,(4) the court appear to have considered that accounting and paying to a person, in a particular capacity, was only *prima facie* evidence of his title.

A person who has described himself as a physician cannot afterwards maintain an action for fees as a surgeon.(5) A vendee of goods, who has given to the vendor a bill of exchange in payment, cannot afterwards dispute the reasonableness of the charge.(6)

If a man hold out a woman as his wife, he cannot set up, as a defence to an action for necessaries, that she was not his wife.(7) So if a woman

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admission of a petitioning creditor, who was also assignee of a bankrupt, was used *against* himself and his co-assignees, though it was contrary to his affidavit.

(1) 3 Sug. Vend. & Purch. 428 (10th ed.), cited *per Cur.*, 10 A. & E. 476; Pickard v. Sears, 6 A. & E. 469; Gregg v. Wells, 10 A. & E. 90; Coles v. Bank of England, Id. 437.

The American authorities support the same doctrine. Whitaker v. Williams, 20 Conn. 98; Camp v. Moseley, 2 Florida, 171; Id. 207; Hall v. Fisher, 9 Barb. 17; Whittington v. Wright, 9 Geo. 23; 18 Barb. 435. To operate as an estoppel, the admission or silence of the party must operate as a fraud upon the purchaser, inducing or permitting him to purchase under a false impression, and the party remaining silent or making the admission, must be aware of his rights. Otis v. Sill, 8 Barb. 102; Moncure v. Hanson, 15 Penn. State, 385; Harlan v. Harlan, Id. 507; Taylor v. Zeff, 14 Mis. 482; Danby v. Rector, 5 Eng. 211; Grace v. Mercer, 10 B. Mon. 157; Brace v. Barclay, Id. 261; 7 Barb. 407; Pennell v. Hinman, Id. 644; Dyer v. Cady, 20 Conn. 563; Sullivan v. Parke, 33 Maine, 438; Carpenter v. Stilwell, 12 Barb. 128; Royston v. Howie, 15 Ala. 309; Stevens v. McNamara, 36 Maine, 176. When a third person has acted upon an admission, the party making it in good faith is estopped from denying its truth. Wells v. Pierce, 7 Foster (N. H.) 503; Kingsley v. Vernon, 4 Sand. 361; 3 Hill, 219; 21 Wend. 172.

(2) Peacock v. Harris, 10 East, 106.

(3) See *infra*, p. 467.

(4) Dickenson v. Coward, 1 B. & A. 679.

(5) Lipscombe v. Holmes, 2 Camp. 441. See Veitch v. Russell, 3 Q. B. 928.

(6) Knox v. Walley, 1 Esp. 159; Solomon v. Turner, 1 Stark. R. 51.

(7) Robinson v. Nahon, 1 Camp. 245; Watson v. Threlkeld, 2 Esp. 637; Munro v. De Chemant, 4 Camp. 215. In Batthews v. Galindo (4 Bing. 610,) Burrough, J., stated, that if a party were sued for a debt, contracted by a woman whom he had held out as his wife, he might have shown that she was not his wife (p. 612), but Best, C. J., said he could not accede to that position (p. 614). That case decided that a person holding out a woman as his wife might afterwards call her as a witness; apparently overruling the decision of Lord Kenyon, C. J., in Adey's Case (Leach, 245, cit. 1 Pri. 81), though Park, J., appears to have considered the decisions as reconcilable, inasmuch as, in Adey's Case, the prisoner had called the woman his wife in his address to the jury. See 4 Bing. 612.

So if a wife make representations in respect to her rights of property, inducing others to trust

has deliberately held herself out as married, she cannot afterwards claim goods as her sole property against the assignees of the person for whose wife she had passed herself.(1) But in a late case(2) Coleridge, J., is said to have ruled that a woman who had held herself out to the world as unmarried, and had even declared so to a tradesman, who, upon the faith of that statement, had supplied her with goods, might afterwards, in an action brought against her by the tradesman for the price of the goods, plead and prove that at the time of the contract she was in fact a married woman. It may be doubted, however, whether this decision is reconcilable with sound principle.

In like manner, a person may sometimes be estopped from taking advantage of a misnomer in process; as where he has assumed the name under which he is sued, but which is not really his right name.(3) So if a party gives another reason to believe that he lives out of the jurisdiction of a local court, he will not afterwards be allowed to prove the fact to be otherwise.(4)

Where a person has held himself out as a partner to a particular individual, or under such circumstances of publicity that the individual may be presumed to have acted on the faith of his being a partner, he will be precluded from disputing his liability as a partner.(5) Thus, where a person allows his name to remain in a firm, either exposed to the public over a shop door, or to be used in printed invoices or bills of parcels, or to be published in advertisements, he is estopped from disputing his liability as a partner.(6)

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her husband, she will be bound by them, and estopped from asserting their untruth. Cravens v. Booth, 8 Texas, 243; Yale v. Dederer, 21 Barb. 286; showing that, though she has no power to contract, she nevertheless binds her estate by giving her husband's notes as surety.

(1) Mace v. Cadell, Cowp. 233, cit. by Gaselee, J., 4 Bing. 613.

(2) Glenister v. Thynne (Lady E.), Q. B., E. T. 1847; Tayl. Ev. 565.

(3) Reeves v. Slater, 7 B. & C. 487; Gould v. Barnes, 3 Taunt. 504; Price v. Harwood, 3 Camp. 108; Morgans v. Bridges, 2 Stark. R. 314; S. C., 1 B. & A. 650; Magnay v. Fisher, 5 M. & G. 778. See also by Wightman, J., in R. v. Wooldale, 6 Q. B. 566, citing Maley v. Shepherd, Cro. Jac. 640; Hyckman v. Shotbolt, Dy. 279, b; Williams v. Bryant, 5 M. & W. 447. See *contra*, Coote v. Lighworth, F. Moo. 457; Thurbane's Case, Hardr. 323. cit. 5 M. & G. 787, n. *c.*

The maker of a note is, when sued upon it, estopped from denying that the name of the payee in the note is his true name. Davis v. David, 1 Iowa, 427.

(4) Jefferies v. Watts, 1 N. R. 153. See also Robinson v. Searson, 6 M. & G. 762.

(5) By Parke, J., in Dickinson v. Valpy, 10 B. & C. 140; by Lord Kenyon, C. J., in De Bertram v. Smith, 1 Esp. 31; by Cresswell, J., in Wood v. Argyle (Duke), 6 M. &. G. 932; by Tindal, C. J., in Harrison v. Heathorn, 6 M. & G. 133, 134. See also Kell v. Nainby, 10 B. & C. 20; Guidon v. Robson, 2 Camp. 302. Where a party has admitted a partnership, though he may not have held himself out as a partner to the plaintiff, such admission will be evidence against him, though not conclusive. Ralph v. Harvey, 1 Q. B. 845. See Brookbank v. Anderson, 7 M. & G. 295.

(6) By Tindal, C. J., in Fox v. Clifton, 6 Bing. 794. The knowledge and assent of the partner is essential in such cases. Id.; Newsome v. Coles, 2 Camp. 617. As to parties holding them-

Tenant cannot dispute landlord's title.

On the same principle is founded the rule, that a tenant cannot dispute his landlord's title. Where a tenancy is created by a lease by deed indented, the tenant may be estopped from saying anything repugnant to it, according to the strict law of estoppels as applicable to deeds.(1) Where the lease is not by deed, the tenant, or any person claiming under him,(2) is precluded from objecting to the title of a landlord from whom he has received possession, or to the title of any party claiming under his landlord.(3) Thus, where a tenant, upon being told by a party, that the deceased landlord had devised the premises to him, had paid rent to such devisee, and signed an agreement to hold the premises of him, it was held, in ejectment by the devisee against the tenant, that the defendant could not offer evidence that the devise was void by reason of incapacity in the testator, no ground being shown for imputing fraud to the devisee in the communication made by him to the tenant.(4) Even though a plaintiff, at the trial, in proving his own case, should disclose that he has only an equitable estate, or that he is entitled as co-executor with others who do not join in the action, the tenant who has paid rent to him as landlord, will not be permitted to avail himself of these matters as a ground of defence.(5) So where a tenant has held premises under a corporation, and has paid rent to them, he will not be allowed to contend that there was no demise by deed.(6)

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selves out as members of a provisional committee of a joint stock company, see Reynell v. Lewis, and Wyld v. Hopkins, 15 M. & W. 517. See also Lake v. Argyle (Duke), 6 Q. B. 477.

Whitney v. Sterling, 16 John. R. 40; Davis v. Allen, 3 Comst. 168, 172.

(1) Co. Litt. 47 b; Strowd v. Willis, Cro. Eliz. 362; Brudenell v. Roberts, 2 Wils. 143; Sylivan v. Stradling, Id. 208; Wilkins v. Wingate, 6 T. R. 62; Parker v. Manning, 7 T. R. 537; Blake v. Foster, 8 T. R. 487; Cook v. Loxley, 5 T. R. 4; Brooksby v. Watts, 6 Taunt. 333; Frogmorton v. Scott, 2 East, 467; Hodson v. Sharpe, 10 East, 350. A lease by deed poll is not an estoppel. Co. Litt. 369 b; Bac. Ab. tit. Leases, O. A lease from a *feme covert*, infant, or from the crown, is not an estoppel for want of mutuality. Bac. Ab. tit. Leases, O; Co. Litt. 352; Cro. Eliz. 36; Say. 13; Morgan v. Ambrosa, Peake Ev. 242; B. N. P. 139; 2 Ves. 696; 11 Ves. 344; Palmer v. Ekins, Ld. Raym. 1552; Atkinson v. Pierrepoint, Esp. Dig. 30; Phipps v. Sculthorpe, 1 B. & A. 50; Parry v. House, Holt R. 489.

(2) See Doe d. Knight v. Smythe, 4 M. & S. 347; Taylor v. Needham, 2 Taunt. 278; Doe d. Bullen v. Mills, 2 A. & E. 17; Doe d. Johnson v. Baytup, 3 A. & E. 188; Doe d. Willis v. Birchmore, 9 A. & E. 662.

(3) Doe d. Manton v. Austin, 9 Bing. 45; Doe d. Bristow v. Pegge, 1 T. R. 760, n.; Hull v. Vaughan, 6 Pri. 157; Fleming v. Gooding, 10 Bing. 549; Rennie v. Robinson, 1 Bing. 147; Doe d. Higginbotham v. Barton, 11 A. & E. 307. In like manner a copyholder, who has been admitted and done fealty, cannot dispute the title of the lord. Doe d. Nepean v. Budden, 5 B. & A. 626.

(4) Doe d. Marlow v. Wiggins, 4 Q. B. 367.

(5) Dolby v. Iles, 11 A. & E. 335. See also Francis v. Doe, 4 M. & W. 331.

(6) Stafford (Mayor) v. Till, 4 Bing. 75; Rochester (Dean and Chapter) v. Pierce, 1 Camp. 466. And see Fishmongers' Co. v. Robertson, 5 M. & G. 194.

For authorities that the tenant cannot dispute the landlord's title, see McIntire v. Patton, 9 Humph. 447; Burke v. Hale, 4 Eng. 328; Newman v. Mackin, 13 S. & M. 383; Stokes v.

What does not amount to admission of title.

But a mere attornment without payment of rent, amounting to a bare assent, does not create an estoppel.(1) And payment of rent to another party than him under whom the tenant came originally into possession, may be shown to have been done under a misrepresentation, or under other circumstances not entitling the party to receive it.(2) The tenant is not precluded from showing that his landlord's title is determined either by act of law, or by his own act, or by efflux of time.(3)

Effect of acceptance as an admission.

Upon the same principle, it seems a party accepting a negotiable instrument, and thereby giving an apparent validity to it, is precluded from disputing the handwriting of the drawer, or from otherwise invalidating the instrument;(4) and although he may in general dispute the handwriting of the indorser;(5) yet where the drawer is a fictitious person,(6) the acceptor is bound to pay to the signature of the same person that signed

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McKibbin, 13 Penn. State R. 267; Id. 317; Syme v. Sanders, 4 Strobh. 196; 9 Barb. 615; 2 New Jersey, 261; 12 Ired. 180; 11 Humph. 313; Freeman v. Heath, 13 Ired. 498; may show it terminated; 16 Ala. 552; 16 Eng. Law & Eq. 232; the tenant's right, as tenant, is precisely that of his landlord; 12 Geo. 386; 7 Rich. S. C. 353; may show that he was fraudulently or by mistake induced to take the lease; 20 Penn. (8 Harris), 60.

(1) Shep. Touch. 254; Cornish v. Searell, 8 B. & C. 471; Gravenor v. Woodhouse, 1 Bing. 38; by Buller, J., in Williams v. Bartholomew, 1 B. & P. 326; Doe d. Plevin v. Brown, 7 A. & E. 447.

(2) Rogers v. Pitcher, 6 Taunt. 202; S. C., 1 Marsh. 541; Williams v. Bartholomew, 1 B. & P. 326; Gregory v. Doidge, 3 Bing. 474. And see Gravenor v. Woodhouse, 1 Bing. 38; Claridge v. Mackenzie, 4 M. & G. 152; Cooper v. Blandy, 1 N. C. 49.

(3) England d. Syburn v. Slade, 4 T. R. 682; Doe d. Marriott v. Edwards, 5 B. & Ad. 1065; Doe d. Jackson v. Ramsbottom, 3 M. & S. 516; Doe d. Lowden v. Watson, 2 Stark. R. 230; Blake v. Foster, 8 T. R. 487; Brudenell v. Roberts, 2 Wils. 143; Hill v. Saunders, 2 Bing. 112; S. C., in error, 4 B. & C. 529; Hopcraft v. Keys, 9 Bing. 603; Doe d. Higginbotham v. Barton, 11 A. & E. 307; Downs v. Cooper, 2 Q. B. 256. See also Doe d. Oliver v. Powell, 1 A. & E. 531; Gouldsworth v. Knights, 11 M. & W. 344; Claridge v. Mackenzie, 4 M. & G. 152; Doe d. Strode v. Seaton, 2 C., M. & R. 728.

(4) Sanderson v. Coleman, 4 M. & G. 209.

(5) Macferson v. Thoytes, Pea. R. 20; Bosanquet v. Anderson, 6 Esp. 44; Cooper v. Meyer, 10 B. & C. 471; Beeman v. Duck, 11 M. & W. 251.

(6) Cooper v. Meyer, 10 B. & C. 468; Robinson v. Yarrow, 7 Taunt. 455 (both recognized and explained in Beeman v. Duck, 11 M. & W. 253, 256); Smith v. Chester, 1 T. R. 654; Jenys v. Fawler, 2 Str. 946; Leach v. Buchanan, 4 Esp. 226; Price v. Neale, 3 Burr. 1354; Smith v. Mercer, 6 Taunt. 76. That the acceptance admits the authority of an agent purporting to draw as such, see Porthouse v. Parker, 1 Camp. 82; Robinson v. Yarrow, *ut supra;* Jones v. Turnour, 4 C. & P. 204. That it admits the style of a firm, see Bass v. Clive, 4 M. & S. 13; and the drawer's capacity to draw, see Taylor v. Croker, 4 Esp. 187, cited 2 B. & C. 299; Haly v. Lane, 2 Atk. 182; also the competency of the drawer to indorse, see Drayton v. Dale, 2 B. & C. 293; Pitt v. Chappelow, 8 M. & W. 616; Mackay v. Wood, 7 M. & W. 420. Concerning the admission of indorsements by acceptor or indorser, see further Hankey v. Wilson, Sayer, 223; Sidford v. Chambers, 1 Stark. R. 326; Hemmings v. Robinson, Barnes, 436; Jones v. Radford, 1 Camp. 83; Carrick v. Vicary, Doug. 630; Duncan v. Scott, 1 Camp. 101; Lambert v. Oakes, 1 Ld. Raym. 433; Critchlow v. Parry, 2 Camp. 182; Chaters v. Bell, 4 Esp. 210; Lambert v. Pack, 1 Salk. 127.

for the drawer. In two early cases(1) there was a readiness on the part of the judges to admit evidence of forgery, but subsequent cases have excluded such a line of defence.(2)

Account rendered.

When an agent, who is employed to receive money, and bound by his duty to his principal from time to time to communicate to him whether the money is received or not, renders an account from time to time, containing a statement that the money is received, he is bound by that account, unless he can show that the statement was made unintentionally, or by mistake.(3)

Admission of title.

It is an established rule, that where wharfingers and other bailees acknowledge the title of a person for whom they hold property, it is considered as an attornment, and they are conclusively estopped from disputing such title, whatever may be the claim of a third person, at least if they were fully acquainted with the nature of such claim, when they made the admissions.(4)

In criminal cases.

The rule, that a party is concluded by his deliberate statements, applies equally to criminal cases. Thus, where a prisoner had been married according to the rites of the Roman Catholic church, having stated at the time that he was a Roman Catholic, upon an indictment for bigamy, he was not permitted to show that at that time he was a Protestant, in order to invalidate the marriage.(5)

Admissions (from conduct) generally not conclusive.

But in general, a person's conduct and language have not the effect of operating against him by way of estoppel.(6) Accordingly we have seen,

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(1) Wilkinson v. Lutwidge, 1 Stra. 648; Cooper v. Le Blanc, 2 Stra. 1051.

(2) See by Tindal, C. J., in Sanderson v. Coleman, 4 M. & G. 208, 218.

Canal Bank v. Bank of Albany, 1 Hill, 287; Coggill v. Amer. Ex. Bank, 1 Comst. 113; Bank of Com. v. Union Bank, 3 Comst. 230; Edwards on Bills and Notes, 432, 433, 190.

(3) Shaw v. Picton, 4 B. & C. 729.

(4) Gosling v. Birnie, 7 Bing. 339. The rule is laid down with the limitation in the text by Alderson, B., 7 Bing. 346. But the other judges lay it down in a more unqualified way. See Stonard v. Dunkin, 2 Camp. 344; Harman v. Anderson, Id. 243; Hawes v. Watson, 2 B. & C. 540; Dixon v. Hamond, 2 B. & A. 310; Anon. cit. 3 Esp. 115; Farringdon v. Clerk, 3 Doug. 124; S. C., 2 Chit. R. 429; Holl v. Griffin, 10 Bing. 426; Evans v. Nichol, 3 M. & G. 614. See further Ogle v. Atkinson, 5 Taunt. 759; Hardman v. Willcock, 9 Bing. 382, n.; Betteley v. Reed, 4 Q. B. 511; Scott v. Crawford, 4 M. & G. 1031. And see Story on Bailments, § 102, *et seq.*, where this subject is fully and scientifically discussed.

The bailee may defend himself by showing the goods to have been taken from him by a legal proceeding (Edson v. Weston, 7 Cowen, 278); though he cannot, as a general rule, set up a right of property in a third person. 1 Duer, 79.

(5) R. v. Orgill, 9 C. & P. 80. See also R. v. Hanley, cit. Id. 81, n.

(6) By Chambre, J., in Smith v. Taylor, 1 N. R. 210.

that in the instance in which the party has assumed a particular character, or has recognized a particular character as belonging to another person, his conduct and language have, in general, not been deemed conclusive against him.(1) And admissions generally will be entitled to very little weight, where they appear to have been made under a misapprehension of law or fact.(2)

A person who had given notice to his landlord that he had become bankrupt, in consequence of which his landlord accepted possession of the demised premises, is not estopped from disputing the fact of his bankruptcy, in an action brought by him against his assignees, the assignees not having been parties or privies to the transaction between himself and his landlord.(3) Nor would a person be precluded from disputing a fiat, by surrendering thereto, or by petitioning the chancellor to enlarge the time for surrendering.(4)

Admission on oath.

With respect to the relative credit and weight of admissions which are not conclusive, it may be observed, that the admissions which may be considered as having the greatest force, are those which are delivered on the oath of the party, although they are not necessarily conclusive against him. Thus, it has been held, that a person is not concluded, as to the amount of his property, by an oath taken before commissioners under the Property Tax Acts.(5) A sworn entry at the custom-house in the names of a firm is not conclusive against the person making the entry, except as between him and the crown.(6)

Answers in chancery are very strong evidence, by way of admission, in courts of law.(7) Where a bill was filed by the plaintiff as lessee of the dean and chapter of Carlisle, and the defendant offered in evidence an answer of the dean and chapter in a former suit, in which they admitted the existence of a modus, it was held to be not only admissible, but strong evidence to prove the modus; and an issue having been directed, Bayley,

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(1) *Vide supra.*

(2) See R. v. East Winch, 12 A. & E. 697.

Brewster v. Striker, 2 Comst. 19.

(3) Heane v. Rogers, 9 B. & C. 577; *Supra*, p. 464.

(4) Mercer v. Wise, Esp. 219.

(5) R. v. Clarke, 8 T. R. 220.

(6) Ellis v. Watson, 2 Stark. R. 453.

(7) B. N. P. 236, 237; Sussex (Earl) v. Temple, Ld. Raym. 310; Doe d. Digby v. Steel, 3 Camp. 115, where the statement in the answer was as to *belief;* Dartmouth (Lady) v. Roberts, 16 East, 344; Rumney v. Beale, Gwil. 1861; Gully v. Exeter (Bishop), 5 Bing. 171; Grant v. Jackson, Peake, 203; Studdy v. Sanders, 2 D. & R. 347.

But not for him. His answer to a cross bill shall not be read as evidence for him, though it may be against him, even in the very cause in which it is called for. Phillips v. Thompson, 1 John. Ch. R. 131, 141. Under the present practice, his testimony is admissible for or against himself. See Code of New York.

J., at the trial, laid great stress upon the answer, as being cogent evidence against the defendant in the issue; observing that it was much stronger than if it had been the answer of an individual.(1) It has been seen that an omission by an insolvent of a particular debt in his schedule, to the truth of which he was sworn, will operate as an admission that such a debt was not due at the time.(2) In one case,(3) Lord Ellenborough, C. J., treated such an omission as very slight evidence, and said it was not enough to prove that the amount was not then due, as there was positive evidence that the biil, upon which the action was brought, was accepted by the defendant for a full consideration. But in a later case,(4) Lord Tenterden, C. J., held, that such an omission was conclusive.(5)

Admissions in deeds.

Admissions of a party by deed, under seal, are entitled to great weight, on account of the deliberation implied by the nature of the instrument, if they do not even exclude any contrary statement. Between the parties to the deed, at least, and those who claim under them, they may be pleaded in an action founded upon the deed, by way of estoppel, and, though not so pleaded, would generally, as between such parties, have the effect of an estoppel.(6)

Thus, where a deed of assignment distinctly stated that the consideration money had been paid, it was held conclusive between the parties, although there were pregnant circumstances of suspicion that the consideration was falsely recited, and that the money was not paid.(7) But it seems that even such a statement may be rebutted by evidence of some

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(1) De Whelpdale v. Milburn, 3 Pri. 485.

(2) *Supra*, p. 451.

(3) Hart v. Newman, 3 Camp. 13.

(4) Nicholls v. Downes, 1 Mo. & R. 13.

(5) See, also, Thomas v. White, 1 T. & G. 110; Hurd v. Foster, 9 D. P. C. 922.

(6) See Com. Dig. tit. Estoppel, B; Fort v. Clarke, 1 Russ. 604.

(7) Rowntree v. Jacob, 2 Taunt. 141. It seems that if any imposition had been practiced in obtaining such a deed the relief would be in equity. Dict. arg. Id. 143. See, also, Shelley v. Wright, Willes, 9; Cossens v. Cossens, Id. 25; Lampon v. Corke, 5 B. & A. 606; Baker v. Dewey, 1 B. & C. 704; Hill v. Manchester Waterworks Co., 2 B. & Ad. 544. See Deverell v. Whitmarsh, 5 Jur. 963, *infra*.

The same has been held in New York in regard to the consideration of a mortgage. Gilliland v. Failing, 5 Denio, 308. Fraud in the consideration may be inquired into in a proper action (Rogers v. Colt, 1 New Jer. 704; Stayton v. Morris, 4 Harring. 357); if obtained by fraud the deed is void. Jackson v. Summerville, 13 Penn. State Rep. 359. The recital in a deed, showing payment of the consideration, is *prima facie* evidence of the fact, but does not prevent the introduction of other proof showing that nothing was paid. White v. Miller, 22 Vt. 380; Glen v. Grover, 3 Md. 212; Spalding v. Brent, 3 Md. Ch. Decis. 411; Wooden v. Shotwell, 3 Zabr. 465; Ayers v. McConnell, 15 Ill. 230.

The object of an assignment may be shown by parol (Allen v. Hudson River M. Ins. Co., 19 Barb. 442); by creditors, or in support of the claim of creditors, it may be shown to have been intended as a mortgage. Tyler v. Strang, 21 Id. 198.

given and received as money at the executing of the instrument, and was dishonored on presentment.(1)

It has been laid down in general terms—apparently without sufficiently adverting to the circumstance of the deed being used by a party to it, or to the fact of its being pleaded by way of estoppel or not—that a party who executes a deed is precluded from saying that the facts stated in the deed are not truly stated.(2) But it seems that a party to a deed may contradict it, in an action between himself and a stranger to it; in such a case it cannot be pleaded by way of estoppel, for there can be no estoppel, as there is no mutuality.(3)

Where a deed is used as an admission against a party to it by a person who is not a party, it seems material to consider that an admission of a fact, not made upon oath, may have been entered into between persons from various causes, besides that of a conviction of the truth of the facts contained in it. The evidence may have been of a conventional nature merely(4).

So, a party to an instrument is not estopped, in an action by the other party not founded on the deed, and wholly collateral to it, from disputing the facts admitted in the deed.(5)

Even as between parties to a deed, also, an averment, which is mere matter of description, and not essential, will not be conclusive;(6) such, for example, as the place where the deed was executed,(7) the nature of the land demised, and the like.(8)

In general, mere matter of recital is not conclusive as an estoppel,(9) especially where it is not expressly pleaded by way of estoppel.(10) Thus, where a plea contained new matter of justification, upon which issue was joined, and a deed was given in evidence, the recital of which directly contradicted the new matter alleged in the plea, it was held, nevertheless, that the defendant was not precluded from submitting matter of defence to the jury, and that the recital in the deed ought not to have been treated as conclusive upon the trial of the issue, the recital not having been pleaded by way of estoppel.(11)

But if a distinct statement of a particular fact is made in the recital of subsequent and distinct circumstance; as, for instance, if a check was

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(1) Deverell v. Whitmarsh, 5 Jur. 963, C. P.

(2) By Bayley, J., in Baker v. Dewey, 1 B. & C. 707.

(3) Co. Litt. 352 a, 363 b; Com. Dig. tit. Estoppel C. And see Doe d. Marchant v. Errington, 6 N. C. 79; Gaunt v. Wainman, 3 N. C. 69.

(4) Slaney v. Wade, 1 Myl. & Cr. 338. And see R. v. Scammonden, 3 T. R. 474; R. v. Laindon, 8 T. R. 179.

(5) By Parke, B., in giving the judgment of the court, in Carpenter v. Buller, 8 M. & W. 213.

(6) Com. Dig. tit. Estoppel E, 6.

(7) 1 Rol. 864, l. 25.

(8) See further Doddington's Case, 2 Rep. 33; Skipworth v. Green, 1 Stra. 610.

(9) Co. Litt. 352 b; Com. Dig. tit Estoppel E, 4.

(10) See 2 Smith Lea. Ca. 443.

(11) Bowman v. Rostron, 2 A. & E. 295.

an instrument, whether under seal or not, and a contract is made with reference to that recital, as between the parties to that instrument, and in an action upon it, it is not competent to the party bound to deny the recital.(1) Thus where, in a bond to secure the payment of rent under a lease, it was stated that the lease was at a rent of £170, it was held that the defendant was estopped from pleading that it was £140 only, and that such amount had been paid.(2)

Such a material recital will also be binding upon privies in estate. Thus, in a late case, A., by deed, reciting that he was seized in fee, mortgaged to B. in fee. Indorsed on this deed was a memorandum, signed by C., "that by an indenture of surcharge, bearing date, &c., the within premises were charged by me, *the purchaser of the equity of redemption thereof*, with the payment of the further sum of," &c., it was held,(3) that this amounted to an admission by C. that he came in under A., and that he was therefore bound by the recital that bound A.

A recital in a deed will, however, be *prima facie* evidence against a party to it, on behalf of a stranger, as an admission. Thus, it has been held, in an action of trespass against a sheriff for taking the property of the plaintiff, that the plaintiff may give in evidence a deed executed by the sheriff to a purchaser of the property, reciting the writ and the seizure and sale of the property under it, and that the deed so produced is *prima facie* evidence of the facts recited in it.(4)

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(1) By Parke, B., in giving the judgment of the court, in Carpenter v. Buller, 8 M. & W. 212.

(2) Lainson v. Tremore, 2 A. & E. 295, cit. by Parke, B., *ut supra*. For other instances where recitals have been held conclusive, see Shelley v. Wright, Willes, 9; Hill v. Manchester Waterworks Co., 2 B. & Ad. 544; Bowman v. Taylor, 2 A. & E. 278; R. v. Stamper, 1 Q. B. 123; Pargeter v. Harris, 7 Q. B. 708; Bringloe v. Goodson, 5 N. C. 739.

(3) Doe d. Gaisford v. Stone, 3 C. B. 176.

(4) Woodward v. Larking, 3 Esp. 286. See, also, Carlisle (Mayor) v. Blamire, 8 East, 493; R. v. Neville, Peake R. 91.

NOTE 130.—The use of recitals in proof of pedigree has been already noticed.

It is proper, perhaps, to notice here an important distinction which prevails between the English and American authorities, as to the force and effect of the recital of one deed in another. In England, where the party to one deed thus recites another, such recital is, according to our author, merely secondary evidence of the recited deed, as where the latter is lost, or the subscribing witness cannot be produced, or where it cannot be established by the usual primary evidence. In such case, the recital comes in like the oral admission of the party, or other secondary evidence. This will be seen by the authorities cited in the text; and it is not once suggested that it may be received as proof of a primary character. Whereas, in the United States, the courts require no higher proof than the recital itself, though the recited deed and the subscribing witness be both in court. This has been expressly held, not only by the Supreme Court of the United States, but by several of the state courts, not only as against the party reciting, but against all claiming under him, as privies in blood, privies in estate, or privies in law. Carver v. Jackson ex dem. Astor, 4 Pet. Rep. 1, 82, 83; Crane v. Morris's Lessee, 6 Id. 598, 611; Den ex dem. West v. Pine, 4 Wash. C. C. Rep. 691; Jackson ex dem. Teed v. Halsted, 5 Cowen's Rep. 216; Penrose v. Griffith, 4 Binn. 231; per Mills, J., in Mitchell v. Maupin, 3 Monroe, 186, 187; Bibb v. Pickett, Litt. Sel. Cas. 309, 312, 313; Kentucky Bank v. Vance's Adm'rs, 4 Litt. Rep. 172, 173. And such recital contained in a bond, is evidence equally high even against the

Admissions in writings not under seal.

After admissions under oath and by deed, those next in order, with regard to credit and importance, are admissions by writing not under seal.

A written receipt for money is an admission of great weight against a party, but not conclusive; and there is no legal objection to his showing, if he can, that the money was not received, or that he gave the receipt under a misrepresentation.(1) A receipt upon a negotiable instrument may be explained in the same manner.(2) An indorsement on a deed of the receipt of sums of money, not being under seal, cannot amount to an estoppel, and is only evidence for a jury, capable of being rebutted by other circumstances in the case.(3)

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obligee, and all claiming under him. Jackson ex dem. Loop v. Harrington, 9 Cowen's Rep. 86. But in such case, the bond must be traced to the possession of the obligee. Jackson ex dem. Bradt v. Brooks, 8 Wend. 426, 433. And this class of recitals are recited as primary proof of other instruments, even of records; a *ca. sa.* for instance. Ransom v. Keyes, 9 Cowen, 128. (See Jackson v. Brooks, 8 Wend. 426; S. C., 15 Id. 11; and Forman v. Stebbins, 4 Hill, 181, to the same effect. It is clear, from recent decisions noticed in the present edition, that the English doctrine is the same in substance as the American. The recital is evidence of the facts recited, though not conclusive, so as to shut out proof of fraud or mistake. Evans v. Edmonds, 24 Eng. Law & Eq. 227.) Whether what is stated by a party in a paper delivered by him as an escrow, shall be received as an admission? *Quere.* Lansing v. Gaine, 2 John. Rep. 300, 306, per Kent, C. J.)

(1) Stratton v. Rastal, 2 T. R. 366; Att. Gen. v. Randal, 2 Eq. Ca. Ab., cited and approved of, 2 T. R. 369; Bauerman v. Radenius, 7 T. R. 663; Skaife v. Jackson, 3 B. & C. 421; Farrar v. Hutchinson, 9 A. & E. 641; Wallace v. Kelsall, 7 M. & W. 273; Wyatt v. Hertford (Marq.), 3 East, 146; Fairmaner v. Budd, 7 Bing. 574. In Alner v. George (1 Camp. 392), Lord Ellenborough, C. J., says, there can be no doubt that *a receipt in full*, where the person who gave it was under no misapprehension, and can complain of no fraud or imposition, is binding upon him. See, also, Bristow v. Eastman, 1 Esp. 173; S. C., Peake, 223. But a receipt in full, obtained by fraud or misrepresentation, is not binding. Benson v. Bennett, 1 Camp. 394, n. If a man give a receipt for the last rent, the former is presumed to be paid. Gilb. Ev. 142.

(2) Graves v. Key, 3 B. & Ad. 318; Scholey v. Walsby, 1 Peake, 34.

(3) By Holroyd, J., in Lampon v. Corke, 5 B. & A. 611. See also by Best, J., Id. 612. As to a statement of the receipt of money, contained in the body of a deed, see *supra*, p. 471.

NOTE 131.—Stackpole v. Arnold, 11 Mass. Rep. 27, 32; Peddicord v. Hill, 4 Monroe, 373. The general doctrine of the text that a mere receipt is inconclusive, has been followed by the American courts without exception, though it will hereafter be seen that they have differed in its application to the clause of receipt and acquittance in deeds. It is usually considered as a mere admission not acted upon. Like all admissions, it is of course liable to be set aside, vacated or disregarded for fraud, duress, or improper practices, as has been often done in favor of sailors by the courts of admiralty. Thus, in answer to a libel for seaman's wages in the admiralty, a receipt in full of all debts, dues and demands was produced. The judge said such receipts were frequently taken, where quarrels had arisen at sea, to repel prosecutions; and seamen were denied their wages often until they signed such receipts. This is illegal; and no such terms ought to be insisted on. Receipts are only *prima facie* evidence, and may be examined into. Thorne v. White, 1 Adm. Dec. 128; Jackson v. White, Id. 179, S. P. Again, where there is fraud, duress, misconception or mistake in either party, or any improper practices appear in obtaining a receipt, the whole subject of the receipt is opened and inquirable into. Jackson v. White, 1 Admr. Dec. 179. But where, after having had full time to deliberate and take counsel, sailors received their wages, deducting those for certain days of absence from the ship, and then gave a receipt in full, held, that it bound them. The judge said: "Where seamen have been

hurried into unjust compliances, by fraud, deception, threats, or improper conduct, palpably imposing upon, deceiving, overawing or misleading them, I have disregarded receipts for full payment. But discharges given with due deliberation, and full explanation of circumstances, should not be set aside on light grounds." Whiteman et al. v. The Neptune, 1 Admr. Dec. 180. Yet, seamen receiving only half their wages, under advice that they were entitled to no more, the Court of Admiralty being of opinion they were entitled to full wages, disregarded the receipt. The judge said that a receipt, like a settled account, is only *prima facie* evidence of what it purports to be; and if shown to be obtained by fraud or under a mistake of facts, or in ignorance of legal rights, it may be corrected in a court of law or equity. Thompson v. Faussat, 1 Peter's C. C. Rep. 182. He added a remark equally applicable to all the business transactions of life, that if the legal rights of a party are doubtful, honestly contested, and opportunity given to satisfy himself in relation to them, a receipt given by him for less than he is legally entitled to, will not be set aside. Id.

Receipts are not only impeachable for fraud, but any mistake may be shown, and so may any erroneous or false statement in them, though designed by the parties. In a word, they may always be contradicted, varied or explained by oral testimony, as will abundantly appear by the cases.

With regard to the common receipt in full of all demands, though it shall not be taken as conclusive, yet the natural presumption is in its favor, and shall prevail until it is displaced by direct proof or strong circumstances. Per Story, J., in Harden v. Gordon, 2 Mason, 561. It will be seen by the cases that it is the same with a receipt in full of any particular demand. Thus, in assumpsit for goods, the defendant showed a receipt in full for them, and insisted it should be conclusive: but the plaintiff was allowed to do it away, by showing that the payment for the goods was in unavailable securities, represented by the defendant to be good, and that he said he would stand accountable for the deficiency. Held well, by the Court of Appeals. Trisler v. Williamson, 4 Har. & M'Hen. 219. Again, the plaintiff took a note of $1,177 from the defendant, with an indorser, and gave a receipt as for so much money in full of his judgment. There was no express agreement that the note should be a satisfaction. The note when due was protested for non-payment; and the plaintiff sued out execution. On motion to set it aside, held, that the receipt was only *evidence* of payment, and might be explained by parol or other evidence. The note was neither paid nor received as satisfaction. To constitute a good plea of accord and satisfaction, both should be averred. The note proved unproductive, and the execution was right. To make the note a satisfaction it should have been received as such, and the party agree to run all risks. Maze v. Miller, 1 Wash. C. C. Rep. 328. So a receipted account was allowed to be contradicted, and proof received that no money was in truth paid. Burnap v. Partridge, 3 Verm. Rep. 144. And a receipt given on a settlement is not conclusive, nor does it preclude evidence to show a mistake in the settlement. Wright v. Wright, 2 M'Cord's Ch. Rep. 192, 205. So, a receipt in full of all demands was allowed to be contradicted, and shown by parol to have been intended for an unliquidated claim, leaving a balance struck still due. Ensign v. Webster, 1 John. Cas. 145. So, that it was agreed by the parties at the time not to be effectual till a certain condition should be performed; and that it was not performed. House v. Low, 2 John. Rep. 378. So, in assumpsit for medicine and services as a physician, the defendant gave in evidence the plaintiff's receipt of $53.96, "it being in full of all demands" against the defendant's intestate. The plaintiff was allowed to prove that the defendant had given him a note instead of the money, and that this was what the receipt meant; and on producing and canceling the note on the trial, he had a verdict. Putnam v. Lewis, 8 John. Rep. 389. So, where the plaintiff gave a receipt in full for goods sold, yet he was allowed to show that the defendant had made the payment by an order payable on the return of his vessel, which had not returned and was much out of time; and held, that this would invalidate the receipt, unless the defendant proved that the plaintiff was to take the risk of the return. Tucker v. Maxwell, 11 Mass. Rep. 143. So a bill of goods, with a receipt in full at the bottom, was met by showing that the plaintiff had received for the goods a note of a third person from the defendant instead of the money, under circumstances which did not operate as payment, the note having proved unavailable. Johnson v. Weed, 9 John. Rep. 310.

A receipt in full, on payment of part to a public agent, of a debt due to a creditor of the

government, though there be no fraud, is not conclusive. Slaughter v. Hamm, 2 Ham. Ohio Rep. 271, 275.

But though a receipt in full even of a settled account be not conclusive, yet to avoid it, it is not enough merely to show that the items in the account are charged below the standard price. Mistake of fact, or the legal rights of the party, or fraud should appear. Lawrence v. The Schuylkill Nav. Co., 4 Wash. C. C. Rep. 562.

Other receipts of a more specific character stand on the same ground with receipts in full. In an action for rent, the defendant gave in evidence receipts by the plaintiff indorsed on the lease for so much cash, "163 dollars on account of the within lease, and in full for the second and third quarters' rent." The plaintiff was allowed to prove that the sum of $115.68, part of the $163, was in truth the note of C., payable at the bank, called money by the receipt, but not paid, C. having become insolvent. Tobey v. Barber, 5 John. Rep. 68. Again; the plaintiff, surety for J. on a bond, paid the debt, and took J.'s note for the money including usury, and gave J. a receipt for so much money as his share paid on the bond. J. avoided the note for the usury, but held that he was liable for the original money paid; and the receipt was explainable, and did not conclude the plaintiff in an action against J. Johnson v. Johnson, 11 Mass. Rep. 359. So, a receipt by the solicitor of a mortgage, of $3,930.90, from a third person, a junior incumbrancer, under a negotiation concerning a redemption or assignment of the mortgage, was explained (for it is entirely open as to the purpose for which the money was received) to mean a payment in satisfaction, or with a view to buy the mortgage and take an assignment, or as a mere deposit. The Court of Errors in this case fully recognized the doctrine that a simple receipt may be explained or contradicted by parol, citing the former cases on this question. Monell v. Lawrence, 12 John. Rep. 521. So, a receipt for so much money, by a sheriff on an execution, may be explained by showing that certain agreements and arrangements made between the parties were the basis of the receipt, and considered as equivalent to money, and the indorsement made in order to effectuate the arrangement. Caldwells v. Harlan, 3 Monroe, 349, 350, 351. And see Davis v. Hall, 4 Monroe, 27; Peddicord v. Hill, 4 Monroe, 373; and Williams v. Cummins, 6 Monroe, 157.

D. & V., two trustees of K., sold lands, and V. received the purchase money for the use of K., both trustees giving a receipt for it. In assumpsit for money had and received by K.'s administrators against D., held that D. might show the fact though this contradicted the receipt, and so defeat the claim against him. Kip v. Denniston, 4 John. Rep. 23. *Quere*, unless the administrators were fully undeceived before suit brought?

In an action for goods sold, the plaintiff gave in evidence the defendant's receipt of "fifty barrels of provisions, for account of" the plaintiff. The defendant was allowed to prove that the provisions were in truth left to sell, and be applied on a debt due from the plaintiff to the defendant as executor of B. M'Kinstry v. Pearsall, 3 John. Rep. 319. It should be noted that this receipt was in truth a written contract, and so it is treated by the court. They say it is equivocal, "for account" might mean for a debt, or on commission, or it might import a sale; and they rather bring it within the class of written contracts which, being doubtful on their face, may therefore be explained by parol.

A distinction should, of course, be made between a mere receipt acknowledging money paid, and a receipt containing an agreement, condition or stipulation between the parties. The latter is in the nature of a contract, and its stipulations or conditions cannot be varied by parol. Thus, where the parties to a charter party settled, and the owner gave a paper acknowledging to have received a certain sum from the charterer in full for the use of the ship supposed to be lost; and declaring the conditions on which more was to be paid. Held, that oral evidence was inadmissible in an action against the latter, to show a smaller sum paid than had really become due before the ship was lost, and so to vary the conditions. Smith v. Brown, 3 Hawks, 580. So a bill of lading though it include a receipt, is not within the rule that a receipt may be explained or contradicted by parol, as to the course which the vessel is to take; and whether the part acknowledging the receipt of the goods be within the rule. *Quere*. May v. Babcock, 4 Ham. Ohio Rep. 334. And any contract acknowledging a consideration stands on the same footing. The acknowledgment cannot be questioned, for the purpose of defeating the contract, unless there be mistake or fraud. Allen v. Luckett, 3 J. J. Marsh. 164, 166, 167.

This doctrine is farther illustrated in the instance of deeds, *infra*, where it will be seen that

though the clause of receipt and acquittance may be inquired into, when the consideration is directly in question, yet this shall not in general be done for the purpose of changing the legal effect of the instrument in the creation or modification of the estate. This distinction was incidentally noticed in M'Kinstry v. Pearsall, *supra.*

It has been often held that the usual clause in a deed of land or other property, acknowledging the receipt and declaring an acquittance of the consideration money, even though it be followed by a receipt of the same money indorsed on the deed, is not only inconclusive in an action of covenant, assumpsit, &c., for the purchase money, or any part of it, but some of the cases say it is evidence of the lowest kind; that this is a mere formal part of the deed, and such receipts on the back of the deed are given every day, when perhaps nine times out of ten there is not a shilling paid. They are, however, *prima facie* evidence of payment, and conclude unless contradicted. Oneale v. Lodge, 3 Har. & M'Hen. 433; Hamilton v. M'Guire's Executors, 3 Serg. & Rawle, 355; Jordan v. Cooper, 3 Serg. & Rawle, 564, 570; Weigley's Adm'rs v. Weir, 7 Serg. & Rawle, 309; Wilkinson v. Scott, 17 Mass. Rep. 259; Shephard v. Little, 14 John. Rep. 210; Bowen v. Bell, 20 John. Rep. 338; Pritchard v. Brown, 4 N. H. Rep. 397; Morse v. Shattuck, 4 N. H. Rep. 229; Hutchinson's Adm'r and Heirs v. Sinclair, 7 Monroe, 291, 293; Gully v. Grubbs, 1 J. J. Marsh. 388, 389, 390. So the amount may be questioned in an action on the covenant of seizin; and the true consideration shown by parol. Morse v. Shattuck, 4 N. H. Rep. 229; Gully v. Grubbs, 1 J. J. Marsh. 388, 389. But directly the contrary is holden in North Carolina, viz: that such an acknowledgment is conclusive, and operates by way of release, whether in a deed of real or personal property. Brocket v. Foscue, 1 Ruffin, 54; S. C., 1 Hawks, 64; Spiers v. Clay's Adm'rs, 4 Hawks, 22; Graves v. Carter, 2 Hawks, 576. But a mistake as to the amount is a valid consideration for a promise to make up the residue, in an action on which the whole circumstances may be inquired into. Smith v. Amis' Ex'r, 3 Hawks, 469. So in Maryland, the above clause of receipt and acquittance in a deed is conclusive between the original parties. Dixon v. Swiggett, 1 Har. & John. 252, overruling Oneale v. Lodge, *supra.* So in Maine. Steele v. Adams, 1 Greenl. Rep. 1; Emery v. Chase, 5 Greenl. Rep. 232.

And even where this receipt may be questioned in an action for the purchase money, or on the covenants in the deed, it cannot, nor can any other fact stated or recited in the deed be inquired into for the purpose of defeating the conveyance, either in vesting or extinguishing a right, or in any way altering the effect of the deed in other particulars beside the mere receipt (Morse v. Shattuck, 4 N. H. Rep. 229; Gully v. Grubbs, 1 J. J. Marsh. 388, 389, 390); though the inquiry is admissible for the purpose of creating a resulting trust. Pritchard v. Brown, 4 N. H. Rep. 397. To this last, the authorities are numerous, but need not be cited. It more properly comes under the head of a well-known exception in the Statute of Frauds.

But where the deed acknowledged a pecuniary payment of $1,100, in the usual form, in full, and the plaintiff (one of the grantors) brought his action for the whole consideration money, on the ground that he and his wife had conveyed the land to the defendant, with the parol understanding and trust that he should convey to the wife, which he had refused to do, held, that the action would not lie; though nothing had in truth been paid. The ground of decision is not stated. It probably proceeded on the form of the action. Griswold v. Messenger, 6 Pick. 517. Here was clearly a resulting use, upon which ejectment would lie, under the Statute of Uses, and before that statute chancery would have relieved.

Though a promissory note express to be for value received, or contain any other acknowledgment of consideration, yet parol evidence is admissible between the original parties, to prove that in fact there was no consideration. Mills v. Wyman, 3 Pick. 207; Hill v. Buckminster, 5 Pick. 391; Amherst Academy v. Cowls, 6 Pick. 427. So of the acknowledgment of the receipt of the premium in a policy of insurance. Millick v. Peterson, 2 Wash. C. C. Rep. 31. This premium may be shown to have been a note given, which was unpaid. Id.

The usual acknowledgment by the grantor in the deed conveying the equity of redemption in land, the mortgage not being registered, that the purchase money is paid, is at law, *prima facie* evidence of actual payment, not only against the grantor but also as against the mortgagee, and in favor of the grantee without notice of the mortgage, and all claiming under him. But it would be otherwise in equity, on a bill filed by the mortgagee to set aside the conveyance of the equity of redemption as fraudulent. The vendee or person claiming under him, must then set up actual

An adjustment of a loss on a policy, though *prima facie* evidence against a person signing it, does not bind him, unless there was a full disclosure of the circumstances of the case.(1) In cases of fraud, or where the underwriter is mistaken in the law or in a material fact, the adjustment has been held not to be conclusive.(2)

An inventory, exhibited by an executor for the purpose of obtaining probate in the Ecclesiastical Court, seems not to be, in general, presumptive evidence of his having received assets;(3) and a probate stamp seems not to be *prima facie* evidence of the receipt of assets to the amount covered by the stamp.(4)

It has been held,(5) that it was competent to show a mistake in an invoice as to the time of credit, though it was in the same case considered that, if it had been delivered with the goods, or under a judge's order, the party would have been bound by it.

A bill delivered by an attorney to his client, for business done during a certain period, is strong presumptive evidence against any additional item within the same period; but the bill is not like a deed to operate as an estoppel, and the party will be at liberty to prove the fact of having transacted other business for the defendant.(6)

A parish certificate is conclusive upon the parish granting it, with respect to that parish to which it is granted, and *prima facie* evidence with respect to other parishes.(7)

A bill in chancery is not evidence of the truth of any fact stated in it as against the party in whose name it is filed, even though his privity be

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payment by the vendee before notice of the mortgage, and prove it, independent of the acknowledgment of the deed. Jackson ex dem. Rounds v. M'Chesney, 7 Cowen's Rep. 360.

One conveys land as attorney for another, and the deed contains the usual acknowledgment that the consideration money is paid. In an action for the money by the principal, against the attorney, the deed is *prima facie* evidence that the money was received by the latter, for the use of the former. Thallhimer v. Brinckerhoof, 6 Cowen's Rep. 90, 102.

(1) Rayner v. Hall, 4 Taunt. 725; Shepherd v. Chewter, 1 Camp. 274. And see the note by the learned reporter, p. 276. Adams v. Sanders, M. & M. 373.

(2) Christian v. Coombe, 2 Esp. 489. In the absence of invalidating circumstances, adjustments have been spoken of by the judges as conclusive; by which, it is conceived, is only meant that such would be the natural effect of the evidence upon the minds of a jury.

(3) Stearn v. Mills, 4 B. & Ad. 657. But see Hickey v. Hayter, 1 Esp. 313; S. C., 6 T. R. 384.

(4) Mann v. Lang, 3 A. & E. 699. By Littledale, J., and Parke, J., in Stearn v. Mills (4 B. & Ad. 657), where it was said that Foster v. Blakelock (5 B. & C. 328), where the contrary was held, had not been much considered as to this point. See Curtis v. Hunt, 1 C. & P. 180.

(5) Bacon v. Chesney, 1 Stark. R. 192. See also Dawson v. Remnant, 6 Esp. 24.

(6) Loveridge v. Botham, 1 B. & P. 49.

NOTE 132.—A bill of parcels on sale note, delivered by the vendor, stating the goods as bought of the *vendor and another*, is not conclusive evidence against the vendor that the goods were joint property; but the real circumstances may be explained by parol. Harris v. Johnson, 3 Cranch, 311.

(7) R. v. Lubbenham, 4 T. R. 251. A certificate has been said to be weighty evidence as to other parishes. See by Buller, J., Id., citing the words of Lord Holt.

shown, the allegations therein being taken merely as the suggestions of counsel; it is admissible only to prove that a suit was instituted, and what was the subject matter of it.(1) In the Banbury Peerage Case,(2) a question was proposed to the judges, "whether a bill in chancery can ever be received as evidence, in a court of law, to prove any facts either alleged or denied in such bill as filed in chancery;" to which the judges answered that, "generally speaking, a bill in chancery cannot be received as evidence, in a court of law, to prove any fact either alleged or denied in such bill as filed. But whether any possible case may be put, which would form an exception to such general rule, they cannot undertake to say." It will be observed, that the answer of the judges does not pointedly negative the admissibility of a bill in chancery when produced by way of an admission; and there are authorities in favor of such evidence being received.(3) The investigation of truth would probably be best promoted by receiving the evidence, subject to such observations as might be called for in regard to the usual manner in which bills of chancery are prepared.

Verbal admissions.

With respect to verbal admissions, it may be observed that they ought to be received with a great deal of caution. It may be a correct principle, that the statement of a person to the prejudice of his own interest, is so far entitled as to be admissible in evidence against him. Still, the repetition of oral statements is always subject to great imperfections. The party from whom they proceed may have been misinformed, or may not have correctly expressed his meaning, or he may have spoken lightly, and without consideration; even his meaning, if correctly expressed, may have been misunderstood, or a slight alteration of the words, without any design of intentional misrepresentation, may entirely vary the effect of his statement;(4) where, however, such admissions are deliberately made and satisfactorily established, they are of course very strong evidence against the party making them.(5)

Admissions must, in all cases, be brought home to the party in a suit, against whom they are used, or to some person who is identified in interest

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(1) Boileau v. Rutlin, 2 Exch. R. 665. And see by Lord Kenyon, C. J., in Doe d. Bowerman v. Sybourn, 7 T. R. 3; by Tindal, C. J., in Roe d. Trimleston (Lord) v. Kemmis, 9 Cl. & Fin. 749.

(2) Le Marchant's Gardiner Peerage, App. 413; S. C., 2 Selw. N. P. 714. And see Ferrers v. Shirley, Fitzg. 197; 1 Wightw. 325; Woollett v. Roberts, 1 Ch. Ca. 64.

(3) B. N. P. 235; Snow v. Philips, 1 Sid. 221; Taylor v. Cole, 7 T. R. 3, n.

(4) See by Parke, J., in note to Earle v. Picken, 5 C. & P. 542; by Lord Ellenborough, C. J., in R. v. Whitley Lower, 1 M. & S. 637; by Alderson, B., in R. v. Simons, 6 C. & P. 540. On the effect of admissions in the Ecclesiastical Courts, see by Lord Stowell, in Williams v. Williams, 1 Hagg. 304.

(5) See Rigg v. Curgenvew, 2 Wils. 395 399.

with him; and it is not a sufficient ground for receiving the admission, that it might have been used to the prejudice of the person from whom it proceeds. Thus, in an action of trover, brought to recover the value of goods distrained, on the ground that the defendant was not the plaintiff's landlord, the plaintiff's case was, that he had paid rent to another person, and it was held that the statement of that person, respecting the receipt of rent, was not evidence without calling him.(1)

Admissions are clearly evidence against a party to the record who has made them. But some questions have arisen as to what persons are to be deemed parties; the circumstance giving rise to these questions, being, when one person is named a party on the record, who is only nominally a party, while another is the person really interested. On this subject, it has been held, that admissions are evidence in favor of the other side, whether made by a nominal party on the record, who sues as a trustee for the benefit of another, or whether made by the party who is really interested in the suit, though not named on the record.(2) The following examples will illustrate the several parts of this rule.

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(1) Spargo v. Brown, 9 B. & C. 935. See Bernasconi v. Farebrother, 3 B. & Ad. 372; and by Holroyd, J., in Barough v. White, 4 B. & C. 325; by Littledale, J., Id. 328; Phillips v. Cole, 10 A. & E. 106.

(2) An attorney conducting a cause in court may be called as a witness by the opposite side, and be asked who employs him, in order to show the real party, and so let in his declarations. Levy v. Pope, M. & M. 410.

NOTE 133.—This position, that a naked trustee, that is, a nominal party, because he is on the record as plaintiff, may confess away the rights of his *cestui que trust*, or the person for whose benefit he sues, must, at this day, be taken with considerable qualification, in some of the American courts. The case of Bauerman v. Radenius (7 T. R. 659, 664), cited by the learned author, was, for aught that appears, an admission made by the nominal plaintiffs, before the defendant had the least intimation that the claim was for the benefit of others. In Craib et ux. v. D'Æth (Id. 666, note *b* to Bauerman v. Radenius), the same court which decided the latter case, went the same length. They received the sworn admission of the nominal plaintiff, an assignor of the bond in suit, made after he had assigned it, in favor of the defendant. The issue was upon the question whether there was an assignment or not, and whether the defendant had not notice of such assignment, and whether he had not obtained the release in fraud of the assignee who brought the suit. The affidavit of the nominal plaintiff sustained the issue for the defendant; and he had a verdict. It does not appear from the case that an assignment for value, and *notice thereof* to the defendant, before the affidavit was made, were proved at the trial, anterior to its production, nor indeed at any stage of the trial. The language of the court is broad in both cases; that the confessions of a plaintiff on the record are to be received. Yet the pleadings in the last case seem to admit, that even the release of the plaintiff would have been void, if the assignment had been *bona fide*, and the defendant took it with notice. Its validity was put on this question at the trial; and to this the affidavit related. In a previous case (Payne v. Rogers, Dougl. 407), the landlord sued in the name of his tenant, for an encroachment on his common; an action which carried notice to the defendant on its face, that the plaintiff was nominal. The defendant obtained a release from the nominal plaintiff; and the court made a rule, on the motion of the landlord, that it should be delivered up to be canceled. So, in a subsequent case, in the Common Pleas (Legh v. Legh, 1 B. & P. 447), the defendant having, after notice, obtained a release from the assignor (nominal plaintiff), the court set it aside. Indeed, the difficulty with the English courts seems to have been as to the mode of interfering; whether summarily, on motion, or whether the whole

might be pleaded or put in issue on the trial, or whether the party must not be turned round to the Court of Chancery. *Vide* Bauerman v. Radenius, *passim*, and the other cases above cited, and Salk. 260. Yet the whole stood on the record in Craib v. D'Æth, as mentioned *supra*, without objection. *Vide* also the reporter's note *a* to Legh v. Legh (1 B. & P. 448); and see Wake v. Tinkler (16 East, 36), where the King's Bench refused to receive a plea of set-off of a bond given by the plaintiff to a third person, who assigned it to the defendant before suit brought.

But in New York all the above questions have long been settled in favor of the assignee or *cestui que trust*. He is regarded as the real party; and, if after notice of the assignment or trust, given to the person liable on the chose in action assigned, he take a release from the nominal creditor, or pay him, or procure a set-off against him, or work out an apparent defence in any other way, through his instrumentality, the whole will be deemed void; and will be so declared, either on summary application, or upon pleading, or notice and evidence on the trial, according to the manner in which the fraudulent act is sought to be enforced. Johnson v. Bloodgood, 1 John. Cas. 51; Wardell v. Eden, 2 Id. 121, 158; 1 John. Rep. 531, note, Col. Cas. 137; Littlefield v. Story, 3 John. Rep. 425; Van Vechten v. Graves, 4 Id. 403; Anderson v. Van Alen, 12 Id. 343; Briggs v. Dorr, 19 Id. 95; Andrews v. Beecher, 1 John. Cas. 411; Raymond v. Squire, 11 John. Rep. 47, 48; Bates v. New York Ins. Co., 3 John. Cas. 238; Eels v. Finch, 5 John. Rep. 193; Meghan v. Mills, 9 Id. 64; Tuttle v. Beebee, 8 Id. 152; Raymond v. Johnson, 11 Id. 488; Clowes v. Hawley, 12 Id. 484; Martin v. Hawks, 15 Id. 405; Dawson v. Coles, 16 Id. 51; Chamberlain v. Day, 3 Cowen's Rep. 353; Taylor v. Bates, 5 Id. 376; Wheeler v. Wheeler, 9 Id. 34; Mauran v. Lamb, 7 Id. 174; Hopkins v. Banks, Id. 650. And an attorney having a lien on the chose in action, *e. g.* on a judgment for his costs, shall be deemed an assignee. Martin v. Hawks, 15 John. Rep. 405; Bradt v. Koon, 4 Cowen's Rep. 416. So, one who takes it merely in pledge as collateral security. Wheeler v. Wheeler, 9 Cowen's Rep. 34; Frear v. Evertson, 20 John. Rep. 142; Legh v. Legh, 1 B. & P. 447, S. P. in principle. The doctrine of the above cases stands now fully recognized by the Revised Statutes in respect to set-off. 1 R. S. 234, 235, 355. Upon these principles, which regard the *cestui que trust* or assignee as the real party, it has been lately decided that he cannot be called on by the party opposed to him to testify against his own interest. Mauran v. Lamb, 7 Cowen's Rep. 174, *ante*, note 19. And this upon the ground that he is a party, and entitled to the same protection as if technically on the record. *Ante*, note 35. The nominal plaintiff is also protected on the principle of being technically there. Frear v. Evertson, 20 John. Rep. 142, *ante*, note 19.

The last case, basing itself on the above established doctrines in respect to the rights of assignees, decides (and so far qualifies the broad doctrine of the text), that the confessions of the nominal plaintiff on record, made after he had assigned the subject of the action, and notice given by his assignee to the defendant, were not admissible. The action was general indebitatus assumpsit. On trial upon the general issue and notice of set-off, the plaintiff proved his demand. The defendant then offered to prove his set-off, by the plaintiff's confession, made after the action was commenced. This the plaintiff objected to; and to lay a foundation for excluding it, proved that before the plaintiff made the confession, he had assigned the demand sued for to Thompson, as collateral security for a debt which the plaintiff owed him; and that also before the confession made, Thompson had given notice of this to the defendant. The judge at the circuit, therefore, overruled the testimony offered, as inadmissible; and his decision was sustained on motion for a new trial. The text of Phillipps was cited at bar, and the case relied on by him; so that the qualification of his doctrine may be considered as finally settled in New York.

In Lewis v. Long, on appeal (3 Munf. Virginia Rep. at p. 14), Coalter, Judge, expressed a very decided opinion, that to receive the written or oral declarations of the assignor *after assignment*, against the assignee, would be opening a door to fraudulent combinations between the assignor and his former debtor, which would be of dangerous tendency. The court below had rejected this evidence; and he was of opinion their decision should be sanctioned by the Court of Appeals. The other judges did not find it necessary to pronounce an opinion on this question. In that case, the matter in the County Court stood much like the above case of Frear v. Evertson; but no notice of the assignment to the debtor was proved to have been given previous to the nominal plaintiff's admission. On appeal, the District Court reversed the decision of the County Court and remanded the cause with orders to the County Court to receive the evidence. On carrying the cause to the Court of Appeals, it went off on a question of jurisdiction.

In Thomas' Ex'x v. Denning (3 Harr. & John. 242), the Court of Appeals reversed a judgment in the Kent County Court, in a cause in which they refused to admit the liquidation of a demand between the assignor of a bond, and the obligor, *made after the assignment*, as evidence for the executrix of the obligor, in an action against her by the assignee in the assignor's name. Such is the marginal note; but the case itself goes farther. The very paper on which the liquidation between the assignor and obligor took place, mentioned the assignment. So that the obligor had full and seasonable notice; and though the case states that no evidence was given of the assignment, yet it is plain that the written liquidation mentioning the fact, was *per se* evidence of an assignment. The marginal note is, therefore, more than warranted. The case is directly the reverse of Frear v. Evertson, cited *supra* from 20 John. 142; and adopts the doctrine of Bauerman v. Radenius, without qualification. This inference is the more strong, as that was the only case cited by counsel.

In Plant v. M'Ewen (4 Conn. Rep. 544), C. J. Hosmer seems to concede the full doctrine of the text without qualification, as to a nominal party on the record. And in the previous case of Bulkley v. Landon (3 Conn. Rep. 76), the court were unanimous in declaring the broad rule laid down in the text, citing the rule from Phillipps, and the cases which he relies upon; and they expressly repudiate the general doctrines of New York in favor of assignees. See the vol. last cited, pp. 82, 83 and 84. The courts in Pennsylvania go to the opposite extreme: accordingly, in debt on a single bill, by the plaintiff, who had assigned it to M., the action was in the plaintiff's name and title, as trustee of M. The defendant offered to prove the plaintiff's receipt in full, given after the assignment. Held inadmissible, though it did not appear expressly, that the defendant had notice of the assignment when the receipt was given. Note. In Pennsylvania, the assignor, though a party on the record, is not even liable for costs, and may be a witness. The court said it was ground to suspect fraud upon the assignee, that the money appeared to have been paid without taking up the bill. Morton v. Morton, 13 Serg. & Rawle, 107. In any view, this will be found a case which goes farther in the protection of assignees than any we have before noticed. But where the plaintiff gave a lease as lessor, and then sued for rent, assuming to be trustee of K., and to bring the suit for his benefit; held, that the plaintiff's admissions were, notwithstanding, evidence against K. It did not appear that the lease was made by the authority, or with the knowledge or consent of K. Johnson v. Kerr, 1 Serg. & Rawle, 25. So the declaration of the defendant, to identify the land sold on execution against him while in possession, was received as evidence in favor of the purchaser, though the defendant had before assigned the same land to trustees for the benefit of his creditors generally, they not having acted on the trust, nor accepted it. Buchanan v. Moore, 10 Serg. & Rawle, 275, 279, 280.

In most of the American courts, where the above question of evidence has not been directly decided, yet, the general doctrine upon which it rests, that a chose in action is assignable, and that the assignee shall be protected against any dealing between the debtor and assignor, after notice to the former, or any set-off acquired after such notice, though not before, will be found to prevail in its fullest extent, being in some of the states partially sanctioned by statute, as well as the authority of their courts. Welch v. Mandeville, 1 Wheat. Rep. 233; Mandeville v. Welch, 5 Id. 277; Corser v. Craig, 1 Wash. C. C. Rep. 424; Bholen v. Cleveland, 5 Mason, 174; Green v. Darling, 5 Mason, 201; Wistar v. Walker, 2 Browne, 166; M'Cullum v. Coxe, 1 Dall. 139; Field v. Biddle, 2 Dall. 172, note; Steele v. The Phœnix Ins. Co., 3 Binn. 306; Canby v. Ridgway, 1 Binn. 496; Wheeler v. Hughes, 1 Dall. 23; Ingles v. Ingles' Ex'rs, 2 Dall. 49; Rundle v. Ettwein, 2 Yeates, 23; Solomon v. Kimmel, 5 Binn. 232; Bury v. Hartman, 4 Serg. & Rawle, 177; Brindle v. M'Ilvaine, 9 Serg. & Rawle, 74; Buchanan v. Taylor, Addis. 155; Aldricks v. Higgins, 16 Serg. & Rawle, 212; Boulden v. Hebel, 17 Serg. & Rawle, 312; Metzgar v. Metzgar, 1 Rawle, 227; Stevens v. Stevens, Ashm. 190; Perkins v. Parker, 1 Mass. Rep. 117; Andrews v. Herring, 5 Mass. Rep. 210; Boylston v. Boylston, 8 Mass. Rep. 465; Dawes v. Boylston, 9 Mass. Rep. 337; Crocker v. Whitney, 10 Mass. Rep. 316; Jones v. Witter, 13 Mass. Rep. 304; Sergent v. Essex Railway Corporation, 9 Pick. 202; Farr v. Hemmingway, 2 Const. Rep. 753; Wadsworth v. Griswold, 1 Harp. Law Rep. 17; Stoney v. M'Neil, 1 Harp. Law Rep. 156; Smith v. Lyons, 1 Harp. Law Rep. 334; Ware v. Key, 2 M'Cord, 373; Strong v. Strong, 2 Aik. 373; Lampson v. Fletcher, 1 Verm. 168; Tichout v. Cilly, 3 Verm. Rep. 415; Clark v. Rogers, 2 Greenl. Rep. 143; Robbins v. Bacon, 3 Id. 346; Swett v. Green, 4 Id. 385;

Dunning v. Sayward, 1 Id. 366; Moody v. Towle, 5 Id. 415; Sumner v. Steward, 2 N. H. Rep. 39; Carlin v. Dumartrait, 8 Mart. Lou. Rep. (N. S.) 212; Triplet v. Bradley, 6 Monroe, 355; Schooling v. M'Gee, 1 Id. 232, 233; Robbins v. Holley, Id. 191, 195; Talbot v. Cook, 7 Id. 438, 439; Clark v. Boyd, 6 Id. 294; Rawlins v. Timberlake, Id. 234; Sharp v. Eccles, 5 Id. 72; Harrison v. Burgess, Id. 420; Armstrong v. Flora, 3 Id. 46; M'Cormack v. Smith, 3 Id. 432; Numlin v. Westlake, 2 Ham. Rep. 24, 25; Clark v. Boyd, Id. 60; M'Cutchen v. Keith, Id. 262; Sheftall's Adm'r v. Clay's Adm'r, Charlt. Rep. 229; Barrow v. Bispham, 6 Halst. Rep. 110, 116.

A debtor who promises the assignee to pay him, may be sued in the name of the latter as plaintiff at the common law. Tierman v. Jackson, 5 Pet. Rep. 580; Currier v. Hodgdon, 3 N. H. Rep. 82; Fairlie v. Denton, 8 Barnw. & Cress. 395; Wiggin v. Damrell, 4 N. Hamp. Rep. 69. But such promise, if made after the assignment, will not conclude against a good previous defence; for it is *nudum pactum*. Ludwick v. Croll, 2 Yeates, 464; Clay v. Johnson, 6 Monroe, 661. Otherwise, if the assignee be induced to take the chose in action by the acknowledgment or promise of the debtor. Ludwick v. Croll, 2 Yeates, 464; Carnes v. Field, 2 Yeates, 541; Weaver v. M'Corcle, 14 Serg. & Rawle, 304; Morrison's Adm'r v. Beckwith, 4 Monroe, 73; Davison v. Franklin, 1 Barnw. & Adolph. 142. Or merely stand by and see it assigned and conceal the defence. Buchanan v. Taylor, Addis. 155.

In equity, in one case, it was held that the assignee of a bond, without notice of an original equitable defence against it, could not be met with that defence; that, being an innocent purchaser, he did not take subject to an equity existing at the time of the purchase, nor indeed when the bond was executed. M'Farlane v. Griffith, 4 Wash. C. C. Rep. 585, 587. This case was, however, confessedly contrary to all the authorities in Pennsylvania, both at law and in equity; and is conceived to be quite anomalous. Barrow v. Bispham, 6 Halst. Rep. 110, 116; Metzgar v. Metzgar, 1 Rawle, 227, with many of the cases *supra*. According to Tichout v. Cilly (3 Verm. Rep. 415), an assignor in whose name an action is prosecuted, is accountable for any abuse of the process, the same as if he were the real party.

The admission of a trustee before he came to the trust, *e. g.* the assignee of a bankrupt (Fenwick v. Thornton, 1 Mood. & Malk. 51), or of a now executor, made before he became such, is not admissible against him. Plant v. M'Ewen, 4 Conn. Rep. 544. See 3 Rand. 399, 407, 408, 409. And an administrator's admission is never receivable against the estate, to charge it *de bonis intestatoris*. Ciples v. Alexander's Adm'r, 2 Const. Rep. 767. But where he is plaintiff, his admission shall be received against him. Hill v. Buckminster, 5 Pick. 391. And in another case the admission of an executor defendant was received against him. Cobb v. Lunt, 4 Greenl. 503, 507. In other cases, it is held that an executor's admission of his testator's debt shall not even take it out of the Statute of Limitations. Peck v. Bottsford, 7 Conn. Rep. 172, 178, *et seq.*; Thompson v. Peters, 12 Wheat. 565. And see Mooers v. White, 6 John. Ch. Rep. 372. The case of Emerson v. Thompson (16 Mass. Rep. 429, 431), is directly *contra* as to the Statute of Limitations; and indeed recognizes the admissions generally of an executor or administrator, as evidence against him. And it was held in another case, that his admission was evidence against him on trial of an issue to establish the will. M'Craine's Executors and Devisees v. Clarke, 2 Murphy, 317.

The rule admitting the confessions of the party in interest follows the doctrine which has been partially considered and illustrated, that the *cestui que trust* or assignee is the real party in the suit; his admissions and his acts are those of the party, and are of course all evidence against him; he has the complete control and may confess away or release the subject matter of the suit, or discharge or impair his claim in any way. Thus, the lessor of the plaintiff, being the real party, may bind himself, and those claiming under him, by his acts. Jackson ex dem. Goodrich v. Ogden, 4 John. Rep. 140.

The defendant may call the plaintiff's attorney in court as a witness, and ask him who retained him, in order to show the real party, and so let in his declarations. Levy v. Pope, 1 Mood. & Malk. 410.

In assumpsit by Kemble, on an agreement purporting to have been made with him on behalf of himself and the other proprietors of Covent Garden Theatre, the admissions of Willett, another co-proprietor, were held admissible in evidence against the plaintiff. They are like the admissions of a principal against a broker, suing on a policy of insurance. Kemble v. Farren, 3 Carr. & Payne, 623. So on a bond taken by A., the plaintiff, in trust for B., the admission of pay-

Admission by party suing for benefit of another.

In the case of Bauerman v. Radenius,(1) which was an action by the shippers of goods against the captain of a ship, for not delivering the goods in proper condition, a letter, written by the plaintiffs, was given in evidence on the part of the defendant, in which they entirely exculpated the defendant from all misconduct; and it appeared, also, from the letter, that the goods were shipped on the risk of third persons, and that the plaintiffs were not really interested in the suit; the counsel on the other side contended that the parties really interested ought not to be concluded by the admission of the plaintiffs, who were merely nominal parties in the action; Lord Kenyon, C. J., was of a different opinion, and the plaintiffs were nonsuited. The Court of King's Bench afterwards affirmed the nonsuit. Lawrence, J., on that occasion, said: "The persons on whose risk the goods were shipped, are in this difficulty; the present plaintiffs either have or have not an interest; but it must be considered that they have an interest, in order to support the action; and if they have, an admission made by them, that they have no cause of action, is admissible evidence. I have looked into the books, to see if I could find any case in which it has been holden that an admission of a plaintiff on the record was not evidence, but have found none."

In Alner v. George,(2) it was held that a receipt in full, given by the

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ment by the latter, is evidence against the plaintiff. Calvin v. Hamilton, 4 Wash. C. C. Rep. 92. And in an action against the sheriff for a false return upon a junior *fi. fa.*, on the ground that the senior *fi. fa.* of R. & H., under which he sold, was dormant and fraudulent, though the declarations of R. & H. were held inadmissible to charge him; yet Marcy, J., said, if they had indemnified the sheriff, and thus became parties in interest, their admissions would have been receivable against him. Benjamin v. Smith, 4 Wend. Rep. 332, 335.

But the declarations of a person named as executor and devisee in a paper, purporting to be a last will, are not evidence to impeach it in a suit to which he is not a nominal party, though the event depend on the validity of the paper as a last will. Lightner v. Wike, 4 Serg. & Rawle, 203; Bovard v. Wallace, Id. 499, S. P., as to a devisee. On an issue of *devisavit vel non*, the admissions of a devisee to whom all the estate was devised for life, except some trifling legacies with remainder over, were offered in evidence to prove the testator's insanity. The court said the parties here are merely nominal, and the devisees are the real parties, but others are interested, and the testimony was excluded for that reason; though the court admitted it would have been receivable, if the devisee, making the admission, had taken the whole interest under the will. They said the finding of the issue would be conclusive on others, as to the personal estate; though it might not as to the real. Nussear v. Arnold, 13 Serg. & Rawle, 323, 328, 329. *Vide* a like point, Phelps v. Hartwell, 1 Mass. Rep. 71. But *quere*. See Atkins v. Sanger, 1 Pick. 192; though the court said the latter case did not interfere with Phelps v. Hartwell. In an action by the holder of a negotiable promissory note for $150, pledged to the plaintiff by S. for $50 or $60, against the maker, held, that the defendant could not give S.'s declarations in evidence to defeat the action. Butler v. Damen, 15 Mass. Rep. 223.

(1) 7 T. R. 663. See also Craib v. D'Æth, Id. 670, n.; Alner v. George, 1 Camp. 392; Gibson v. Winter, 5 B. & Ad. 96.

(2) 1 Camp. 392. See Gibson v. Winter, 5 B. & Ad. 96. The proper remedy is by application to the equitable jurisdiction of the court; by Lord Ellenborough, C. J., 1 Camp. 393. Where a nominal party gives a release, the courts will sometimes order it to be delivered up. Payne v.

plaintiff on the record, could not be invalidated at the trial, by showing that the plaintiff had assigned all his interest, and was a mere trustee, and that the receipt was fraudulently given. It has been seen that it is competent to a party to the record, who has given a receipt, to show that it was given under misrepresentation or misapprehension;(1) but, in the case under consideration, the evidence would be offered on behalf of persons who were not parties to the record, for the purpose of showing a fraud between those who were so.

The rule in question does not apply to cases where an infant sues by his guardian or *prochein ami:* the declaration of such a party will not, in general, be admissible against the infant,(2) for the guardian or *prochein ami* is to be considered as an officer of the court, specially appointed by them to look after the interests of the infant,(3) and who acts, in fact, as his attorney.(4) Admissions, however, made by such a party, especially for the purpose of the cause, would stand upon another ground, and be considered in the same light as similar admissions made by the attorney in the cause.(5) But it has been held that the answer of the guardian of an infant defendant in chancery, cannot be read against the defendant in another suit;(6) though being made by the guardian upon oath, it may be used against himself, where he sues or is sued in his private capacity.(7)

Rogers, Doug. 407; Legh v. Legh, 1 B. & P. 447; Innell v. Newman, 4 B. & A. 419; Hickey v. Burt, 7 Taunt. 48; Mountstephen v. Brooke, 1 Chit. R. 390; Manning v. Cox, 7 Moo. 617; Barker v. Richardson, 1 Y. & J. 362. But in Phillips v. Clagett (11 M. & W. 93), Parke, B., doubted whether the court had any authority to make such an order, and considered the proper course to be, not to allow the release to be pleaded. See also Crook v. Stephen, 5 N. C. 688, 691; Wild v. Williams, 6 M. & W. 490; Jones v. Herbert, 7 Taunt. 421; Arton v. Booth, 4 Moo. 192; Herbert v. Pigott, 2 C. & M. 384; Rawstorne v. Gandell, 15 M. & W. 304.

The fact that the plaintiff sues as a trustee does not ordinarily exclude his admission. Tenny v. Evans, 14 N. Hamp. 343; Franklin Bank v. Cooper, 36 Maine, 180. But the admissions of a nominal plaintiff, who has parted with his interest in the cause of action, are not admissible. Dazey v. Mills, 5 Gilman, 67. And the rule is well settled in this country, as stated in a previous note, that the admissions of an assignor, made after his assignment, are not receivable in evidence against his assignee. Frear v. Evertson, 20 John. R. 142; The State v. Jennings, 5 Eng. 428; 17 Mis. (2 Bennett) 284; Gillighan v. Tibbetts, 33 Maine, 360. And what is a receipt but an admission of payment? The assignment divests the assignor of all interest in or control over the thing assigned. Beckwith v. The Union Bank, 5 Seld. 211; *contra*, the assignment of an account is not complete, as against the debtor, until notice is given to him. Loomis & Jackson v. Loomis 26 Vt. 198; 14 Conn. 141. Till then a receipt by the assignor will be good as against the assignee. Campbell v. Day, 16 Vt. 558.

(1) *Vide supra*, p. 474.

(2) Cowling v. Ely, 2 Stark. R. 366; Webb v. Smith, Ry. & M. 106. See James v. Hatfield, 1 Stra. 548, *contra*.

(3) By Parke, B., in Morgan v. Thorne, 7 M. & W. 400, 408.

(4) By Alderson, B., Id. And see by Pollock, C. B., in Sinclair v. Sinclair, 13 M. & W. 640, 646.

(5) *Infra*.

(6) Eccleston v. Spoke, 3 Mod. 258; S. C. *nom.* Eccleston v. Petty, Carth. 79.

(7) Beasley v. Magrath, 2 Sch. & Lef. 34.

Admission by persons beneficially interested.

The second branch of the rule as to admissions by the person really interested in the suit, though not a party to the record, is rather more difficult of application.

In an action by trustees, if it distinctly appears, that the *cestui que trust* alone is entitled to the benefit resulting from the action, his statements will be admissible in evidence for the defendant; but in order to render such statements binding upon the plaintiff, the nature of his interest in the trust estate must be shown.(1)

In an action of debt upon a bond conditioned to pay money to L. D., for whose benefit the action was brought,(2) the defendant proved that L. D. had said, in a conversation respecting this bond, that the defendant owned nothing, upon which the jury found for the defendant. On a motion for a new trial, it was argued that the declarations of L. D., who was not a party to the action, ought not to affect the plaintiff; but the court said that the case was to be considered as if L. D. was the plaintiff, the action being for L. D.'s benefit.

Where A. deposited a sum of money with B. to distribute amongst A.'s creditors in proportion to their claims; it was held in an action by C. against B., that A.'s declaration was evidence to show that C. was his creditor to a specific amount.(3)

In trover for a deed, which the defendant admitted he detained for a third party, and in the detention whereof the latter was substantially interested, the declarations of such party were held to be admissible.(4)

An action upon a policy may be brought in the name of the person who effected it, though he be not the person interested: yet the persons interested are so far looked upon as parties to the suit, that the declarations of any of them are admissible in evidence against the plaintiff.(5)

In an action by the master of a ship for freight, the declarations of the owner of the ship are admissible against the plaintiff, as the action is brought for the owner's benefit.(6)

In the case of Hart v. Horn,(7) which was an action of replevin, Heath, J., rejected the declarations of the person under whom the defendant made cognizance; but it may be doubted whether this case would now

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(1) May v. Taylor, 6 M. & G. 261. See also Doe d. Rowlandson v. Wainwright, 8 A. & E. 691.

(2) Hanson v. Parker, 1 Wils. 257. See Davis v. Dinwoody, 4 T. R. 678.

(3) Robson v. Andrade, 1 Stark. R. 372; S. C., 2 Chit. R. 263.

(4) Harrison v. Vallance, 1 Bing. 45. And see by Bayley, J., in Spargo v. Brown, 9 B. & C. 938.

(5) By Lord Ellenborough, C. J., in Bell v. Ansley, 16 East, 143. See also Bell v. Smith, 5 B. & C. 188.

(6) Smith v. Lyon, 3 Camp. 465.

(7) 2 Camp. 92.

be acted upon, especially since Lord Denman's Act, as the conusor in replevin is the party substantially interested in the case.(1)

With respect to admissions by rated parishioners, it seems that upon an appeal against an order of removal, where the parochial officers are the nominal parties, the declarations of a rated inhabitant of the appellant parish are evidence against that parish, without calling the inhabitant, and showing that he refused to be examined.(2)

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(1) As to the admissibility of declarations, made by the indorser of a bill while he was holder, in an action against a subsequent holder, see Walstead v. Levy, 1 Mo. & R. 438.

(2) R. v. Whitley Lower, 1 M. & S. 636; R. v. Hardwicke, 11 East, 579; R. v. Woburn, 10 East, 395, 402. Before the 54 Geo. III, c. 170, the admissions of rated parishioners were received on account of their being parties to the suit. See also 3 & 4 Vict. c. 25; 6 & 7 Vict. c. 85. The The statutes which render parishioners competent witnesses, do not interfere with the rule of evidence respecting admissions, as the statutes do not render it *compulsory* upon such persons to give evidence. See R. v. Adderbury (East), 5 Q. B. 187. In the case of London (Corporation) v. Long (1 Camp. 22), where the question related to the powers of a city officer, Lord Ellenborough, C. J., held, that the declarations of an indifferent individual of the corporation were not admissible, but that he would admit what the officer himself had been heard to say upon the subject.

NOTE 134.—The admissions of corporators and *quasi* corporators, in the United States, are received or rejected upon much the same principle as governs in respect to admissions of agents. We have seen *ante*, that in *quasi* corporations, or where the corporation has a public object, the corporators are often considered competent witnesses for or against the corporation, or in other words, the civil division of the state. Of course their admissions are not receivable like those of rated inhabitants in England, which, as intimated in the text, would not be received even there, since the statute making the corporators witnesses. The cases and authorities which follow are thrown together for the purpose of illustrating the principle on which the admissions of private corporators are received. As to their competency to testify, see also *ante*, note 21.

In the Hartford Bank v. Hart (3 Day, 491), charging him as indorser to the plaintiff of a note, the defendant offered in evidence the confessions of the president and directors of the bank, that they knew the indorsement to be a forgery when they received the note. The court held, that their confessions were those of individual corporators, and like those of any other stockholders, and therefore not receivable; though their declarations as a board, while acting on the subject as agents for the bank, would be receivable like the declarations of any other agent which are a part of the *res gestæ*. By a statute of New York, "In suits by or against an aggregate corporation, the admission of any member thereof not named on the record as a party to such suit, shall not be received as evidence against such corporation, unless such admission was made concerning some transaction in which such member was the authorized agent of such corporation." 2 R. S. 407, § 80. But it will be perceived by the above and other cases, that the admission of the agent is not then receivable, unless his admission is part of the *res gestæ*. For where, in an action of assumpsit for the money in a bag of dollars, against the President, Directors and Company of the City Bank of Baltimore, the court below received evidence of the president's declaration or admission, that a bag of dollars, which was afterwards taken into the bank by one of the directors and converted, was the property of the plaintiff; it was held, on appeal, inadmissible; not being part of the *res gestæ*, but an independent disconnected admission of a past transaction; and this though the president was a part of the defendant's name on the record; for this was but a part of the name of the corporation. He was a mere agent, and should have been called as a witness. The City Bank of Baltimore v. Bateman, 7 Har. & John. 104. But in assumpsit for ten kegs of dollars, against a bank, the plaintiff proved that they, being brought to the bank against the plaintiff's will, were paid out for the debts of the bank by direction of H. & B. president and cashier *pro tempore;* and this was held admissible, though H. & B. were both within reach of the process of the court; because a president and cashier of a bank may direct money in the

A creditor who has indemnified a sheriff, for making a seizure under a writ of execution, is considered as substantially the defendant, in an action brought against the sheriff on account of the seizure;(1) on the ground that the sheriff, by his conduct, substitutes himself for the original defendant.(2) In like manner, admissions by an under-sheriff, tending to charge himself, are admissible in an action against the sheriff for the misconduct of his under-sheriff, as for an escape.(3) So in an action by the assignees of a bankrupt, where it was proved that the defendant had stated that he had been indemnified by the bankrupt, it was ruled that statements made by the latter were admissible on behalf of the plaintiffs.(4)

Person whose liability is in issue.

Admissions made by strangers to a suit are also sometimes received in evidence, where the question in the suit is whether a particular claim

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bank to be paid out for the debts of the institution. The City Bank of Baltimore v. Bateman, 7 Har. & John. 104. In ejectment for land claimed by the defendant in behalf of a religious corporation, the declaration (an *ex parte* affidavit) made by a member and one of the trustees of the corporation, was offered in evidence by the plaintiff against the corporation. Held inadmissible. The court say the evidence was not of *an act* of the agent of the corporation, or a declaration while transacting the business of the corporation; but of confessions made afterwards. An agent is authorized *to act;* and therefore his acts *explained by his declarations during the time of action,* are obligatory on the principal; but he has no authority *to make confessions* after he has acted. Magill v. Kauffman, 4 Serg. & Rawle, 317, 321. A corporation will not be affected by a declaration of one of its members as to what had passed at a meeting of the congregation. This would be but hearsay evidence. What passed should be proved by the oath of some person who was present, unless it was reduced to writing; and then that would alone be admissible. Magill v. Kauffman, 4 Serg. & Rawle, 317, 321. In an action by a bank on a single bill, the defendant offered in evidence the admissions of the officers of the bank, of what they they told a witness as to the manner in which the debt was to be discharged. Held inadmissible, it not appearing that such declarations were authorized by the board of directors. Stewart v. The Huntington Bank, 11 Serg. & Rawle, 267, 269. In an action by a bank against an indorser on a note, a receipt given by the president to the defendant, of money received to be deposited in the bank to the credit of the defendant, is evidence of payment, though the president simply signed his name without adding his title as president; but not conclusive. It is open to explanation, as if the money was delivered to the president in his private character, to be deposited, and never reached the bank. Sterling v. The Marietta & Susquehannah Trading Company, 11 Serg. & Rawle, 179, 180, 181. The declarations of the ex-president of a bank that payments had been made to him on a note belonging to the bank, are not admissible evidence against the bank. Sterling v. The Marietta & Susquehannah Trading Company, 11 Serg. & Rawle, 179, 181. An insurance company took a respondentia bond. A correspondence between the obligor and a director, by whose letters it was sought to impeach the bond, was held inadmissible. Atlantic Ins. Co. v. Conard, 4 Wash. C. C. Rep. 663, 667. The affidavit of the president made to postpone the trial of the cause, stated facts which made against the corporation; but held inadmissible. Kemp v. The Baltimore Fire Ins. Co., 2 Gill & John. 108. The declarations of a cashier, that the directors had given time on a note, were held inadmissible against the bank. Grafton Bank v. Woodward, 5 N. H. Rep. 301. See also Husack v. The Coll. of Physicians, &c., 5 Wend. Rep. 547.

(1) Dyke v. Aldridge, cited 7 T. R. 665; 11 East, 584, n.; Proctor v. Lainson, 7 C. & P. 629. And see Dowden v. Fowle, 4 Camp. 38; Young v. Smith, 6 Esp. 121.

(2) By Richardson, J., in Goss v. Watlington, 3 B. & B. 136.

(3) Snowball v. Goodricke, 4 B. & Ad. 451, *post.*

(4) Arkle v. Wakeman, 1 C. & K. 516.

might have been enforced as against those strangers. Thus it has been held, that on a plea in abatement for the non-joinder of A. B. as a defendant, his declarations before action brought were evidence in support of the plea;(1) on the ground, that whatever would be evidence in an action brought against him to prove him liable, might be received to prove his liability on this issue.(2) So in an action against a sheriff for not arresting a debtor, or for allowing him to escape, statements made by the debtor acknowledging the existence of the debt, are evidence against the defendant;(3) the sheriff in this case also being put in the place of the debtor, as to the creditor who sues him for a breach of duty.(4)

Apparently on the same principle, the admissions of bankrupts, or entries in their books, made before the act of bankruptcy, are receivable in evidence, to prove the petitioning creditor's debt,(5) or the state of the bankrupt's affairs,(6) the assignees having only to prove their title as against the bankrupt.(4)

But admissions by a bankrupt, made after the act of bankruptcy, are not receivable for this purpose, though they are evidence against himself.(7)

But these cases are exceptions to the general rule, and their principle is not to be extended.

Thus, upon an issue directed under the Interpleader Act, between the claimant of certain goods and the execution creditor, where the plaintiff claimed the goods under an assignment made to him by the debtor as a security for previous advances, it was held that an admission made by the

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(1) Clay v. Langslow, M. & M. 45.

(2) See also by Parke, B., in Coole v. Braham, 3 Exch. R. 183.

(3) Sloman v. Herne, 2 Esp. 695; Gibbon v. Coggan, 2 Camp. 188; Williams v. Bridges, 2 Stark. R. 42; Kempland v. Macauley, Peake, 65; by Bayley, J., in Rogers v. Jones, 7 B. & C. 89.

(4) By Parke, B., in Coole v. Braham, 18 L. J. (N. S.) Exch. 106.

(5) Watts v. Thorpe, 1 Camp. 376; Hoare v. Coryton, 4 Taunt. 560; Taylor v. Kinloch, 1 Stark. R. 175; 2 Id. 594; Robson v. Kemp, 4 Esp. 234; Ewer v. Preston, Rep. temp. Hard. 378. See also Evans v. Lake, B. N. P. 282.

(6) Belcher v. Brake, 2 C. & K. 658.

(7) Smallcombe v. Bruges, 13 Pri. 136; Taylor v. Kinloch, *ut supra;* Sanderson v. Laforest, 1 C. & P. 46; Jarrett v. Leonard, 2 M. & S. 265. In Parker v. Barker (1 B. & B. 9), a bankrupt's admissions that he was in partnership with a trader were received as proof of the *trading.* But the propriety of this decision was doubted in Bromley v. King, R. & M. 228. It may be observed, that in an action by assignees, the question as to the petitioning creditor's debt is, whether it could have been enforced against the bankrupt, which point the admission clearly establishes. The bankrupt's declarations before the act of bankruptcy may be used against the assignees to show collusion, as part of the *res gestæ.* Thompson v. Bridges, 8 Taunt. 336. And a bankrupt's declarations, that a bill would not be paid, has been admitted, to supply proof of notice, where the admission was made after bankruptcy and before the issuing of the commission. Brett v. Levett, 13 East, 213, cited 1 Stark. R. 176. But at the period of that decision (as appears from the case of Dowton v. Cross, 1 Esp. 168, there cited), a bankrupt's declarations were admitted, to prove the petitioning creditor's debt, if made at any time before the commission issued. See Schooling v. Lee, 3 Stark. R. 151; Marsh v. Meager, Id. 353; Bernasconi v. Farebrother, 3 B. & Ad. 372.

debtor, before the assignment, in the absence of the defendant, was not receivable in evidence for the plaintiff.(1)

In one case the admission of a petitioning creditor, as to the amount of his debt, was held to be receivable in evidence against the assignees of a bankrupt.(2) It does not appear from the report of this case, whether the admission was made before or after the commission; and Patteson, J., in a later case(3) observed upon it, that it was loosely stated, and that he could not but think that the declarations must have been made before the commission. In cases of this description, the issue appears to be, what were the mutual rights of two persons (one or both being strangers to the suit), at a particular period; which inquiry seems to let in such evidence as would have been receivable between those persons. In the last example, however, it is not clear that the decision did not turn on the point that the assignees were liable to be affected by admissions of the petitioning creditor, because he was a privy in estate. In the case of Harwood v. Keys,(4) it was ruled, that the declarations of a deceased petitioning creditor, made after the commission, were not evidence against the assignees, in an issue directed to try whether the commission was concerted between the petitioning creditor, the bankrupt, and the attorney; the petitioning creditor, it was said, could not be taken to be the real party interested in the cause; and the result of the trial, if the verdict were for the plaintiff, would not necessarily be the superseding of the commission, the issue being merely a proceeding to satisfy the chancellor's conscience.

Admission by party in different capacity.

An admission may have been made by a party to a record when in a different capacity from that in which he is concerned as regards the suit; and it seems to have been considered, in such a case, that his former admission ought not to be evidence against him; for the change which has taken place in his interest, his means of knowledge, and his powers of acting, show that his former admission is not a safe criterion of the truth of the claim or defence which he is at present setting up. And the injustice of allowing his former admission to be used against him may appear to be the greater where, by the change of his situation, he has become the representative of the interest of others, with whom, in his former situation, he had no privity.

Thus, it was ruled by Lord Tenterden, C. J., in the case of Fenwick v. Thornton,(5) that the declarations of a person, made before he became assignee of a bankrupt, are not evidence against him, when suing as such

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(1) Coole v. Braham, 3 Exch. R. 183.
(2) Young v. Smith, 6 Esp. 121.
(3) Harwood v, Keys, 1 Mo. & R. 205.
(4) *Ut supra.*
(5) M. & M. 51.

assignee. In the later case of Smith v. Morgan,(1) however, Tindal, C. J., admitted similar evidence, and observed that such a distinction was new to him, the general rule being that the declarations of a party to the record are evidence. The case of Fenwick v. Thornton does not appear, however, to have been brought before his Lordship's notice; and it is apprehended that the ruling of Lord Tenterden, C. J., in that case, is the more correct, for the reasons above stated.(2)

Admission by one party evidence against another jointly interested.

It appears to be a general principle, that in a civil suit by or against several persons, who are proved to have a joint interest in the decision, a declaration made by one of those persons, concerning a material fact within his knowledge, is evidence against him, and against all who are parties with him to the suit.(3) In an action of covenant against two defend-

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(1) 3 Mo. & R. 257.

(2) As to declarations of a guardian or *prochein ami*, see *supra*, p. 485. This rule may be illustrated by the doctrine of estoppels. A woman is not estopped, after coverture, by an admission upon record by her husband and herself during coverture. See Hodgson v. Merest, 9 Pri. 563; Elston v. Wood, 2 Myl. & K. 678. An heir claiming as heir of his father is not estopped by an estoppel upon him as heir to his mother. A party suing as executor, in an action of debt upon a bond, is not estopped by having been barred by an action on the same bond, when he sued as administrator. Robinson's Case, 5 Co. 32 b; Com. Dig. tit. Estoppel C; Wrottesley v. Bendert, 3 P. Wms. 237; Barron v. Grellard, 3 V. & B. 166.

(3) By Le Blanc, J., 11 East, 589. See also Whitcomb v. Whiting, 2 Doug. 652.

The rule in New York is different: the admission of one of two joint debtors, *e. g.* joint makers of a promissory note, who are not partners, does not bind the other. Lewis v. Woodworth, 2 Comst. 512. When the joint debtors are also partners, they are by such association constituted agents, one for the other, in relation to the partnership business. 1 Greenl. Ev. §§ 112, 174. But when they are only jointly liable, it is difficult to see upon what principle the act or admission of one of them should be held binding upon the other. Clearly neither of them has any authority from the other to change the character of the debt, or create any new obligation to pay it, much less to make for him a new contract. Accordingly, it is settled in this state that an admission by one of several partners, made after dissolution of the firm, will not revive a debt against the firm that has been barred by the Statute of Limitation. Van Keuren v. Parmelee, 2 Comst. 523.

The rule stated in the text has been followed to a limited extent in Massachusetts (Cady v. Shepherd, 11 Pick. 400; Bridge v. Gray, 14 Id. 55; Sigourney v. Drury, Id. 387, 391; Vinal v. Burrill, 16 Id. 401); in Connecticut (Bond v. Lathrop, 4 Conn. R. 336; Coit v. Tracy, 8 Id. 268; Austin v. Bostwick, 9 Id. 496; Clark v. Sigourney, 17 Id. 511); in Maine (Parker v. Merrill, 6 Greenl. 41; Pike v. Warren, 15 Maine, 390; Dinsmore v. Dinsmore, 21 Id. 433; Shepley v. Waterhouse, 22 Id. 497); and in Vermont (Loomis and Jackson v. Loomis, 26 Vt. 198). In North Carolina and Georgia, the promise of a partner after dissolution, if made before the debt was barred by statute, will prevent the operation of the statute. McIntire v. Oliver, 2 Hawks. 209; Brewster v. Hardeman, Dudley, 138. But after the debt has been barred, such new promise will not revive the debt as against the other partners. So held in many of the states. Brewster v. Hardeman, *supra;* Steele v. Jennings, 1 McMullen, 297; Lawther v. Chappel, 8 Alab. R. 353; Belote's Ex'rs v. Wynne, 7 Yerger, 534; Muse v. Donelson, 2 Humph. 166; Levy v. Cadet, 17 S. & R. 126; Seeright v. Craighead, 1 Pen. & Watts, 135; Youdes v. Lefavour, 2 Blackf. 371; Bell v. Morrison, 1 Peters, 351.

Where the rule stated in the text prevails, it is necessary that it should appear that the defendants had an existing joint interest when the admission was made, before it can be received in

ants,(1) the affidavit of one of them was held to be evidence against both.

But unless there be a joint interest in the decision, the admission of one defendant will not be receivable against a co-defendant. Thus, in general, the answer of one defendant in chancery is not evidence against his co-defendant; if it were otherwise, a plaintiff might make one of his friends a defendant.(2)

But this exception does not apply where the co-defendants have a joint interest in the transaction, as in the case of partners, or where one defendant claims through the other, whose answer is offered in evidence.(3)

Thus, where the obligee of a bond filed a bill against two joint and several obligors, alleging that the bond had been delivered up to one of them by mistake, and praying that he might recover the amount due on it, an admission by the party to whom the bond was given up, that it had been delivered to her by mistake, was held to be evidence against the co-obligor, though the joint answer of the defendants had traversed the allegation as to mistake, and simply admitting the delivery of the bond, had stated that the party to whom it was given up had destroyed it.(4)

But even where parties have been partners, the answer in chancery of one who has previously retired from the firm, and ceased to have any interest therein, is not admissible in evidence against the continuing partners, although it relates to transactions with the firm which occurred at a time when the retired partner was a member.(5)

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evidence against the others. Borwell & al. v. Blackman, 12 Geo. 591; Blakeney v. Ferguson, 17 Ark. 641. See Tillinghast v. Nourse, 14 Geo. 641.

(1) Vicary's Case, Gilb. Ev. 51.

(2) Wych v. Meal, 3 P. Wms. 311. And see Jones v. Turberville, 2 Ves. 11; Morse v. Royal, 12 Ves. 355.

The admission of one of several owners or tenants in common of a vessel does not bind the others (McLellan v. Cox, 36 Maine, 95); unless they navigate the vessel together. Blackstock v. Leidy, 19 Penn. State R. 335, 340.

(3) See Pritchard v. Draper, 1 Russ. & Myl. 191; Petherick v. Turner, cit. 1 Taunt. 104.

(4) Crosse v. Bedingfield, 12 Sim. 35.

(5) Parker v. Morrell, 2 C. & K. 589. This was an issue directed by the Lord Chancellor. Upon the hearing of the original cause, Knight Bruce, V. C., had allowed the answer to be given in evidence *de bene esse*. Upon an appeal before Lord Cottenham, C., his Lordship said, it was contrary to the rule and practice of the court to read the answer of one defendant against the other, and that it appeared that the answer had been so used in the court below, and not as a statement made by a party whose admission would be evidence against the defendants. His Lordship added, that upon the trial of the issue, which was to try the validity of a warrant of attorney given by the plaintiff to the defendants and the party who had been a co-defendant in the chancery suit, if the answer should be tendered in evidence, its admissibility would be decided upon by the presiding judge. The issue was tried before Cresswell, J., who rejected the evidence. See also Petherick v. Turner, cit. 1 Taunt. 104.

In torts, admission by one defendant not evidence against another.

In actions of tort, the admission of one co-defendant will not affect another co-defendant.(1) The rule is clear against the reception of such evidence in the case of persons jointly indicted, except in cases of conspiracy.(2)

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(1) Daniels v. Potter, M. & M. 502, where the lax expressions of Lord Ellenborough, C. J., in R. v. Hardwicke, 11 East, 585, are qualified by Tindal, C. J. See also Morse v. Royal, 12 Ves. 362.

(2) By Lord Kenyon, C. J., in Grant v. Jackson, Peake, 204. *Vide infra, Confessions; supra, Declarations, part of the res gestæ.*

NOTE 135.—The rule as laid down in the text by Lord Ellenborough, seems to have been fully sustained by the later cases in England, notwithstanding the reasons urged by the learned author in favor of its limitation. Thus, in false imprisonment, it was proved that the three defendants jointly had imprisoned the plaintiff; and he was allowed to prove what one said on the subject some weeks after, in the absence of the others; Garrow, B., said, that after the defendants were connected in the imprisonment, he must receive anything that either of them said as to the trespass, as evidence against all. If this were not law, one going to commit a trespass might proclaim his malice in the market place, and yet shut out the evidence of it from the jury, by associating other persons a shade less guilty than himself. Wright v. Court, 2 Carr. & Payne, 232. And where the plaintiff was arrested by one of the defendants, and in continuation of the imprisonment delivered to another, who held the plaintiff in custody, the acts and declarations of that other were held to be evidence against the former; and that too, though by proving a distinct act of imprisonment against the former, disconnected with the latter, the plaintiff precluded himself from recovering against the latter. Powell v. Hodgetts, 2 Carr. & Payne, 432. In the last, Garrow, B., before whom the cause was tried, said, "I take it, that in all cases where one person puts a party into the custody of another, what is said and done by that other is evidence against the person placing the party in custody, though said or done in his absence." This is a remark which would seem to apply by parity of reason, where one party commits a trespass in the wrongful taking of property, and places it in the hands of another. And where one idemnifies a sheriff against an act which turns out to be a wrong, Marcy, J., said the admissions of the former were receivable to charge the sheriff. Benjamin v. Smith, 4 Wend. Rep. 335. See note 145.

In ejectment against two, the admission by one, of a fact going to disprove an adverse possession set up in the other, was refused. Bank of Kentucky v. Williams, 2 J. J. Marsh. 256, 260. Four persons, P., W., & F., were sued for putting wine into a cellar in the public street, the cellar flap being so negligently placed that it fell and injured the plaintiff. F. suffered judgment by default; P., who owned the premises, died before the trial: and as to the other three, at the time of letting down a hogshead of wine by them into the cellar, the flap fell and did the injury. An offer was made to prove a statement by F., and it was claimed that it should be received as evidence against all three of the defendants. It was admitted that this would be evidence against F.; but the judge denied that it was so against the others, there being here no common intent to do wrong, proved to exist among the defendants; it was a mere case of negligence. Daniels v. Potter, 4 Carr. & Payne, 375; S. C., 1 Mood & Malk. 501. In an action of assault and battery against Metcalfe and several persons who were present when Metcalfe committed the assault, the court received evidence of Metcalfe's confession, that they all came with intention to take a boy from the plaintiff with force; but nothing appeared that this was in fact so, nor did the others take any part in the transaction. All being convicted on this evidence, the judgment was reversed. Metcalfe et al. v. Conner, Litt. Sel. Cas. 497. In trespass before a justice, one of two defendants, after the cause had been discontinued, consented to appear for himself and the other; and the declarations of the latter were given in evidence against both; held inadmissible on error, for the latter was not a party. Stoddard v. Holmes, 1 Cowen's Rep. 245. *Quere*, whether if he had been a party, his declarations would have been admissible against the other unless a part of the joint *res gestæ;* or until the trespass had been otherwise shown to have been

the common purpose of both. In either of the two latter cases, it seems the declarations would have been evidence, whether the person making them had been a party on the record or not.

NOTE 136.—The American cases will be found to furnish a very valuable illustration of the text as to the circumstances under which the acts and declarations of one who is *particeps criminis*, may or may not be received to affect his copartners in guilt.

First, as to the proof of their connection, which is always an essential preliminary addressed to the court.

To let in the declarations of a co-conspirator against his fellow, it is enough that the conspiracy be proved by one competent witness. The court will not decide on his credibility. Commonwealth v. Crowninshield, 10 Pick. 497. Where it appeared that the prisoner said to the witness in presence of R., that one F. had offered him a sum of money if he would kill W.; and the prisoner told F. he would give him an answer at a subsequent time; that the prisoner offered the witness a third part of the money if he would commit the murder; that R. proposed a mode of doing it; that the witness declined having anything to do with it, and then the prisoner said he was in jest; and in a few days after, the murder was actually perpetrated by F.; held sufficient proof that the prisoner and R. entered into the conspiracy, to let in the declarations of R. as evidence against the prisoner. Commonwealth v. Crowninshield, 10 Pick. 497.

Trespass by the plaintiff against the sheriff for levying on a negro under a *fi. fa.* against Trigg, the plaintiff's brother-in-law, after he, being insolvent, had conveyed the negro, with eleven others, in trust, to satisfy a debt due to the plaintiff, and they had been sold to the plaintiff at auction, where there were very few bidders. The possession of the negroes was not changed till some time after; and there were some other circumstances showing fraud in the trust sale. It was, therefore, offered by the sheriff to prove Trigg's private request to a bidder at the trust sale to forbear, for the plaintiff was bidding for his (Trigg's) benefit. Held admissible, the circumstances showing, to the satisfaction of the court, a community of design between the plaintiff and Trigg to defraud Trigg's creditors; that this being shown by circumstances of which the court were to judge, the declaration was admissible though the plaintiff was not present. Per Carr and Green, J's, in Clayton v. Anthony, 6 Rand. 285. So where a bond was given by the father to the son with a confession of judgment; on an issue to try whether it was not intended as a fraud against creditors, they having proved a combination between the father and the son to defraud creditors; held that they might then give evidence of declarations of the father, made in the absence of the son, that the bond was given for the sole purpose of keeping off creditors, and that it was without consideration. Reitenback v. Reitenback, 1 Rawle, 362. So, where a vendor is left in possession of property, and exercises acts of ownership over it after sale, this proves a combination to defraud creditors, and his declarations are evidence against the vendee. Wilbur v. Strickland, 1 Rawle, 458. See Willies v. Farley (3 Carr. & Payne, 396), S. P., on the ground that, being in possession, the declaration is a part of the *res gestæ*. See also Babb v. Clemson, 10 Serg. & Rawle, 419, 426, 427, with S. C., 12 Id. 328, 330.

On trial of an indictment against the defendant for prosecuting the slave trade, the proof was that his captain of a vessel owned by him took on board various fitments for the trade at Baltimore (with the defendant's assent), and where he resided; and that the defendant afterwards declared the vessel had made him a good voyage in that trade. Evidence was then received, that after the vessel had left Baltimore, having cleared out on a voyage and proceeded to St. Thomas, the captain proposed to one Coit to employ him as mate on a voyage to the coast of Africa for slaves, and thence back to Cuba. Held admissible against the defendant, as a declaration coming from his agent in the enterprise, and made in the course of its prosecution, as part of the *res gestæ*, and as coming within the general scope of his authority. He had an implied authority to hire a crew, and do other acts necessary for the voyage. United States v. Gooding, 12 Wheat. 460, 468 to 470.

The combination being established in the above or some other way, the cases are uniform that the confessions or declarations are received under the qualifications mentioned in the text.

Thus, on a libel against goods as being forfeited by illegal exportation, in a trade with the Indians, the declarations and acts of the exporters' agent, or of any one who acted in conjunction with the exporters in the course of their business, were held admissible as evidence against the goods. The court declare the principles laid down in the text. American Fur Company v. The United States, 2 Pet. S. C. Rep. 358, 365. So the declarations of the second in a duel are evi

By partner, being a party to the suit.

In an action against persons as partners, when the partnership is first proved, an admission by one of the defendants is admissible against all.(1)

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dence against the principal. State v. Dupont, 2 M'Cord, 334. The defendants, fifty-nine in number, being indicted for a conspiracy to prevent the use of the English language in the German Lutheran Church; and being proved to have been engaged in that enterprise, holding meetings, &c., to concert measures for prosecuting their design with force; held, that the inflammatory and threatening speeches of a few were proper as evidence against the whole. The Commonwealth v. Eberle and others, 3 Serg. & Rawle, 9, 16, 19, 20. In an action against several defendants for a fraudulent conspiracy and obtaining public securities from the plaintiff, the plaintiff having proved the conspiracy for that purpose, was allowed to give evidence of conversations among several of the conspirators, to affect another who was not present at the time. Patton v. Freeman and others, Coxe's Rep. 113. On one of several defendants having suffered a default against him in an action for a conspiracy and fraud upon the plaintiff, and the others having pleaded to issue, on executing a *venire tam quam*, the confessions of the former were held admissible to aggravate the damages. Bostwick v. Lewis, 1 Day, 33. The court said they are evidence against him, he being on trial as to the quantum of damages; and that they *might affect* the others, was no reason for their rejection.

It may be proper to observe here, that the admission of the principal (*e. g.* his plea of guilty to an indictment) is *prima facie* evidence that he committed the crime, on the trial of the accessory. In this respect, whatever is evidence against the principal, is so against the accessory. Rex v. Blick, 4 Carr. & Payne, 377.

On the other hand, on the trial of an indictment against two blacks, Poll and Lavinia, for poisoning their master, *Samuel Skinner*, with white arsenic, a conversation between the prisoners was proved, in which they spoke of putting some deadly drug into the water he should call for, in consequence of their having poisoned his soup, Lavinia adding, "That is the way *he* said do it." She stated before the magistrate that *he* meant *John Skinner*, who gave them something which looked like lime, but it was heavier. The court then received John Skinner's declaration in evidence, that he had just before bought arsenic. The prisoners, being convicted, appealed, and the Court of Appeal granted a new trial. Taylor, C. J., said J. Skinner's declarations would be admissible only against himself; and Henderson, J., said: "The rule has never been carried farther than this: that when a common design is proven, the act of one in furtherance of that design is evidence against his associates. It is in some measure the act of all. But the *declarations* of one of the parties can be received only against himself." Hall, J., concurred. State v. Poll & Lavinia, 1 Hawks, 442. So, on the trial of Col. Burr for a misdemeanor in setting on foot a military expedition against Mexico, the attorney-general, after giving proof tending to show that Blannerhasset was a co-conspirator or an accomplice, then offered to prove the declarations of the latter tending to implicate Col. Burr. The testimony was overruled. Marshall, C. J., delivered the opinion of the court, that such a declaration not forming a part of the transaction, and not made in the presence of the accused, could not be received as evidence. It is inferrible from the report, that the declaration related to some past transaction, and so came within the rule conceded in Hardy's Case, cited in the text. U. States v. Burr, 2 Burr's Tr. by Robertson, 538, 539. And see Apthorpe v. Comstock, 2 Paige, 488, per Walworth, Ch., S. P. See also *ante*, note 135.

Where two persons jointly concerned were on trial, held that the separate examination of one before the magistrate was not evidence against the other. Hopkins and Gannon's Case, before Radcliff, Mayor, 1 C. H. Rec. 173; People v. Bleecker, 2 Wheel. Cr. Cas. 256. Of course it is not evidence for the other. Brandon's Case, 4 C. H. Rec. 140. See Commonwealth v. Boyer, 2 Wheel. Cr. Cas. 150. Where a witness was excused from answering a question, because the answer might subject him to a prosecution, it was held that his declarations as to the same facts were not for that reason admissible, especially as they affected the character of a third person. Nettles v. Harrison, 2 M'Cord, 230.

(1) Nicholls v. Dowding, 1 Stark. R. 81; Gibbons v. Wilcox, 2 Stark. R. 43; Grant v. Jackson, Peake, 204.

Thus, in an action by several partners against the defendant for the non-performance of an agreement, a declaration by one of the partners suing, that the goods to which the agreement related, were his separate property, is evidence against all the plaintiffs suing as upon a joint contract.(1) And a representation of any fact, made by one partner with respect to a partnership transaction, is evidence against the other partners.(2) Where it appeared that the agreement, which was the subject of the suit, was made by the plaintiff, on behalf of himself and the other proprietors of a theatre, declarations of the other proprietors were admitted as evidence for the defendant.(3) An admission by one defendant, of his parnership with the co-defendants, who were sued with him as acceptors of a bill of exchange, and who had been outlawed, has been received as proof against him of a joint promise by all.(4)

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(1) Lucas v. De la Cour, 1 M. & S. 249.

(2) Rapp v. Latham, 2 B. & A. 795.

(3) Kemble v. Farren, 3 C. & P. 623.

(4) Sangster v. Mazarreddo, 1 Stark. R. 161. See, also, Ellis v. Watson, 2 Stark. R. 453.

NOTE 137.—The admissions of one of two joint grantors in a deed of land, the grantors being both of them lessors of the plaintiff in ejectment, were received as evidence against both as to the existence, contents and effect of the deed; a foundation having been first duly laid for oral proof of its contents. Jackson ex dem. Hoogland v. Vail, 7 Wend. 125. The rule that the acknowledgment of one of several parties on the record is evidence against the others, was applied to a suit by a creditor of the ancestor against his heirs and devisees. The acknowledgment and promise of two of these, who were also executors of the ancestor, were received against the others, to take the debt out of the Statute of Limitations. Johnson v. Beardslee, 15 John. Rep. 3. *Quere.* See *infra*, in this note. In debt on a single bill, executed by the two defendants, B. & E., to the plaintiff, the admissions of B., respecting the money being due, were held receivable in evidence for the plaintiff against E. as well as B. Lowe v. Boteler & Eastburn, 4 Har. & M'Hen. 346. In ejectment on several demises, a deed given by one of the lessors to a third person, reciting the will of their common ancestor, by which a title outstanding from all the lessors was shown, was received in evidence against the whole of them. The reason given is, that the one lessor could not be a witness, and they all had a community of interest. Brandt ex dem. Van Cortland v. Klein, 17 John. Rep. 335; Jackson ex dem. Neilson v. M'Vey, 18 John. Rep. 330. But afterwards, in partition, by several persons claiming as heirs and tenants in common, against defendants, who claimed the premises in question under a devise from the demandant's ancestor, it was held that the admission of one of the demandants was inadmissible as against the others, to show the loss of the will and let in oral proof of its contents. This was on the express general ground that one tenant in common cannot admit away the rights of another; and the instance of lessors (tenants in common) in an ejectment is put by way of illustration. The cases in 17 John. 335, and 18 Id. 330, and the latter decision, certainly cannot stand together. Dan and others v. Brown and others, 4 Cowen's Rep. 483. "To warrant receiving the admissions of one in prejudice of another, they should have a joint interest in possession, not a mere community of interest. Gray et al. v. Palmers et al., 1 Esp. N. P. C. 135; Hackley v. Patrick, 3 John. Rep. 536; Smith v. Ludlow, 6 Id. 267, 269; Whitney v. Ferris, 10 Id. 66." Said by Sudam, Senator, delivering the opinion of the Court of Errors, in Osgood v. The Manhattan Co., 3 Cowen, 623. In a proceeding to prove a will before a court of probate, if the admission of one of the several who claim under it be admissible in evidence, it must be one made after the interest accrued, not one before the date of the will. But whether it be admissible. *Quere.* Burton v. Scott, 3 Rand. 399, 407, 408, 409. See cases in 1 Mood. & Malk. 51, and 4 Conn. R. 544, stated *Ante*, note 133. In an action against R. & H., two makers of a promissory note, H. suffered judgment, by default. On a trial with R., the written admission of

H. was received in evidence against R., though H. was insolvent, and though H. & R. had long since dissolved partnership. "It may be doubted whether the joint interest is dissolved until the note is paid." In this case a subsequent counter declaration of H., offered by R., was refused as evidence, though the plaintiff had used the second declaration as evidence in another trial. Martin v. Root, 17 Mass. Rep. 222, 227. On appeal from the probate of a will, by the executors and principal legatees, the declarations of one of them, as to the circumstances attending the making of the will, was received in evidence against the validity of the will, and of course, against the other legatees and executors. Atkins v. Sanger, 1 Pick. 192. *Vid.* in Miller v. Miller, 3 Serg. & Rawle, 267, a similar question raised but not decided. But see *infra*, Phelps v. Hartwell. *Quere;* whether, on an issue of *devisavit vel non*, the admission of one devisee, who is a party, would be evidence against the others. Miller v. Miller, 3 Serg. & Rawle, 267. In an action on a bond against the principal and his surety, conditioned that the former should faithfully execute an agency, his admission that his agency continued beyond a certain time, the question being whether it did not then terminate, was offered in evidence by the plaintiff, at Nisi Prius, and rejected. On a motion for a new trial, the court doubted whether the admission of a principal, not being a part of the *res gestæ*, should be received to affect his surety. But the point went off on another ground. Boston Hat Manufactory v. Messinger, 2 Pick. 224, 240. Such an admission was denied in State Bank v. Johnson (1 Rep. Const. Court, 404), but received in Simonton's Assignees v. Boucher (2 Wash. C. C. Rep. 473). In the first, the principal was not a party; in the latter he was. But no stress seems to have been laid upon the distinction. An acknowledgment of a debt barred by the Statute of Limitations, by one of several joint debtors, defendants, takes the case out of the statute as to all. White v. Hale et al., 3 Pick. 291. In assumpsit by two for transporting the defendant's whiskey, a letter from one, admitting that they had converted a part of the whiskey to their own use, was received as evidence against both. Holmes et al. v. Ketlinger et al., 4 Yeates, 532. In an action against the managers of a lottery, to recover the amount of a prize, the confession of one of the defendants that the plaintiff was the owner of the ticket, is evidence against all defendants. Snyder v. Wolfley and others, 8 Serg. & Rawle, 328.

A joint assumpsit against two defendants not being maintainable without proof, express or implied, that both have assented to the contract in its joint form, although, after establishing that one is liable, the other admits a joint liability, this will not support the action. Mitchell v. Roulstone, 2 Hall's Rep. N. Y. S. C. 351. So where, in assumpsit against two jointly, it was in evidence that each admitted, in their respective answer in chancery, that they had respectively (being joint trustees of the plaintiff) received trust funds to the amount of the plaintiff's claim; held, that the action was not supported, for this created no more than a several liability. Parsons v. De Forrest, 2 Hall's Rep. N. Y. S. C. 131. Where two persons, A. & B., covenanted as between themselves to make certain repairs at their joint expense, yet A.'s admission that he and B. were jointly liable for work done in such repairs on the order of A. alone, is inadmissible in an action at the suit of the workman to charge both. M'Creedy v. Freedly, 3 Rawle, 251. The admission of several defendants that certain books, which all the defendants had notice to produce, were in the possession of a man who was the alleged agent of them all, was held not admissible as to another defendant, so as to warrant oral proof of their contents, no joint liability in all being yet proved. Birbeck v. Tucker, 2 Hall's Rep. N. Y. S. C. 121. In assumpsit for money paid by a plaintiff as a surety, against several of his co-makers, on a promissory note, the admissions of one of the co-makers, a defendant, that the plaintiff was surety on the note for all the others, are inadmissible to affect any one beside the person making the admission. Warner v. Price, 3 Wend. 397. *Semb.* The admission of one administrator of his intestate's debt is inadmissible against another, though both are parties defendants on the same record. Forsyth v. Ganson, 5 Wend. 558, 561. And the contrary concession in James v. Hackley (16 John. Rep. 277), was questioned. And in Hammon v. Huntley (4 Cowen's Rep. 494), an admission of one of two executors, defendants, was not allowed against the other, for it may charge the other with a *devastavit*, though it was said sufficient to take the claim out of the Statute of Limitations. But even of this last, *quere;* and see the cases *ante*, note 133, where it is made a serious question, whether the admission of a personal representative shall be received against himself, even to take the case out of the statute. On appeal against devisees from an order of probate, confirming and allowing a will, on the ground that the devisor was insane, the opinion of one of

In Gray v. Palmer,(1) it was held, that where the plaintiff declared against several defendants on a joint and several note, and the defendants severed in their pleas, and one of them by his plea admitted the handwriting of the note, the handwriting must, nevertheless, be proved against the other defendants. But this case was apparently decided on the ground that an admission in one plea cannot be used to disprove another plea.

The rule with regard to the admissions of partners is not confined to cases where they are parties to the same suit. The admission of a partner, though not a party to a suit, is evidence against another partner, who is sued, as to joint contracts during the partnership; and this has been held to be so, even where the admission is made after the determination of the partnership.(2)

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the devisees was not allowed to be given in evidence against the whole, as he was not solely interested, but another devisee, joined with him as appellee, had an interest. Phelps v. Hartwell and another, 1 Mass. Rep. 71. In an action by the holder against C., G. & R., partners, on a note signed by R. with the partnership name, payable to himself and indorsed by him to the plaintiff, the defence was that this was to pay R.'s private debt to the plaintiff. The plaintiff offered R.'s admissions in evidence of facts showing the note to be valid. Held inadmissible on this question, viz: whether R. was, *quoad hoc*, a partner. Tuttle v. Cooper et al., 5 Pick. 414.

The declaration of one of several defendants, that he and the others were partners, is receivable for the plaintiff. Whitney v. Sterling, 14 John. Rep. 215. And so are the like declarations from each of the defendants. Taylor v. Henderson, 17 Serg. & Rawle, 453, 457. But they are evidence only against the person who makes them, not against the others. Corps v. Robinson, 2 Wash. C. C. Rep. 338. And hence it has been said, if the person making the declaration were not defendant on the record, the declaration could not be received at all. Martin v. Kaffroth, 16 Serg. & Rawle, 120. And in all these cases the testimony should be received with the express qualification that it shall affect him alone who makes the admission. Whitney v. Ferris, 10 John. Rep. 66. And where one of the defendants was defaulted, and on trial of the issue against the other a *prima facie* case of partnership was made out against both, yet the admissions of the defaulted defendant were refused to implicate the other. Robbins v. Willard, 6 Pick. 464.

The confession of one partner, after the partnership is proved, is not received against another on the ground of his being a joint party, but on the ground of unity of interest; and his admissions may be received, though he be not served with process, or a *nolle prosequi* be entered against him. Boyce v. Watson, 3 J. J. Marsh. 498, 500. And it lies with the judge, not the jury, to decide whether a partnership is shown, so as to let in the admissions of one against the other. Harris v. Wilson, 7 Wend. 57.

(1) 1 Esp. 135.

(2) Wood v. Braddick, 1 Taunt. 104. See Thwaites v. Richardson, Peake, 16; where Lord Kenyon, C. J., thought that the admission of a party not a partner to the suit was not receivable in evidence. See also Hodenpyl v. Vingerhoed, Chitty on Bills, 627, n., admission of an acceptance by a partner; Henderson v. Wild, 2 Camp. 562, fraudulent receipts of a partner. It seems this rule does not apply to an answer in chancery by a retired partner, even though it relates to partnership transactions. Parker v. Morrel, 2 C. & K. 599; *Supra*, p. 492.

NOTE 138.—Martin v. Root, 17 Mass. Rep. 222, 227; Cady v. Shepherd, 11 Pick. 400, 407, 408.

But the rule in many of the courts of this country is directly the contrary, by which the power of a partner to bind his copartners by admission, is limited in time to the existence of the copartnership. After dissolution, his admission will not be received, even respecting previous transactions of the firm, so as to affect any other than himself. Accordingly, he cannot after dissolution, state an account with a former creditor of the firm, so as to affect his co-debtors. Hackley v. Patrick, 3 John. Rep. 536; Walden v. Sherburne, 15 Id. 409; Shelton v. Cocke, 3 Munf. 191; Walker v. Duberry, 1 Marsh. Kent'y Rep. 189. So, of his affidavit of facts showing

that the debt claimed as a set-off by him and his copartners, is not due. Hopkins v. Banks et al., 7 Cowen's Rep. 650. But the admission of a debt by one of several partners, made after dissolution, will take the debt so admitted out of the Statute of Limitations, though the original debt cannot be so proved. Shelton v. Cocke, 3 Munf. 191; Smith v. Ludlow, 6 John. Rep. 267. Entries made after dissolution in partnership books, are evidence against him alone who made them. Simonton's Assignees v. Boucher, 2 Wash. C. C. Rep. 473. Action for attorney's fees. The defendants had been partners, but their partnership was dissolved. After this, one of them admitted that he had employed the plaintiff's intestate, an attorney, to prosecute two suits for the partners. Held not sufficient to implicate both defendants. Clark v. Gleason et al., 9 Cowen's Rep. 57. On a bill filed against two partners for an account of trading voyages, in which the complainant was jointly interested with them, one question respected the amount of the complainant's interest in a certain cargo of cotton, whether it was limited to the amount of the funds in the defendant's hands belonging to him, and which had grown out of certain previous voyages the parties had made; or whether it was one-half of the whole cargo. The partnership between the defendants had been dissolved before bill filed. On a reference to a master, he received and acted on the admission of one of the partners before him, that the complainant's interest in the cargo was limited to the amount of his funds in the defendant's hands, a fact which the other partner denied, insisting that the complainant's interest was one-half of the cargo. There having been a great loss on the cotton, this admission very much reduced the charges against the plaintiff. The partners were therefore interested to make his interest as large as possible. On appeal to the Court of Errors, the counsel for the complainant sought to make a distinction between a partner's admitting an account, or a balance of account after dissolution, and his admission of any fact; but the court held there was no difference, and that, though he may bind himself by an admission at any time, a partner after dissolution can make no admission whatever, which shall operate against his copartner. Baker v. Stackpole, 9 Cowen's Rep. 420, 434. See Chapin v. Coleman, 11 Pick. 331.

The English rule was once followed in South Carolina; accordingly in assumpsit for goods sold, against two partners, a letter from one, written after dissolution, admitting the receipt of an account current, and that it was correct, was held admissible against both. Simpson et al. ads. Jeddes, 2 Bay, 533. This was in 1804; but in 1815 this case was directly overruled by the whole court, and the New York rule adopted. Chardon v. Calder & Co., 2 Const. Rep. 685. And again, in 1819, the same doctrine was deliberately recognized on the authority of the New York cases. White v. The Union Ins. Co., 1 Nott & M'Cord, 561. And see Fisher's Ex'rs v. Tucker's Ex'rs, 1 M'Cord's Ch. Rep. 171, 172. But in Kentucky, where the New York rule is fully established (Walker v. Duberry, 1 Marsh. 189), where one partner after dissolution, but before notice given, and before it appeared the plaintiff had any knowledge of the fact, certified a balance to be due from the firm to him; held that this was evidence against the old firm. Gardner et al. v. Towsey, 3 Litt. Rep. 425.

The admission or promise of a surviving partner will not even take the debt out of the Statute of Limitations as to the estate of the deceased partner; much less would it prove an original debt. Fisher's Ex'rs v. Tucker's Representatives, 1 M'Cord's Ch. Rep. 169. And the dictum to the contrary, in Higginson and others v. Air and others (1 Dessauss, 427), is overruled. Id. After the partnership of the defendants was dissolved, and that known to the plaintiffs, one of the defendants certified a balance as due from the firm. Held not admissible to charge the other partners. Ward v. Howell et al., 5 Har. & John. Rep. 60. But Nott, J., thought contrary to the two last cases, that the confession of an original debt by one partner was admissible against the other, though made after dissolution. Fisher's Ex'rs v. Tucker's Ex'rs, 1 M'Cord's Ch. Rep. 190. See notes *supra*, in regard to joint debtors.

NOTE 139.—The authorities all agree that the admission of one partner during the continuance of the partnership is evidence against all. Per Hosmer, C. J., in Bound v. Lathrop, 4 Conn. Rep. 338. Thus, entries, made by one partner during the partnership in the partnership book of accounts are evidence against the other partners. Walden v. Sherburne, 15 John. Rep. 409. And the acknowledgment of a debt by one partner will bind the other, because each is bound for the whole. *Per Cur.* in Corps v. Robinson, 2 Wash. C. C. Rep. 390. In an action against a surviving partner, on a promissory note, alleged to have been signed by the deceased partner with the name of the firm, evidence of his confession that he signed was admitted. Adams v. Brown-

But the statement of one who has been admitted into partnership subsequently to the transaction in question, is clearly not admissible in evidence, as to such antecedent transaction.(1)

It does not follow, however, that an admission made by one partner, or other person jointly interested with others, will in all cases be binding on the others. It will not be so, if it is not made with reference to a matter in which one has power to bind the others. An admission by a partner with reference to partnership matters is binding upon the firm, as an admission by one executor with reference to the testator's estate is binding upon his co-executors; but where two persons are partners, and also part owners of a vessel, the admission of one as to a subject of co-part-ownership, but not of copartnership, will not be binding upon the other.(2) And in like manner, where two executors were sued upon a covenant by their testator for quiet enjoyment, the breach assigned being that the two defendants had entered and evicted the plaintiff under a lawful title, it was held that a declaration by one of them, that he had lawful title through the testator, prior to the covenant upon which the plaintiff sued, was not binding upon the other defendant.(3) An admission by one trustee will not bind his co-trustees, as they are not personally liable.(4)

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son, 1 Tyl. 452. *Semble*, that where a partnership between two defendants in chancery is established by proof *aliunde*, the answer of one partner is evidence against the other, the same as any other admission would be. Williams v. Hodgson, 2 Har. & John. 474, 477; Chapin v. Coleman, 11 Pick. 331. See *ante*, note 137.

Confessions of one partner to charge the others are not received because both are parties to the record, but because of unity in their interest; they are evidence, therefore, though a *nolle prosequi* be entered against the confessing partner. Boyce v. Watson, 3 J. J. Marsh. 498, 500.

(1) Catt v. Howard, 3 Stark. R. 5.

(2) Jaggers v. Binnings, 1 Stark. R. 64.

(3) Fox v. Waters, 12 A & E. 43.

(4) Davies v. Ridge, 3 Esp. 101, 102.

The debt of a copartnership is a joint debt, and not joint and several. Lawrence v. Trustees, &c., 2 Denio, 577. It follows that a dissolution of the firm leaves the partners standing in no other relation to each other but that of joint debtors, who have also a joint interest in the property of the late firm. See Van Keuren v. Parmelee et al., 2 Comst. 523, and authorities there cited.

The general doctrine is, that an admission by one partner, made after the dissolution of the firm, in regard to the business of the firm previously transacted, is admissible as evidence against all the partners. Gay v. Bowen, 8 Met. 100, and cases cited *supra*, in regard to joint debtors. The evidence is competent, not conclusive. Cady v. Shepherd, 11 Pick. 400; Lewis v. Woodworth & Pratt, 2 Comst. 512. There is a distinction between joint owners and tenants in common; thus, one of several owners of a vessel, each owning a fractional part of her, cannot bind the other, as for supplies, by his admission (McLellan v. Cox, 36 Maine, 95); unless they are jointly engaged in navigating the vessel, which it seems may be presumed in the first instance from the fact of ownership (9 Penn. State R. 335, 340).

In an action against several executors or administrators, the admission of one may be proved against all, though it is not sufficient to charge all, and must be excluded or ruled out, unless there be other evidence to charge the other parties. Forsyth v. Ganson, 5 Wend. 558. And it is now well settled in this state that the admissions of an executor or administrator cannot be received in evidence either as against his co-executors or co-administrators, or as against heirs

In Whitcomb v. Whiting,(1) which was an action on a joint and several promissory note, given by the defendant and others, to which action the defendant pleaded the general issue and the Statute of Limitations, the Court of King's Bench determined that proof of payment of interest, and part of the principal, within six years, by one of the others, who was not sued, would take the case out of the statute. Lord Mansfield, C. J., said: "Payment by one is payment by all, the one acting virtually as agent for the rest; and, in the same manner, an admission by one is an admission by all." Different opinions have been expressed respecting the propriety of the decision in this case, but the doctrine contained in it appears to be now clearly established.(2) And it will apply even though

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and devisees. 3 Cowen, 612; 6 John. Ch. 372; 4 Cowen, 494; 14 Wend. 97; 5 Hill, 239; 5 Barb. 407.

(1) 2 Dougl. 661.

(2) See Perham v. Raynal, 2 Bing. 306; Jackson v. Fairbank, 2 H. Bl. 340; Chippendale v. Thurston, M. & M. 411; Pease v. Hurst, 10 B. & C. 122; Wyatt v. Hodson, 8 Bing. 309; Dowling v. Ford, 11 M. & W. 329.

NOTE 140.—See notes above as to the rule in this country.

Where the defendant gave a letter of credit, engaging to be accountable with W. for goods to be purchased by the latter, in an action against the defendant for goods sold to W. under the letter; held, that W.'s subsequent letter, admitting the purchase, was evidence against the defendant. Meade v. M'Dowell, 5 Bin. 195. In an action by a bank against a surety in a bond for the good behavior of a teller, his entries of sums to his credit, made while he was acting as teller, were held admissible as evidence against his surety, as a part of the *res gestæ;* otherwise as to his declarations after his dismissal from the bank. State Bank v. Johnson, 1 Rep. Const. Ct. 404. But see Simonton's Assignees v. Boucher, 2 Wash. C. C. Rep. 473.

The admission of one maker of a joint and several note was received against the other, who was sued alone (Beitz v. Fuller, 1 M'Cord, 541; Bound v. Lathrop, 4 Conn. Rep. 336); and this, though the one not sued had obtained his certificate as a bankrupt, under the law of the United States, and the defendant was his surety; the court saying he must indemnify his surety. Howard v. Cobb, 3 Day, 309. But the admissions of a co-obligor, not sued, in a joint and several bond, were refused against the defendant. Hamlin v. Fitch, Kirby, 174; Abel v. Forgue, 1 Root, 502. And see Baker v. Briggs, *infra.* On plea, in abatement of a non-joinder of A., in an action arising *ex contractu* (*i. e.* for work and labor), his declarations, made before action was brought, were received in evidence for the defendant, to show him a joint contractor (*i. e.* a member of the company for whom the work was done); and Abbott, Ch. J., laid down this important general rule: "Whatever, in an action brought against him as a proprietor, could be evidence to prove him one, may be received on this issue to prove him to be one." Clay v. Langslow, 1 Mood. & Malk. 45; Storrs v. Wetmore, Kirby, 203, *contra.* But the party alleged to have been non-joined was received as a witness for the defendant. The direct contrary of Clay v. Langslow was also resolved in Sweeting v. Turner (10 John. Rep. 216). After a partnership established, what is said by one is evidence against the other, though the former be not a party on the record. Fish v. Copeland, 1 Tenn. Rep. 383; Adams v. Brownson, 1 Tyl. 452.

In the following cases the admissions of a party not on the record, though having a common interest of a certain character with the party to the suit, have been denied; it was held that the admission of the principal maker of a promissory note was not admissible to affect the surety who was sued alone. Baker v. Briggs, 8 Pick. 122, 128. See Howard v. Cobb, *supra, contra.* The plaintiff, with G. and several others, borrowed money on a note made by the plaintiff, and indorsed by G. and the others, which the plaintiff paid, and sued G.'s administrator for G.'s aliquot share, and offered the declarations of the other indorsers in evidence, to prove that they

the payment were made after the six years, and when, therefore, the statute had commenced to run,(1) or where the person making the part payment had died before action, so that the joint contract had been determined.(2) And a part payment by one partner of a debt due by a firm, even after the dissolution of the partnership, will have the same effect.(3)

Admission must relate joint debt.

But this doctrine does not apply unless the payment is distinctly made on account of the joint debt,(4) nor where the payment is made by a party not originally liable. Thus, after the death of one maker of a joint and several promissory note signed by two, a payment upon it by the executor of the deceased party will not take the debt out of the statute as against the survivor;(5) nor will a payment by the survivor bind the executor of the deceased party.(6) And it has even been held that an express promise by one executor will not operate so as to take the case out of the Statute of Limitations, as against the others.(7) Where an action was brought

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were all to share alike. Held inadmissible. Putting their names on the note as joint indorsers did not make them partners. Slaymaker v. Gundacker's Ex'rs, 10 Serg. & Rawle, 75, 81.

In an action by a creditor against the heirs and devisees of his debtor, some of whom were also executors, who had petitioned the surrogate for a sale of the debtor's real estate, on the ground of an alleged deficiency of personal assets; the admission made by the executors in their application to the surrogate, was held by the Supreme Court to be evidence against all the defendants, to show the insolvency of the debtor, with the view to avoid a voluntary conveyance made by him, and thus repel the plea of *reins per descent*, or *reins per devise*. Manhattan Co. v. Osgood, 15 John. Rep. 165. But the judgment in that case was reversed by the Court of Errors on this single point. Osgood v. The Manhattan Co., 3 Cowen's Rep. 612. Nor will an admission by an heir, or any act of his, affect a claim against the executor. Blake's Ex'rs v. Quash's Ex'rs, 3 M'Cord, 340. So any acknowledgment or admission made by an executor or administrator, will not bind the *real assets* in the hands of an heir or devisee, or of the people by escheat, or even affect the right of either to plead the Statute of Limitations. Mooers v. White, 6 John. Ch. Rep. 360. The admissions of an executor or administrator of a co-obligor, are not evidence against the surviving obligor in an action against him by the obligee (Wilmer v. Harris, 5 Har. & John. 1), nor are the declarations of one of several representatives of the deceased admissible against another in a suit by him. Walkup v. Pratt, 5 Har. & John. 51. And the executor of an executor cannot be affected by his testator's declarations, that he had assets of the first testator. Knapp v. Hanford, 6 Conn. Rep. 170, 174, 175.

(1) Manderston v. Robertson, 4 Man. & R. 440; Channell v. Ditchburn, 5 M. & W. 494. See also, Rew v. Pettet, 1 A. & E. 196; Beaumont v. Greathead, 2 C. B. 494.

Contra, 2 Comst. N. Y. Rep. 523.

(2) Burleigh v. Stott, 8 B. & C. 36.

(3) Goddard v. Ingram, 3 Q. B. 839. And see Wood v. Braddick, 1 Taunt. 104; and by Lord Brougham, C., in Pritchard v. Draper, 1 Russ. & M. 191, 199, 200; Story on Partnership, § 107.

(4) See Holme v. Green, 1 Stark. R. 488; Brandram v. Wharton, 1 B. & A. 463; Dowling v. Ford, 11 M. & W. 329; Scholey v. Walton, 12 M. & W. 510.

(5) Slater v. Lawson, 1 B. & Ad 396. See 9 Geo. IV, c. 14, as to new promises by joint contractors, executors or administrators.

(6) Atkins v. Tredgold, 2 B. & C. 23.

(7) Tallock v. Dunn (Ry. & M. 416), cited with approbation by Parke, B., in Scholey v. Walton (12 M. & W. 510, 514), where the same learned judge expressed a similar opinion as to the

against A., and B. and C., his wife, upon a joint promissory note made by A. and C. before her marriage, it was held that an acknowledgment of the note by A., made after the marriage of C. with B., would not take the case out of the statute.(1)

The effect of admissions made by a party to the suit in the course of the pleadings, which do not require to be proved in the same manner as ordinary admissions, will more properly be considered in the chapter which treats of the rule that the substance only of the issue needs be proved.

2. Of admissions by parties made under a judge's order.

It is now proposed to treat briefly of admissions made by parties to a suit under a judge's order. Such admissions are in their effect similar to those made by the attorney on the record for the purposes of the suit; which will be discussed hereafter: but as admissions under a judge's order are considered as made by the party to the suit himself, this appears to be the proper place to consider them.

Such admissions relate exclusively to written documents, and the practice of requiring them has grown up, of late years, in conformity with certain rules of court, sanctioned by all the judges with a view of saving expense to suitors in the formal proof of documents.(2)

If a party relies upon documentary evidence, he will not now, in general, be allowed the costs of proving the documents, unless he has before the trial given notice to the opposite party, requiring him to admit them. This omission to give such notice will not, however, preclude him from giving the documents in evidence, but he cannot charge the adverse party with the expense of so doing, whatever may be the result of the cause.

A foreign judgment, and other documents abroad, have been held to be within these rules, and an order may be made to admit them, if the party, who relies upon them, will pay to the opposite party the expenses of examining them.(3)

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operation of a part payment by one of several executors. A different opinion as to the effect of such a promise had been intimated by the Court of King's Bench, in Atkins v. Tredgold (2 B. & C. 23), and M'Culloch v. Dawes (9 D. & R. 40). See 12 M. & W. 514.

(1) Pittam v. Foster, 1 B. & C. 248.

(2) See Reg. 6 & 7 A. D. 1832; 3 B. & Ad. 392, 393; Reg. Gen. H. T., 4 Wm. IV, r. 20, A. D. 1834; 5 B. & Ad. App. 17, 18.

(3) Smith v. Bird, 3 Dowl. P. C. 641. See Bastard v. Smith (10 A. & E. 213), as to the costs of a witness to translate and explain ancient records; and the cost of an officer of the Court of Chancery to produce affidavits.

(Under the Code of New York, either party may exhibit to the other or his attorney any paper material to the action, and request an admission in writing of its genuineness; and if he refuse or fail to give the admission within four days after the request, the party proving it on the trial will be entitled to demand and receive from the party refusing, the expenses incurred in making the proof, unless the court is satisfied there were good reasons for the refusal. And the court has power to order either party to give to the other an inspection and copy, or permission to take a copy of any books, papers and documents in his possession, or under his control, containing evidence relating to the merits of the action, or the defence therein. And if the party refuses to

The notice is required to be given a reasonable time before the trial;(1) but, it seems, if the party who receives the notice does not object to its sufficiency upon this ground, though he refuses to admit the documents referred to in the notice, the other party, if he succeeds at the trial, will be entitled to the costs of the proof.(2)

The order is usually made in the terms of the notice, "saving all just exceptions to the admissibility of the documents as evidence." If an order is so made by consent, it will be taken as an admission that the document has been properly described in the notice. Thus, where the plaintiff gave the defendant notice that he might inspect, and would be required to admit on the trial, a "counterpart of lease" from T. to S., dated, &c., and a judge's order by consent was made for admitting the same; the instrument produced at the trial was in the form of a demise from T. to S., of the date specified, and was indorsed "counterpart," but was executed both by landlord and tenant; it was held, that the defendant having consented to admit a counterpart of lease, corresponding in date and parties with that produced, could not afterwards contend that the instrument produced was a lease, and was inadmissible for want of a sufficient stamp.(3)

Where an admission was that a document "was signed, sealed, and executed, as it purports to be," the document, which was produced by the party who took the benefit under it, concluded "as witness the hands and seals" of the parties, but the attestation was to signing and sealing only; it was held, that it was to be inferred that the document had been delivered, and amounted in law to a deed.(4)

The doctrine that an admission of this nature will preclude the party making it from disputing the accuracy of the description of the document,

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obey the order, the court may, on motion, exclude the paper from being given in evidence, or punish the party refusing, or both. § 388.)

(1) See the Rules of Court, *ut supra*.

(2) Tinn v. Billingsley, 2 C., M. & R. 253.

(3) Doe d. Wright v. Smith, 8 A. & E. 255.

(Admissions before trial, in England, are now regulated and required by the Common Law Procedure Act, 1852, which provides that: "Either party may call on the other party by notice to admit any document, saving all just exceptions; and, in case of refusal or neglect to admit, the costs of proving the document, shall be paid by the party so neglecting or refusing, whatever the result of the cause may be; unless at the trial the judge shall certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except in cases where the omission to give the notice is, in the opinion of the master, a saving of expense." 15 & 16 Vict., c. 76, § 117.

Under this form of admission, which is the same as that under the previous rules of court, an admission of *copies* of documents does not dispense with the production of the originals. Sharpe v. Lambe, 11 A. & E. 805. But the admission of a deed is a waiver of objection to it on the ground that it appears to have been interlined (Freeman v. Steggall, 19 L. J., 18 Q. B.); though an admission of signature to a draft does not waive an objection to it on account of the insufficiency of the stamp. Vain v. Whittington, 2 Dowl. (N. S.) 757.)

(4) Hall v. Bainbridge, 17 L. J., Q. B. 317.

as contained in the admission, renders it necessary that the party making the admission should be careful not to make it larger than he intends.

Authority of agent to accept bills.

In the late case of Wilkes v. Hopkins,(1) the plaintiff declared upon a bill of exchange for £121 10*s*., alleged to have been drawn by him upon, and accepted by, the defendants as the Newbridge Coal Company. The plaintiff served upon the defendants a notice to admit a "bill of exchange, drawn for £121 10*s*. by the plaintiff upon, and directed to [the defendants as] the Newbridge Coal Company, &c., and accepted by one H. Bishop, for [the defendants as] the Newbridge Coal Company, payable," &c., &c. An order was made by consent to admit the drawing and acceptance according to the notice. At the trial, the defendants wished to deny the authority of H. Bishop to bind the firm by such acceptance; but it was held, that they were precluded by the terms of the admission from so doing; and that the admission was not merely to the effect that H. Bishop signed an acceptance *purporting* to bind the firm. Tindal, C. J., in giving the judgment of the court, observed: "How far this might have been the case (*i. e.*, that nothing more was admitted than that the acceptance was in the handwriting of H. Bishop), if the bill had been set out, in the notice to admit, in the precise terms in which it purports to have been drawn; that is, if it had been described as a bill drawn on the Newbridge Coal Company, and to have been accepted for the Newbridge Coal Company by H. Bishop, we are not called upon to determine; for the bill is described in the notice to admit, as a bill 'drawn upon, and directed to the defendants as the Newbridge Coal Company,' and to be 'accepted by one H. Bishop, for the defendants, as the Newbridge Coal Company.' So that the facts—that the defendants constitute the Newbridge Coal Company, and that the bill is accepted by H. Bishop for the defendants—facts not appearing on the face of the bill—are plainly and unequivocally admitted under this notice."(2)

Order does not preclude objection to admissibility.

But the party upon whom the order to admit is made, is entitled to rely upon any just exception against the admissibility of any document as evidence, even though the saving as to exceptions should be omitted from such order. Thus, were a plaintiff was ordered to admit a "a copy of a letter" from himself to one of the defendants, who had suffered judgment by default; it was held; that this did not authorize the giving in

(1) 1 C. B. 737. See also Poole v. Palmer, C. & Marsh. 69.

(2) 1 C. B. 745. The court, however, upon affidavits that the defendants were taken by surprise at the extent to which their admission had been carried, and had thereby been prevented from entering into their real defence, allowed their admission to be remodeled by striking out the words in brackets, and granted a new trial upon payment of costs.

evidence such copy, without proof of what had become of the original, though notice to produce had been given to the plaintiff, it not being proved that the plaintiff had the original.(1) "The judge's order," observed Lord Denman, C. J., "secures the accuracy of the secondary evidence, but does not give it the effect of primary evidence." So where the order was to admit "a bill of exchange for £33, at three months' date, drawn by," &c.; it was suled, that this did not preclude the party upon whom the order was made, from objecting that the bill was not admissible, as not being properly stamped.(2)

A slight variation between the notice or order, and the document itself, will not prevent the opposite party from availing himself of the admission, if the variation was not one calculated to mislead. Thus, where a promissory note was described in the notice to admit, as payable on the 10th of October, instead of November, but in all other respects was correctly described; it was ruled, that the defendant, who had made the admission, could not object to the note being read.(3) So where a judge's order to admit referred to a notice served by the defendant's attorney, dated the 4th of March, and the notice produced was dated the 1st; but the plaintiff's attorney stated it was the only notice served in the cause; it was held sufficient.(4)

It is not necessary to prove that the party, who has admitted a document, has actually inspected it beforehand. If he has the opportunity to do so, and does not take the trouble, he places himself in the same situation as if he had.(5)

Nor does it seem absolutely necessary to prove that the document produced at the trial was the same as the one produced at the judge's chambers; to require such evidence would be to multiply proofs so as to defeat the rules of court.(6) But it is usual, and is certainly expedient, to be prepared with some evidence to identify the document.(7)

An admission made under a judge's order, will be available upon a new trial of the same cause, even though there has been an alteration in the pleadings, provided the alteration does not affect the subject matter of the admission.(8)

If the party upon whom the order is made, refuses, at the trial, to make

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(1) Sharpe v. Lamb, 11 A. & E. 805.

(2) Vain v. Whittington, C. & Marsh. 484.

(3) Field v. Heming, 7 C. & P. 619; S. C., in bank (*nom.* Field v. Flemming), 5 Dowl. P. C. 450.

(4) Bittleston v. Cooper, 14 M. & W. 399.

(5) By Patteson, J., in Doe d. Wright v. Smith, 8 A. & E. 264.

(6) By Coleridge, J., Id. 265.

(7) See Clay v. Thackray, 9 C. & P. 47, 53; S. C., not S. P., *nom.* Clay v. Shackeray, 2 Moo. & R. 244; Doe d. Tindal v. Roe, 5 Dowl. P. C. 420.

(8) Langley v. Oxford (Earl), 1 M. & W. 508. See also Elton v. Larkins, 5 C. & P. 386; Doe d. Wetherall v. Bird, 7 C. & P. 6.

the required admissions, and is successful, the court will grant a new trial, and make him pay all preceding expenses.(1)

The jurisdiction given to the rules of court is confined to a judge at chambers, yet at his desire, the court in bank, though they have no power to make an order, will hear the argument, and communicate their opinion to him.(2)

3. Of admissions by the agent of a party.

It is proposed to consider next the subject of admissions by agents of parties. These admissions appear to be liable to some objections, from which the admissions of the parties themselves are free. Tindal, C. J., has observed:(3) "It is dangerous to open the door to declarations of agents, beyond what the cases have already done. The declaration itself is evidence against the principal, though not given on oath; it is made in his absence, when he has no opportunity to dispute or correct it by any observation or by any question put to the agent, and it is frequently brought before the court and jury after a long interval of time. It is liable, therefore, to suspicion originally, from carelessness or misapprehension in the original hearer, and to still further suspicion from the faithlessness of memory in the reporter, and from the facility with which he may give an untrue account. Evidence, therefore, of such a nature ought always to be kept within the strictest rules, to which the cases have confined it." There is less necessity for resorting to such evidence, in the case of living agents, than where proof is given of the admissions of parties who may refuse to be examined; and, perhaps, the admissions of agents may be considered not so likely, as those of the parties, to contain an accurate and complete statement of circumstances.

Numerous questions have arisen respecting the point how far the admissions of agents may affect their principals. The general rule may be stated thus: That the statement or representation of an agent, at the time of a transaction which is within the scope of his authority, is evidence against the principal himself, in consequence of the legal relation between principal and agent. It is in the nature of original evidence and not of hearsay, the representation or statement of the agent in such cases being the ultimate fact to be proved, and not an admission of some other fact. Thus, what an agent says at the time of a sale, which he is employed to make, is evidence as part of the transaction of selling; and in order to prove what was said, it cannot be necessary that the agent himself should be called.(4)

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(1) Doe d. Tindal v. Roe, *ut supra.*

(2) Smith v. Bird, 3 Dowl. P. C. 641.

(3) In Garth v. Howard, 8 Bing. 453.

(4) See the judgment of Grant, M. R., in Fairlie v. Hastings, 10 Ves. 123, 126, 127; Helyear v. Hawke, 5 Esp. 72; Betham v. Benson, Gow, 45; Alexander v. Gibson, 2 Camp. 555; Irving v. Motley, 7 Bing. 553; Peyton v. St. Thomas's Hospital, 3 C. & P. 363; S. C., *nom.* Peyton v.

London (Mayor, &c.), 9 B. & C. 725; Peto v. Hague, 5 Esp. 134; Shumack v. Lock, 10 B. Moore, 39; Morel v. Harborough (Lord), 1 Gale, 146; Lucas v. Godwin, 3 N. C. 737; R. v. Hall, 8 C. & P. 358; Mortimer v. M'Callan, 6 M. & W. 58.

NOTE 141.—The distinctions contained in Fairlie v. Hastings, relied on by our author, and now so fully recognized by the English authorities, have continued to maintain their ground in England, and formed the grand text upon which all the American courts have proceeded, with perhaps less deviation than the English courts themselves. These distinctions have been often laid down in the abstract; and still oftener illustrated by the variety of aspects and relations in which the declarations of the agent have presented themselves. We are, in the first place, after fixing upon him the character of an agent, to inquire whether his acts, statements, or declarations proposed to be given in evidence, took place while he was making the agreement, or otherwise proceeding within the scope or bounds of the authority which we find he possessed. If this be so, they are the acts, statements, or declarations of the principal himself; and though the party insisting upon them as such, may call the agent and prove them by him, yet he may be passed by, and any third person having the requisite knowledge of such acts, statements, or declarations, is equally admissible for that purpose. Rawson v. Adams, 17 John. Rep. 130, 131; Sherman v. Crosby, 11 Id. 70, 71; Shelmaker v. Thomas, 7 Serg. & Rawle, 109; Meredith v. Kennedy, Litt. Sel. Cas. 516, 517, 518; Hood v. Reeve, 3 Carr. & P. 532; per Spencer, J., in Coleman v. Southwick, 9 John Rep. 54, 55; per Marcy, J., in Benjamin v. Smith, 4 Wend. 334; Thallhimer v. Brinckerhoff, 4 Wend. 396, 397; Burlington v. Calais, 1 Verm. 385; Perkins v. Burnet, 2 Root, 30; Mather v. Phelps, Id. 150; Irving v. Motley, 7 Bing. 543; Webb v. Alexander, 7 Wend. 281, 283, 286. Thus, if the agent's declaration be by letter, instead of calling him, you may call another and prove the signature to be in his handwriting, as if it were actually a letter of the principal; for it is so in law. Daniel v. Hill, Norris' Peake, 40. But *semb.* you must show that it was sent; and it is not enough to prove a copy from the agent's files, though he be dead, unless the original be accounted for. Davis v. Mason, 4 Pick. 156. Nor this, though the copy be properly directed. Id. So copies of invoices made by him cannot be proved, though the originals remain in his custody. Cooper v. Morrell, 4 Yeates, 341.

We proceed, therefore, to a brief sketch of the cases, as they show, first, when the declaration of the agent proposed to be given in evidence shall be deemed within his authority, or, as it is often expressed, a part of the *res gestæ;* and secondly, when they are beyond his authority, and therefore, like any declaration of a third person, inadmissible without the sanction of his oath.

First. For the declarations of corporators offered in evidence to affect the interest of the institution to which they belong, we refer generally to the previous note 134, on this subject. The cases as to the admission of joint wrongdoers *ante*, notes 135 and 136, may also be advantageously consulted, as having an important bearing on the question when a declaration shall be deemed a part of the *res gestæ*.

The admission of an overseer of the poor that he had received the requisite notice to charge his town with the expenses of a pauper, such admission being made by him while engaged in court as agent, defending the town against the claim as is his office and duty by law, is admissible in evidence against the town at any time after. Burlington v. Calais, 1 Verm. Rep. 385. And note, this admission was made while trying the cause in the court below before the justice, and was received as evidence against the town on the trial upon appeal, as it would have been if made by the party himself. Reed v. Rocap, 4 Halst. 346, 352; Fitch v. Hyde, Kirby, 258, 259, stated *ante*, note 125.

It has also been made a question whether the admissions of counsel upon one trial would be evidence against the client in another; for the counsel is equally authorized to make the particular admission as was the overseer. But he has no such general power, and hence it has been holden that his admissions cannot be received out of the cause (Harrison's Devisees v. Baker, 5 Litt. 250); and that a bill of exceptions is not evidence in or out of the particular cause (Baylor v. Smithers, 1 Mon. 6, 7); though held, it may be in the same cause, to discredit a witness (Id.); but *quere*. Nor is a case made for a new trial evidence in another suit, though both suits relate to the same subject matter. And such cases ought not, perhaps, in any case, to be received as evidence, unless the admission of some fact contained in them be made the condition of a new trial. Elting v. Scott, 2 John. Rep. 157, 162; Harrison's Devisees v. Baker, 5 Litt. 250, 252, 254. Nor does a demurrer to a plea so admit the facts as to be received in another cause

between the same parties. Tompkins v. Ashley, 1 Mood. & Malk. 32, 33. But a bill of particulars was held an admission in the particular cause in which it was rendered. Rymer v. Cook, 1 Mood. & Malk. 86, 87, note. But see Brittingham v. Stevens, 1 Hall's Rep. N. Y. S. C. 379, *contra*. So a notice from the attorney may be used as an admission in the particular cause. Holt v. Squire, cited in the text.

When the wife shall be deemed the agent of the husband, and so her admissions received, see *ante*, note 46.

Of confessions by the under-sheriff, deputy or bailiff, to charge the sheriff, see *infra*.

The defendant agreed to pay to the plaintiff a sum of money, in consideration of the plaintiff suffering his wife to live separate, and delivering to her certain property. In a suit for the money, the wife's declarations that she had received the property, were held admissible against the defendant, she being his agent for this purpose. The court said her receipt would have been evidence of the delivery, and her parol admission ought to be equally so. Fenner v. Lewis, 10 John. Rep. 38, 44, 45.

But note, this case seems more difficult to support as one of a mere agency admission, than as the admission of the real party in interest, though not on the record, according to the rule, *ante*, in the text, and note 133.

The defendant having written to the plaintiff that he would be accountable with W. for any contract he would make for the purchase of goods, in an action for goods sold to W., held that a letter from W. subsequent to the purchase, acknowledging the purchase of goods from the plaintiff, was evidence against the defendant. And Tilghman, C. J., said, the defendant having confided to W. the power of making the contract, confided to him, of consequence, the power of furnishing evidence of the contract. Meade v. M'Dowell, 5 Binn. 195. But note, this is more like the case of principal and surety, than principal and agent. Both parties seem to have been liable; the defendant as surety, on his letter of credit, and the purchaser as a principal. *Ante*, note 140. Accordingly it is said, the letters of an agent cannot be received in evidence to prove facts stated in them. He is a competent witness, and should be sworn to prove these. But his letters may be received to show what facts he has stated in the course of his business as agent, in order to explain upon what motives and principles the party receiving them acted; though the facts stated must be proved otherwise. Blight v. Ashley, 1 Peters' C. C. Rep. 15, 21, per Washington, J.

In assumpsit for money had and received, the plaintiff offered in evidence what the defendant's agent who received the money, said. *Curia:* "What he said and did in that transaction is the same as said and done by the defendant." Perkins v. Burnet, 2 Root, 30. To repel a plea of usury to a promissory note, the plaintiff offered to show what the defendant's son had said while acting as agent in relation to the transaction in question. Held admissible. Mather v. Phelps, Id. 150. So an entry of deposit by the agent of a bank in a bank-book accompanying the deposit, is a conclusive admission against the bank; otherwise, if made afterwards. Manhattan Co. v. Lydig, 4 John. Rep. 389. So the entry in a bank-book of a dealer, of the amount of his deposit, made by a teller or clerk of the bank, is an entry by the bank agent. He is *not the agent of the dealer*, and a mistake may be shown by the latter. Mechanics and Farmers' Bank in the city of Albany v. Smith, 19 John. Rep. 115. Accordingly, in assumpsit for the price of hides sold by a butcher, against the proprietors of a tan-yard, their general manager of the yard, who had power to buy hides and sell leather, gave the plaintiff three certificates of different dates; one that $1,640.75 was due the plaintiff on settlement; one that $2,843.25, and another that $1,297.30 worth of hides had been received by him from such a day to such a day, mentioning the time in each certificate; and signed his name. And these certificates were held admissible to charge the defendants. Marshall, Ch. J., said the proprietors themselves might have given such papers; and their general manager had the same power; and the court held all the papers receivable in evidence against the defendants, including that which certified the settlement or balance struck. Barry v. Foyles, 1 Pet. S. C. Rep. 311. And see Rawson v. Adams, 17 John. R. 130. So to prove a loss on an adventure shipped to New York, the account of sales by the factor was received in evidence on proving his signature to the account. Rich v. Broadfield, 1 Dall. 16. And *semb.* the log-book of a ship is evidence for (of course it is so against) the owner; but it must be proved to have been regularly made. Proof of the mate's handwriting in many parts, and that a sailor saw him writing "Log-book of the Lydia" (the

name of the ship), during the voyage, held not enough. United States v. Mitchell, 2 Wash. C. C. Rep. 478. Such strict proof would of course not be necessary, where it is used against the owner. So the declaration of a sheriff or auctioneer as to what property is up for sale, *e. g.*, whether it be the whole farm or only a certain parcel of it, is admissible. Wright's Lessee v. Deklyne, 1 Pet. C. C. Rep. 199, 201, 204. And in assumpsit for ten kegs of dollars, against a bank, the plaintiff proved that the kegs, being brought to the bank against the plaintiff's will, were paid out for the debts of the bank by direction of H. and B., president and cashier *pro tempore*. And this was held admissible, though H. and B. were both within reach of a subpœna; because a president and cashier of a bank may direct money in the bank to be paid out for the debts of the institution. But the subsequent admission of the president as to a bag of dollars which had been brought into the bank and converted by a stockholder, that this was the plaintiff's property, was held inadmissible. The City Bank of Baltimore v. Bateman, 7 Har. & John. 104. So on a libel against goods, as being forfeited by illegal exportation, in a trade with the Indians, the declarations and acts of the exporters' agent, or of any one who acted in conjunction with the exporters in the course of their business, were held admissible as evidence against the goods. American Fur Company v. The United States, 2 Pet. S. C. Rep. 358. So in a statute proceeding, to recover for labor done on the respondent's ship, he insisted that the libelant had been paid by a note of W. & C., former owners. The libelant insisted that the note was not paid, but renewed and discounted, the money going to W. and C. A witness for the libelant proved that W. and C.'s clerk came to the libelant, and requested him to renew the note, which he did. Objected that this was hearsay; and that the clerk should be sworn as a witness; but the objection was overruled. The court say, being clerk of W. and C., he was their agent; and his sayings and doings were matters of fact. Ship Portland v. Lewis, 2 Serg. & Rawle, 197, 203. And though the acts of a deputy surveyor in surveying state lands for A. cannot be given in evidence for him without producing the public authority under which the deputy acted, yet the unauthorized act of the deputy, done or attempted by the procurement of A., may be given in evidence against him. Unger v. Wiggins, 1 Rawle, 331. So in an action by the owners of a vessel on a policy of insurance, the protest of the master and mariners, is admissible evidence for the plaintiffs, and of course for the defendants. Miller v. South Carolina Ins. Company, 2 M'Cord, 336; Campbell v. Williamson, 2 Bay, 237. *E. g.*, as to the cause of deviation, or the seaworthiness of the vessel. Id. The plaintiff made an agent to receive certain moneys collected for him by the defendant. Held, that the agent's drafts on, and receipts to the defendant for money, his letters in the course of the business to the defendant, and an account and balance struck between them in respect to the money; and the agent's admission of payment at the time of so settling, were all evidence for the defendant. The agent need not be made a witness by him. Thallhimer v. Brinkerhoff, 6 Cowen's Rep. 90, 99, 100. And see Sherman v. Crosby, 11 John. R. 70. So a letter from the debtor's agent (authorized to do the act), directing the creditor on which of several debts to apply certain moneys paid, were held admissible to prove the application of the payment. Mitchell v. Dall, 2 Har. & Gill, 159, 170. The party had employed Fitch as agent to sell for him a quantity of barilla, who sold part to the defendant, who gave his note. The barilla was in truth worth nothing; and in an action on the note, the defence being that there was fraud, the defendant proved the declarations of Fitch in respect to the quality of the remaining quantity on hand, after the sale to the defendant. The court thought that as Fitch was agent for selling the whole, his declarations, while engaged in that agency, were admissible against the plaintiff. But the cause went off mainly on another point. Welch v. Carter, 1 Wend. Rep. 185, 190, 191.

In an action for money had and received, it appeared that the defendants' agents had directions to receive the money and remit it to the defendants. A letter from the agents admitting they had received it—that letter being answered by one from the defendants—was therefore received in evidence against the defendants, as a declaration made in the course of their business as agents. The object of the letter was to show the money to be in the hands of the defendants' agents. Coates v. Bainbridge, 5 Bing. 58; S. C., 2 Moore & Payne, 142. In assumpsit on a promise to remove certain mud, which the defendant's foreman had asked leave to throw on the plaintiff's land, on cleansing a stream for the benefit of the defendant's mill, the plaintiff offered to prove what the defendant's clerk in his counting-house, and who also had the internal management of the mill, had directed the foreman as to cleaning the stream and taking away the

mud. Held inadmissible. The act of throwing out the mud was not within the ordinary business of the defendant as a miller, and the clerk who managed the mill could not, therefore, interfere. Suppose, said Best, C. J., the defendant's house had been out of repair, the repairing would not come within the business of the clerk as agent in the counting-room. Shumack v. Lock, 10 B. Moore, 39. The acknowledgment of the cashier of a bank, that a note had been paid, was received, and held *prima facie* evidence against the bank. State Bank v. Wilson, 1 Dev. 484. So where the wife of the plaintiff, who was shown to be the plaintiff's agent for the purpose, declared that the demand in question had been sold by her to F., this was held admissible as evidence against the plaintiff, and that any one might safely treat with F. concerning it. Curtis v. Ingham, 2 Verm. Rep. 287, 289. Note—the plaintiff had left the state, leaving the whole control of this business with his wife. On trying a claim as informer against the United States collector, for the proceeds of goods informed against, the admissions of his deputy, while engaged in the seizure and securing the property, are admissible against the collector as to the fact of the claimant being the real informer, but not after the goods are secured in the store, or the transaction otherwise closed by him. In the first case they are a part of the *res gestæ;* in the last, not. Westcott v. Bradford, 4 Wash. C. C. Rep. 492, 499 to 501. An attorney-general has power to make admissions favorable to the accused. State v. Fields, Peck, 140. And the declarations of a surveyor authorized by the owner of land to survey and lay out a town, made in reference to matters chiefly within the scope of his powers, and while he is acting in his agency, are evidence against the owner and his grantees. Barclay v. Howell's Lessee, 6 Pet. S. C. Rep. 498; M'Cormick v. Barnum, 10 Wend. Rep. 104, S. P. In the latter case the surveyor was dead, but this was not relied upon. His declaration was considered within the scope of his power, which was to make a survey and allotment for the owner, though made just after the close of his survey. But see Meredith v. Kennedy (Litt. Sel. Cas. 516, 517, 518, stated also *infra*), which holds that such subsequent declarations cannot be received. The declarations of the defendant's supercargo, made while sailing, that the deviation of the vessel from the voyage described in the charter party was by his (the supercargo's) direction, were received in evidence against the defendant. Higgins v. Soloman, 2 Hall's Rep. N. Y. S. C. 482, 487, 488. The defendant gave a written order on the plaintiff in favor of S., stating that S. wished to trade with the plaintiff for hides to the amount of eighty or one hundred dollars, and that the defendant would be responsible for the engagements of S., and S. indorsed on the order a receipt for the hides "to the amount of one hundred dollars," &c.; held, that the receipt so indorsed was *prima facie* evidence of the delivery of the hides pursuant to the order. The court say that S. was the defendant's agent, having authority to receive, and the receipt was his act as agent. Rawson v. Adams, 17 John. Rep. 130.

Secondly, we are to present the cases where the declarations or statements proposed to be proved are beyond the scope of the agent's authority, in which case they are not evidence to affect his principal, farther than any mere assertion, though they regard acts which were within his authority. Per Cheves, J., in State Bank v. Johnson, 1 Rep. Const. Ct. 409; Blight v. Ashley, 1 Pet. C. C. Rep. 15, 21; Webb v. Alexander, 7 Wend. Rep. 281, 283, 286; per M'Lean, J., in Barclay v. Howell's Lessee, 6 Pet. S. C. Rep. 404. And this, though they are contained in the agent's sworn answer to a bill in chancery. Leeds v. The Marine Ins. Co. of Alexandria, 2 Wheat. 380.

In assumpsit for work and labor, the plaintiff was allowed to prove by D. the declaration of the defendant's agent concerning buildings erected by the plaintiff on the farm of a third person, with whom it did not appear the defendant had any connection. This was left to the jury, with instructions that, if they believed D., they should find for the plaintiff. Held erroneous, for no connection was shown between the defendant and the third person. Irvine v. Buckaloe, 12 Serg. & Rawle, 35. The defendant, by F., his agent, purchased certain trees of the plaintiff's intestate. Held, that a subsequent written account made by F., of the timber cut under F.'s direction for the defendant, was not admissible in evidence against him. Pasteur v. Parker, 3 Rand. 458. So in assumpsit for the price of pig iron, the delivery was sought to be proved by the certificate of the defendant's clerk, dated Nov. 1815, that the quantity of pig iron delivered to him by the plaintiff in October and November, 1814, was so much. Held inadmissible, it being a past transaction, and not a receipt given at the time, which, *semble*, would have been evidence. The plaintiff should have sworn the clerk as a witness. Glasser v. Reno, 6 Serg. &

Rawle, 206, 207. Again; in an action for money had and received, the claim arose from the defendant having received money from the treasury for certain rations furnished to the army by one Bradshaw. The plaintiffs claimed that Bradshaw, now deceased, was their agent in furnishing the rations; and the defendant, that he was his agent in furnishing them. The defendant offered in evidence a written statement of facts by Bradshaw, respecting the matter in controversy, made to be submitted to referees in a controversy between himself and one Duncan. Held inadmissible. The plaintiffs then offered in evidence Bradshaw's letter denying that the defendant had supplied the rations; but this was in answer to certain declarations of his to the contrary, which the defendant had given in evidence. Held admissible only in this point of view, but not as proof of an independent fact. Turnbull et al. v. O'Hara, 4 Yeates, 446, 452, 453. *Quere.* Action for money paid as a premium in effecting an insurance for the defendant. W., as the defendant's agent, requested the plaintiff to insure, and gave to the plaintiff his (W.'s) own note, but failed. The plaintiff offered to prove the subsequent declarations of W., that the defendant would pay the debt. Held inadmissible. The reason given is, that W. was agent only to effect the policy, not to bind the defendant by a subsequent promise to pay. Millick v. Peterson, 2 Wash. C. C. Rep. 31.

In ejectment founded on an entry and survey, the admission of the plaintiff's agents and surveyors, that they had agreed to a survey which should not interfere with the defendants, were held inadmissible against the plaintiff, not being made in the course of their acts as agents; but afterwards. Meredith v. Kennedy, Lit. Sel. Cas. 516, 517, 518. *Quere.* See M'Cormick v. Barnum, 10 Wend. 104, and Barclay v. Howell's Lessee, 6 Pet. 498, both cited *supra.* But in the New York case the surveyor was dead, and it was a declaration as to boundaries, and in the case from Peters, the declarations of the surveyor were while he was acting as such. In trover against four, two of them owners, and two agents of the owners in managing a warehouse, the two agents admitted that they had, by the owners' orders, converted the plaintiff's whiskey which he had at the warehouse. Held inadmissible, as the admissions were not at the time of their doing the acts complained of. Roberts, &c. v. Burks, Litt. Sel. Cas. 411. The plaintiff appointed an agent to settle with, and receive money from, the defendant for a debt. The defendant, to prove a settlement and payment between him and the agent, offered in evidence an account current, to which the agent had made an affidavit. Held inadmissible, it being the admission of past acts of the agent, and the admission not within the scope of his authority. Thallhimer v. Brinckerhoff, 4 Wend. Rep. 394. So the declarations of one who had been an agent to make a contract, after he had made it, though he was still agent to make like contracts for the same party, were held inadmissible to affect his principal in respect to the terms or construction of the former contract; for such were not a part of the *res gestæ.* Haven v. Brown, 7 Greenl. 421. So the declarations of an agent, that he had given license to enter and cut timber, are not admissible against his principal; being an admission of what was past. Hubbard v. Elmer, 7 Wend. Rep. 446, 448. The maker gave a proposition for time on his note at the bank to the cashier, who, as he promised, submitted the proposition to the directors; and came and told the maker that the proposition had been accepted. It was proposed to give this in evidence against the bank, the cashier being their general agent, which fact was admitted. But held, that notwithstanding, this information was not a part of the *res gestæ.* He did not himself make the contract for time; it was made by the directors. He merely carried the proposal and brought back the answer; and the information being but hearsay, held, the agent must be sworn. Grafton Bank v. Woodward, 5 N. H. Rep. 301, 308, 309. An agent appointed to superintend the execution of a survey in a suit of chancery, has no authority to admit the notoriety of any object whose notoriety may be material in the cause. Robinson v. Morgan, Litt. Sel. Cas. 56. In detinue for the plaintiff's goods, pawned without his authority to the defendant, a pawnbroker, the only evidence to charge the defendant with possession, was the admission of the defendant's shopman, made at the house of the plaintiff's attorney. And Tindal, C. J., delivering the opinion of the court, said if the transaction had been one in the ordinary trade and business of the defendant as a pawnbroker, in which trade the shopman was his agent or servant, a declaration that his master had received the goods might probably have been evidence; as it might be held within the scope of the shopman's authority to give an answer to an inquiry made by any person interested in goods deposited with the pawnbroker. But he said this deposit was on an ordinary loan at five per cent. out of his line as pawnbroker, a case in respect to which the shopman had no authority. The

But where an agent has said or written anything relative to a transaction which is past and completed, the question of the admissibility of the agent's declaration, without calling the agent, depends on the point whether the making of such a statement was within the scope of the agent's authority. Thus, in Fairlie v. Hastings,(1) where the fact sought to be established was, that a bond had been executed by the defendant to the plaintiff, which the defendant had got possession of, the master of the Rolls refused to admit, as evidence of this fact, the declaration of the defendant's agent, who had been employed to keep the bond for the plaintiff's benefit, and who, on its being demanded by the plaintiff, informed him that it had been delivered to the defendant. His Honor there laid down the rule respecting the statements of agents to be, that they are inadmissible, unless made by them either at the time of their making an agreement about which they are employed, or in acting within the scope of their authority. But it seems to be a more simple rule with respect to admissions, that they are only receivable when there was authority to make them.(2)

Warranty of horse by servant.

Thus, the declaration of a servant, employed to sell a horse, is evidence

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court recognize Fairlie v. Hastings, cited in the text, as the true and leading authority, and manifest a great reluctance to open the door for agents' declarations beyond what the cases have already done. Garth v. Howard, 8 Bing. 451.

It is proper to remark, that the case of Fairlie v. Hastings, as may be seen by the text, was the admission of a special agent, the agent for a single purpose to keep a paper. Had the agency been general, that is, an agency arising from a multitude of instances (15 East, 108), we cannot say what the master of the Rolls would have thought of it. Most of the cases above cited make no distinction between the admissions of a general and special agent. But it will be seen by several of them that the powers of a general agent to make admissions, while the agency continues, are put on the same footing as the power of the principal. Such are the cases of Barry v. Foyles, State Bank v. Wilson, and Curtis v. Ingham, cited *supra;* and such, too, are the cases of Mott v. Kip, 10 John. Rep. 478; and Wheeler v. Hambright, 9 Serg. & Rawle, 390, 396, 397, also cited *post*, note 146; while in the City Bank of Baltimore v. Bateman, Westcott v. Bradford, Glasser v. Reno, and Roberts v. Burtis, *supra*, the powers of a general agent are tied down to admissions which are literally cotemporaneous with the act of agency, like those of a special agent.

There is certainly an appearance of incongruity between these sets of cases. In England the admission of a general agent concerning the business intrusted to him, has, in several cases, been allowed to be equivalent to the acknowledgment of the principal. Burt v. Palmer, 5 Esp. Rep. 145; Palethorp v. Furnish, 2 Esp. Rep. 511, note.

A remarkable exception to the doctrine of Fairlie v. Hastings was allowed in Greenwood v. Curtis (6 Mass. Rep. 358). The action was on a note payable in slaves on demand, upon the coast of Africa. The agent who made the demand there being dead, his letter was received to prove it. This was placed on the ground that he acted in a country destitute of civil government, without officers qualified to take and certify proofs; and no cause being then pending, it could not be expected the agent would take with him a *dedimus potestatem.*

(1) 10 Ves. 128, referred to by Tindal, C. J., in Garth v. Howard, 8 Bing. 452, as being the leading case on the subject.

(2) See Garth v. Howard, 8 Bing. 452; Helyear v. Hawke, 5 Esp. 74.

to charge the master with a warranty, if made at the time of sale; but the servant's admission at any other time, that there had been a warranty, is not receivable.(1) So, the declarations of a pawnbroker's shopman, unconnected with the ordinary business of his master, are not admissible against the master.(2) It was said by Tindal, C. J., in this case, that if the transaction, out of which the suit arose, had been one in the ordinary trade or business of the pawnbroker, a declaration of the shopman, that his master had received goods, might probably have been evidence against the master, as it might be held within the scope of such agent's authority to give an answer to such an inquiry, made by any person interested in the goods deposited with the pawnbroker. But the transaction appeared to have been unconnected with the business of the shop, and there was no evidence to show the agency of the shopman in such transactions.(3)

Letter of agent.

In the case of Maester v. Abraham,(4) Lord Kenyon, C. J., refused to admit the letter of an agent (respecting a contract made by him as agent) as evidence of the agreement against the principal, and ruled that the agent himself ought to be examined. Sir W. Grant, M. R., adverting to this case,(5) said, that if the agreement was contained in the letter, he should have thought it sufficient to prove that the letter was written by the agent; but if the letter was offered as proof of the contents of a pre-existing agreement, then it was properly rejected. And the Court of Common Pleas determined, after much argument, in the cases of Kahl v. Jansen,(6) and Langhorn v. Allnut,(7) that the letters of an agent abroad

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(1) Helyear v. Hawke, 5 Esp. 72. See Peto v. Hague, 5 Esp. 134; Allen v. Denstone, 8 C. & P. 760.

(2) Garth v. Howard, 8 Bing. 451.

(3) NOTE 142.—Scott v. Crane, 1 Conn. Rep. 255. But the proposition that the agency must be proved before the agent's admission can be received, was taken with some qualification in the two following cases. In the first it was declared that where the proof of agency is doubtful, it may, with the agent's act or declaration, be submitted to the jury to adopt or reject his act or declaration, as they shall find the fact of agency or not. The plaintiff, to charge the defendant as a party to a receipt given by M., proved by H. that M. had in the same year with the date of the receipt and the next year, done business as agent of the defendant, with H.; and that two years after the receipt, the defendant said M. was his agent, and did business for him; and the court charged the jury that if they believed what was sworn by H., they should find against the defendant. Held, that it was wrongly left to the jury; that it should have been put to them to find the agency or not, instead of inquiring simply whether the testimony was true. Irvine v. Buckaloe, 12 Serg. & Rawle, 35. In the other case, the plaintiff wrote two letters to the defendant, demanding a debt, which were unanswered. He then wrote to K. as the defendant's agent, who answered the letters, and paid part. Some time after the plaintiff wrote again to K., who promised to pay the residue. Lord Tenterden said there was clear evidence that K. was the defendant's agent at one time, and he put it to the jury on the whole evidence whether he did not continue so. Roberts v. Gresley, 3 Carr. & Payne, 380.

(4) 1 Esp. 375.

(5) In Fairlie v. Hastings, 10 Ves. 127.

(6) 4 Taunt. 565.

(7) Id. 511; S. P., Reyner v. Pearson, 4 Taunt. 663.

to his principal, containing a narrative of the transaction in which he had been employed, were not admissible in evidence against the principal, as the mere representation of the agent.(1) The general rule on the subject was there fully recognized and confirmed. "When it is proved," said Gibbs, C. J., "that A. is agent to B., whatever A. does, or says, or writes, in the making of a contract as agent of B., is admissible in evidence, because it is part of the contract which he makes for B., and which, therefore, binds him, but it is not admissible as the agent's account of what passed."(2) When the declarations of an agent are admitted in evidence,

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(1) See also Lawrence v. Thatcher, 1 C. & P. 669.

NOTE 143.—The defendant, as alleged, authorized his agent C. to guaranty in the defendant's name two promissory notes made by G. to the plaintiffs, for premiums of insurance. Held, that letters which passed between the defendant and C., the defendant and G., and even between G. and C., in respect to the cause, consideration, and fact of the authority to guaranty, were admissible to prove C.'s authority. The court say it is the transaction itself; the *res gestæ*. New England Marine Ins. Co. v. De Wolf, 8 Pick. 56, 62.

Two letters of the defendant to the plaintiff respecting an arbitration pending between them, said (one of them): "Hancock is in possession of my sentiments, and will attend." (Another): "I have written to my friend, Mr. Hancock, on the same subject, and refer you to him thereon." Held, that this proved Hancock's authority to speak on the subject of the arbitration, and before the arbitrators, for the defendant; and his admissions there were received as evidence against the defendant. Hood v. Reeve, 3 Carr. & Payne, 532.

In assumpsit the defendant proved that the plaintiff admitted that his wife had a power of attorney from him to settle or dispose of the demand. Held, sufficient proof of an agency in the wife. And it was said, though the declaration had been of a written power, it was admissible, without notice to produce it. But of this last *quere*. Curtis v. Ingham, 2 Verm. Rep. 287, 289.

A party appeared in court to defend another who had trespassed on lands for the party's benefit. Held, that he thus made the trespasser his agent, adopted his acts, and evidence against the trespasser was thus made evidence against him as principal. Thompson v. Chauveau, 7 Mart. Lou. Rep. (N. S.) 331, 333. By sanctioning his conduct, the principal adopts the act. Thurman v. Wells, 18 Barb. N. Y. 500; 12 Id. 27; 10 Geo. 362. A singular strictness seems to prevail in Pennsylvania as to the competency of an agent to prove his authority in certain cases. It has there been repeatedly decided that an agent is incompetent to prove his own authority to sell lands, even if his written power be lost; but the power must be proved by other witnesses, and then he may be allowed to show how he had executed his instructions. Nicholson's Lessee v. Mifflin, 2 Dall. 246; 2 Yeates, 38, and the cases there cited; Meredith's Lessee v. Macoss, 1 Yeates, 200. But the mere loss of the power may be shown by the agent, though he is inadmissible to prove the contents. Meredith's Lessee v. Macoss, 1 Yeates, 200. And a factor may, in some instances, at least, prove his own authority. Said in Right's Lessee v. Mifflin, 2 Yeates, 38. See the later decision: Chidsey v. Porter, 21 Penn. (9 Harris) 390; McCulloch v. McKee, 16 Penn. State R. 289.

(2) 4 Taunt. 519.

NOTE 144.—Neither the declarations of a man nor his acts can be given in evidence to prove that he is the agent of another. Scott v. Crane, 1 Conn. Rep. 255; Plumsted's Lessee v. Rudebagh, 1 Yeates, 502, 505; James's Lessee v. Stookey, 1 Wash. C. C. Rep. 330. In an action against a constable for not delivering up goods he had attached to satisfy the plaintiff's execution, he offered to show that he had delivered them to H., who took the direction of the suit. The court admitted that acts or concessions of an agent are binding on the principal; but said, to let in proof of them, the agency must be first proved, which was not done here. Scott v. Crane, 1 Conn. Rep. 255. But in order to prove the authority of an agent in a particular transaction; it is competent for the party under certain limitations, to give evidence of his conduct,

they are received not for the purpose of establishing the truth of the fact stated, but as representations by which the principal is as much bound as if he had made them himself, and which are equally binding, whether the fact stated be true or false.

But where an agent's letters have been adopted or acted upon by the principal, they become admissible against him, for the principal's conduct raises the inference that the letters were written within the scope of the agent's authority.(1)

Authority of agent.

The authority of an agent to make admissions, may be either express or implied from circumstances.(2) Thus, if the attorney for one party has

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dealings and declarations in other cotemporaneous affairs of the principal, from which a general agency might be inferred. Cobb v. Lunt, 4 Greenl. 503.

In assumpsit for a merchant's account, to show payment, the defendant proved that L. was a brother-in-law of one of the plaintiffs, resided near him in the same city, was often at the plaintiffs' store, and was in habits of intimacy with them; and then offered his receipt for money on their account, which the court below received. Held erroneous; for the above facts did not go to prove an agency. Worman v. Boyer, 14 Serg. & Rawle, 212.

The teller or clerk in a bank, making an entry in the bank-book of a customer, is the agent of the bank, not of the customer. Mech. & Farm. Bank v. Smith, 19 John. Rep. 115. The acts of the cashier of a bank, done in the ordinary course of business usually confided to such an officer, may well be deemed *prima facie* evidence that they fell within the scope of his duty. Said by Story, J., in Fleckner v. U. S. Bank, 8 Wheat. 357. In an action for striking the defendant's carriage against the plaintiff's cart, it was held that what any one (the ladies for instance) in the defendant's carriage answered, on inquiry as to the address of the owner, was admissible against him; but not a statement by them that any damage done would be paid for. Beamon v. Ellice, 4 Carr. & Payne, 585. An alteration having been made in the plaintiff's pass-book, by some person at his bankers', he inquired there why it was done, and received an answer from a person acting in the banking-house as a clerk; and he offered this in evidence against the bankers. Held admissible. Price v. Marsh, 1 Carr. & Payne, 60. And *vid.* Barrett v. Deere, 1 Mood. & Malk. 200; Wilmot v. Smith, 1 Mood. & Malk. 238. In a case against a corporation for injuring the plaintiff's house by negligently pulling down their own, a letter written to the plaintiff by the defendants' surveyor, who had the management of their buildings, is to be presumed to have been written by him, in that capacity, and is therefore evidence against the corporation. Peyton v. The Governor of St. Thomas' Hospital, 3 Carr. & Payne, 363. So the possession of a merchant's note, by his clerk, the note being drawn in the usual form of a note for discount at the bank, is *prima facie* evidence of the clerk's authority to procure it to be indorsed and discounted. Ship Portland v. Lewis, 2 Serg. & Rawle, 197, 203. (See, also, Turner v. Yates, 16 How. U. S. 14; Thurman v. Wells, 18 Barb. 500; Bliss v. Cutler, 19 Id. 9; Owlsey v. Woolhofter, 14 Geo. 124.

The declarations or representations of the agent when not expressly authorized by the principal, must, in order to bind him, be within the scope of his agency. New York Life Ins. & Trust Co. v. Beebe, 3 Selden R. 364; Olding v. Smith, 11 Eng. Law & Eq. 424; Very v. Levy, 13 How. U. S. 345.

The agent is a competent witness to prove his authority, given to him by parol, and that he acted within its scope. Downer v. Button, 6 Foster (N. H.), 338.)

(1) Coates v. Bainbridge, 5 Bing. 58.

(2) See Lucas v. Godwin, 3 N. C. 737.

The authority may be shown by circumstances. Dewz v. Greene, 16 Barb. 72; 14 Geo. 124.

made certain propositians to another upon matters in difference between them, such propositions will be evidence against the attorney's client, without further proof of his authority to make them than the fact that he was his attorney.(1) So, if one party refers another on a disputed fact to a third person as authorized to answer for him, he is bound by what his referee answers upon the occasion, as much as if the answers had been made by himself. For example, in an action for goods sold and delivered,(2) where it appeared at the trial, that in a conversation between the plaintiff and defendant, the former asserted that he had delivered the goods by one C., and the defendant replied: "If C. will say he did deliver the goods, I will pay for them," the plaintiff was allowed to give in evidence C.'s answer respecting the matter referred to him.

It is upon this latter principle that the decision of arbitrators, whether professional or not, are binding upon the parties. And, in like manner, where two parties had agreed to be bound by the opinion of a counsel upon the construction of an act of Parliament, his opinion was held to be conclusive between them.(3)

In like manner, where a dispute had arisen in a mining district, and it was proved that the defendant had said that, if a miners' jury were called, and they should find a particular fact, he would pay for certain damage, and the jury did find such fact, it was held that this finding of the jury, coupled with the declaration, was evidence against him in an action to recover the amount of the damages.(4)

A husband will not in general be bound by any admissions made by his wife, even where he is suing *jure uxoris;* as where he is suing for wages earned by her, even her written receipt will not be evidence against him;(5) so, in an action by husband and wife for a debt due to the latter *dum sola*, any admission made by her after marriage is inadmissible against the husband."(6)

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(1) Gainsford v. Grammar, 2 Camp. 9. See also Marshall v. Cliff, 4 Camp. 133. In the former case, Lord Ellenborough, C. J., refused to permit the attorney himself to give evidence of what he had proposed to the adverse party, but allowed it to be proved by a witness who had been present. Bnt in Griffith v. Davis (5 B. & Ad.), it was held, that the attorney for one party was a competent witness to prove a proposition made in his presence by his client to the adverse party; and Park, J., and Patteson, J., dissented from Lord Ellenborough's ruling as to the exclusion of the attorney's testimony.

(2) Daniell v. Pitt, 1 Camp. 366, n.; S. C., 6 Esp. 74. And see Lloyd v. Willan, 1 Esp. 178; Williams v. Innes, 1 Camp. 364; Brock v. Kent, Id. 366, n.; Burt v. Palmer, 5 Esp. 145; Garnet v. Ball, 3 Stark. R. 160; Bretton v. Prettiman, Sir T. Raym. 153; Hood v. Reeve, 3 C. & P. 532; Gardner v. Moult, 10 Ad. & Ell. 464.

(3) Price v. Hollis, 1 M. & S. 105. See alse Downs v. Cooper, 2 Q. B. 256.

(4) Sybray v. White, 1 M. & W. 435.

(5) Hall v. Hill, 2 Str. 1094; Alban v. Pritchett, 6 T. R. 680; Denn v. White, 7 T. R. 112.

(6) Kelly v. Small, 2 Esp. 716.

See James' Lessee v. Gordon, 1 Wash. C. C. 333, 335; Funkhouser v. Pogue, 8 Eng. (13 Ark.) 295; McKay v. Treadwell, 8 Texas, 176; Willis v. Snelling, 6 Rich. 280; Crane v. Gough, 4

But such admissions are evidence after her death, in an action in which the husband sues or is sued as her personal representative.(1) For the party's character as husband has nothing to do with such an action: and a wife, like any other person, may bind her executor or administrator.

A wife's admissions will also be binding on the husband, if an authority to make them can be proved or inferred. Thus, where goods had been furnished for the wife's accommodation, while her husband occasionally visited her, it was held that she might be regarded as her husband's agent respecting them; and that a letter from her, written within six years from the supply of the goods, containing an admission that the goods were unpaid for, was evidence (before Lord Tenterden's Act) to take the case out of the Statute of Limitations.(2) The authority of a wife to bind her husband by her admissions, seems to have been inferred in a more unobjectionable manner in another case,(3) where it was proved that the wife managed her husband's business, and generally gave orders and paid for goods.

These cases are mentioned as illustrating the principle of the rule in question; but since Lord Tenterden's Act,(4) that principle is not applicable to the same state of facts, for the first section of that statute enacts that no acknowledgment or promise shall be sufficient to take a case out of the Statute of Limitations, unless it be in writing, "and signed by the party chargeable thereby;" and, therefore, an acknowledgment of a debt contained in a letter, written by the wife of a defendant in his name, and even at his request, will now be insufficient, because the statute gives no authority to an agent to make the acknowledgment.(5)

The authority of a wife to bind her husband generally by admissions, may be inferred from the circumstance that the business to which the admissions relate was usually conducted by her. Thus, in a case before Pratt, C. J.,(6) his Lordship allowed that the wife's declaration, that she agreed to pay 4*s.* per week for nursing a child, was good evidence to charge the husband, as being a matter usually transacted by women. So, in an action for the education of a child, who had been placed with the

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Md. 316; Lasselle v. Brown, 8 Blackf. 221. Her acts as his agent may be shown, and her declarations accompanying them (Murphy v. Hubert, 16 Penn. State R. 50; Id. 196); and her admissions in regard to her separate estate. Hollingshead v. Allen, 17 Id. 275.

(1) Humphreys v. Boyce, 1 Mo. & R. 140.

(2) Gregory v. Parker, 1 Camp. 395. It seems to be a strong decision, that the wife had an authority to make an admission years after the time when the goods were furnished.

(3) Palethorp v. Furnish, 2 Esp. 511, n., S. P.; Anderson v. Saunderson, 2 Stark. R. 204; S. C., Holt, 591. And see Clifford v. Burton, 1 Bing. 199; Emerson v. Blonden, 1 Esp. 141; Petty v. Anderson, 3 Bing. 170; Barlow v. Bishop, 1 East, 432; Cotes v. Davis, 1 Camp. 485; Barker v. Ray, 2 Russ. Ch. C. 70; Palmer v. Sells, 3 N. & M. 422; Barker v. Vaughan, 4 Jur. 222, Exch. See notes above.

(4) 9 Geo. IV, c. 14.

(5) Hyde v. Johnson, 2 N. C. 766.

(6) Anon., Stra. 527; B. N. P. 287. See also Palethorp v. Furnish, *ut supra.*

plaintiff by the defendant's wife (who was aunt to the child), evidence was held to be admissible to show that the wife was in the habit of ordering domestic articles which were paid for by the defendant—it being evidence, though slender, to establish her agency.(1)

But a wife cannot bind her husband by admissions unless they fall within the scope of the authority which she may reasonably be presumed to have derived from him.(2) Thus, where a wife, in her husband's absence, carried on the business of a shop, and by his authority attended to all the receipts and payments; still, a statement made by her to her husband's landlord, that she would pay the rent on a future day, and admitting its amount, was held not to be evidence against the husband, of the terms of the tenancy.(3)

In the case of Fabrigas v. Mostyn,(4) a point arose which may serve as another example to illustrate the rule above laid down. A witness, who had been employed by the defendant to convey certain proposals to the plaintiff, explained them to him by an interpreter, from whom also he received the answer. The question was, whether the words of the interpreter could be given in evidence by the witness, as the answer of the plaintiff, or whether the interpreter himself ought to be called, as the witness understood neither the questions put to the plaintiff nor the answer made by him. Gould, J., ruled that the evidence of the witness was clearly admissible and sufficient. Here the interpreter was the accredited agent of the parties, acting within the scope of his authority, and in the execution of his agency.(5)

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(1) M'George v. Egan, Arn. Rep. C. P. 462; S. C., 5 N. C. 196.

(2) By Alderson, B., 11 M. & W. 204.

(3) Meredith v. Footmer, 11 M. & W. 202.

(4) 20 How. St. Tr. 122.

(5) It was said by Lord Denman, C. J., in R. v. Adderbury, East (Inhabitants) (5 Q. B. 187, 196), that if the surveyor of highways to a township has advisedly made statements as to the liability and practice of the township in respect of repairs, such statements will be admissible against the inhabitants of the township, as being made by their authorized official agent, and not merely upon the ground that the surveyor was an inhabitant; but it may perhaps be questionable, if this *dictum* rests upon sound principle, as a surveyor of highways can hardly be considered an official agent on a question of liability; unless indeed he had been specially referred to as such.

NOTE 145.—See per Marcy, J., in Benjamin v. Smith, 4 Wend. 334. And so the defendant may make the plaintiff himself his agent in the same way; for where the plaintiff claimed a sum of money of the defendant, who denied it, but said if the plaintiff would swear to the correctness of the claim, he would pay it, and the plaintiff made affidavit accordingly; held a valid promise, and that the defendant was concluded and could not show the affidavit untrue. Brooks v. Ball, 18 John. Rep. 337; Delesline v. Greenland, 1 Bay, 458, S. P.

T. in a letter to N. uses expressions supposed to amount to a challenge to fight a duel, and by postscript refers N. to H. (the bearer of the letter), if any further arrangements should be necessary. On an indictment against T., held that N. might give testimony of the conversation between H. (the bearer) and himself against the defendant. State v. Taylor, 1 Const. Rep. S. C. 107, 108.

The declarations of a third person, referred to and adopted by a party for one purpose, are not evidence against him for another. Thus, where the defendant said he would pay the interest of

Evidence of facts, by the admissions of agents, is receivable in criminal as well as in civil cases. Thus, on the impeachment of Lord Melville,(1) the House of Lords decided that a receipt, given in the regular and official form by Mr. Douglas (who, as it was proved, had been appointed by Lord Melville to be his attorney, to transact the business of his office of treasurer of the navy, and to receive all necessary sums of money, and sign receipts for the same), was admissible as evidence against Lord Melville to establish this single fact: that a person appointed by him, as his paymaster, did receive from the Exchequer a certain sum of money, in the ordinary course of business. "The first step in the proof of the charge," said the Lord Chancellor, "must advance by evidence applicable alike to civil and to criminal cases; for a fact must be established by the same evidence, whether it is to be followed by a civil or criminal consequence; but it is totally a different question, in the consideration of criminal justice as distinguished from civil, how the noble person now on trial may be affected by the fact when so established. The receipt by the paymaster would, in itself, involve him civilly, but could, by no possibility, convict him of a crime."

It may be observed, finally, that declarations made or instructions given by a principal to his agent, are not admissible in evidence for the former, where it is sought to affect a third party, unless it can be shown that such declarations or instructions were communicated to that party. Thus, where the plaintiff, through his agent, contracted with K. for the sale of goods, and the question was, whether they were sold on the credit of K. or of the defendants, it was held that a letter of instructions from the plaintiff to his agent, on the subject of the sale, not communicated to the defendants, was not admissible for the plaintiff.(2)

4. Of admissions by under-sheriff, bailiff, attorney, counsel, &c.

It has been seen that the admissions of an under-sheriff are admissible in evidence against the sheriff, where they tend to charge himself as being the real party in the cause, as in an action for an escape.(3) But where they have not that tendency, they are inadmissible. Thus, in an action

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property to Mrs. D., the plaintiff, which her father had left in the defendant's hands for her use, provided the father so directed; held, that this did not authorize evidence of the father's declaration that he had placed the property in the defendant's hands for the support of Mrs. D. Duval and Wife v. Covenhoven, 4 Wend. Rep. 561, 564. And where an obligation is to pay A. to the satisfaction of B.; in a suit on the obligation the declarations of dissatisfaction by B. are not admissible. B. is a competent witness to the point, and should be examined. M'Cullough v. Montgomery, 7 Serg. & Rawle, 17.

Deeds between other parties become evidence, when referred to in a deed between the parties to the suit. Blair v. Hum, 2 Rawle, 104.

Where one agrees to abide by the decision of another upon a disputed fact, who accordingly decides, this is not conclusive, but is evidence for the jury. Craig v. Craig, 3 Rawle, 472.

(1) 29 How. St. Tr. 746, 764.

(2) Smethurst v. Taylor, 12 M. & W. 545.

(3) *Supra*, p. 488.

against the sheriff for taking illegal poundage, declarations of the under-sheriff, after he was out of office, were held not to be admissible to prove that the bailiff, charged with having committed the extortion, was the sheriff's authorized agent.(1)

Declarations accompanying official acts.

Where, indeed, the declarations of the under-sheriff accompany official acts, they are in the nature of original evidence,(2) though the admissions of a bailiff or sheriff's officer, where the authority is limited to the particular duties specified in his warrant, are not evidence against the sheriff.(3) What a bailiff says whilst he has a party in custody, concerning the cir-

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(1) Snowball v. Goodricke, 4 B. & Ad. 541. This decision impugns the general doctrine of Lord Kenyon, C. J., in Drake v. Sykes (7 T. R. 117), as to the sheriff being identified with the under-sheriff to all intents.

NOTE 146.—In an action against the sheriff for a false return, admissions by his deputy were allowed as evidence against him; viz: a letter from him to the plaintiff's attorney admitting that he received an execution sent to him. And the court put this on the general ground that the deputy who acts, is the real defendant, and answerable over to the sheriff. Tyler v. Ulmer, 12 Mass. Rep. 163; per Marcy, J., in Benjamin v. Smith, 4 Wend. 334, S. P. In Hecker v. Jarret (3 Bin. 404), the admissions of the deputy in respect to the legality of an arrest made by him, on which it was sought to charge the sheriff, these admissions being made after the deputy had taken the prisoner to jail, were rejected by Brackenridge, J., at Nisi Prius; and on motion for a new trial, the cause went off on other grounds. In Mott v. Kip (10 John. Rep. 478), the Supreme Court of New York held, that the admissions of the deputy to the plaintiff's attorney in respect to the business in progress, are admissible to affect the sheriff if made while the process in question is in the deputy's hands and in a course of execution. The admissions are then to be taken as part of the transaction, as the acts of the deputy, who is to be regarded as the sheriff's agent. In this case, the admission was that the deputy had suffered a voluntary escape. On the same ground, an admission by the deputy, *e. g.* of an escape, though the admission be made after the return day of the writ, *e. g. a ca. sa.*, if while it is in his hands, is admissible as evidence against the sheriff. Wheeler v. Hambright, 9 Serg. & Rawle, 390; (Stewart v. Wells, 6 Barb. 79. And it is held that the sheriff, who has been indemnified by the plaintiff for making a levy, acts for and in behalf of the plaintiff in the execution, who is the substantial party in interest, in the defence of an action against the sheriff for the property levied on. Howland v. Willetts, 5 Selden, 170. If the plaintiff in the execution gives the deputy special instructions to act in a particular manner, as to sell the property taken on credit, he thereby makes the deputy his agent so far as his instructions which are acted upon imply a departure from the line of his legal duty. See Gorham v. Gale, 6 Cowen, 467; 7 Id. 739; Corning v. Southland, Sheriff, &c., 3 Hill, 522; 3 Selden, 458.

The return to an execution, although made by the deputy in the sheriff's name, is the act of the sheriff, and when the question comes up directly between one of the parties to the execution and the sheriff, the latter is not permitted to gainsay it, or impeach the truth of the return. Sheldon v. Payne, 3 Selden, 452; Townsend v. Olin, 5 Wend. 207; Gardner v. Hosmer, 6 Mass. 327; Haynes v. Small, 22 Maine, 14; Barrett v. Copeland, 18 Vt. 69; Paxton v. Steckel, 2 Burr. 93.)

(2) Yabsley v. Noble, 1 Ld. Raym. 190. See Kempland v. Macauley, Peake 65; where it was considered that the circumstance of the bailiff giving a bond of indemnity (which was relied on in Yabsley v. Noble, with regard to the undersheriff), did not make a bailiff's admission receivable.

(3) Drake v. Sykes, 7 T. R. 117. It was said by Lord Ellenborough, C. J. in North v. Miles (1 Camp. 389), that a bailiff's *general conversation* with an indifferent person is not evidence against the sheriff. The bailiff's authority must be proved in every particular case. Id.

cumstances of the arrest, may be admissible against the sheriff as part of the act for which he is responsible.(1) And it has been held that the relation of sheriff and officer continues whilst the writ is in course of execution, and therefore that the sheriff may be affected by the officer's declarations after the return of a *fieri facias*, and before a warrant is made for sale, so long as the goods are in the hands of the officer.(2) In such cases the declarations of the officer are properly original evidence, and not in the nature of hearsay or admission. It has been held, also,(3) that what was said by a bailiff, when asked by the plaintiff's attorney, before the return of the writ, why he did not execute it, was evidence against the sheriff. The action was for a false return of *non est inventus*. Lord Ellenborough, C. J., said that the conversation must be considered as *part of the* act touching the execution of the writ. And he observed, that where a thing is carried on by one as a *quasi* principal, what he says in the course of the transaction has been held, on great consideration, to be evidence against those he represents.

It has been seen that, where an infant sues by his guardian, the declarations of the guardian are not admissible against the infant.(4)

By attorney.

With respect to admissions made by attorneys, they are considered as having an implied authority to make any admission for the purpose of obviating the necessity of proving any fact upon a trial, as where an attorney gives a direct and formal admission of the execution of a deed, or of

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(1) Bowsher v. Cally, 1 Camp. 391, n. On the subject of the proof of the bailiff's authority, upon which there have been many conflicting decisions, it has been held sufficient to prove an examined copy of the writ on which the bailiff's name was indorsed, and that a person of that name actually executed the writ, and that the course of the sheriff's office was that the name of the bailiff to whom the warrant was granted, was usually indorsed on the writ. Scott v. Marshall, 2 C. & J. 238.

(2) Jacobs v. Humphrey, 2 C. & M. 413.

(3) North v. Miles, 1 Camp. 389.

(4) NOTE 147.—Eccleston v. Petty (Carth. 79), is also reported in 3 Mod. 258, by the title of Eccleston v. Spoke, where the same point was resolved as in Carthew. The same case is mentioned, 2 Sid. 70, in a memorandum at the foot of Leigh v. Ward. The confessions of an infant are admissible against him, the same as that of adults. Said in an action against him for bastardy. Mather v. Clark, 2 Aik. 209; Wilcox v. Sheldon, cited Id. 189. But the jury should weigh it with reference to his age and understanding. Id. The capacity to commit a crime necessarily supposes the capacity to confess it; and a boy only twelve years and five months old was convicted, and executed for murder on his own confession. State v. Guild, 5 Halst. 163, 189; Aaron's Case, cited Id. 189. And these decisions appear to be fully sustained by the authorities referred to in Halstead, 189, viz: Leach's Hawk. b. 1. c. 1, p. 1; 4 Bl. Com. 23; Foster, 70. But his confession should be received more cautiously on account of his age. 5 Halst. 189, 190.

(That the admissions of an infant are admissible in evidence against him in civil as well as criminal actions, was distinctly held in Haile v. Lillie (3 Hill R. 149); as to the effect of them, see M'Coon v. Smith (Id. 147). But an infant is not estopped by his admission that he was of full age. 5 Sand. 224.)

a dishonor of a bill, or where he makes propositions on behalf of his client.(1) Thus, in an action against the defendant as acceptor of a bill, where his attorney had served a notice on the plaintiff to produce all papers relating to a bill, described in the same terms as the one sued upon, and which the notice stated to have been "accepted by the defendant"—this was held *prima facie* evidence of the defendant's acceptance.(2) So, an undertaking by an attorney on the record to appear for two persons, described in the undertaking as joint owners of a ship, is evidence of joint ownership.(3)

Admissions by attorneys may also be made indirectly. Thus, it has been held that an attorney's admission of the handwriting of the attesting witness to a deed, was tantamount to an admission of the due execution of the instrument.(4)

But an admission by the defendant's attorney of the due execution of an instrument mentioned in the declaration, will not preclude the defendant from taking advantage of a variance.(5) And it is not everything that an attorney may happen to state in the course of conversation, which will be evidence in the cause.(6) Thus, in an action for use and occupation, where a witness stated that he had heard from the plaintiff's attorney that there was an agreement in writing, it was held that this was not sufficient evidence of the existence of an agreement, so as to render its production necessary.(7)

Admissions, also, that are expressly made by an attorney "without prejudice," are, as has already been seen, inadmissible in evidence.(8)

As to the proof of a person being attorney in the cause (so that his admission may bind the party), it will be sufficient, in general, to prove

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(1) Gainsford v. Grammar, 2 Camp. 9.

(2) Holt v. Squire, R. & M. 282.

(3) Marshall v. Cliff, 4 Camp. 133.

(4) Milward v. Temple, 1 Camp. 375.

(5) Goldie v. Shuttleworth, 1 Camp 70.

(6) Young v. Wright, 1 Camp. 139, 141; Parkins v. Hawkshaw, 2 Stark. R. 239; Doe d. Hulin v. Richards, 2 C. & K. 216; Wilson v. Turner, 1 Taunt. 30; Petch v. Lyon, 9 Q. B. 147.

(7) Watson v. King, 3 C. B. 608. See also Petch v. Lyon, 9 Q. B. 147.

NOTE 148.—If the client be not present when the admission is made by his counsel or attorney, the current of authority would seem clearly to be that such admission cannot be used against the client out of the particular cause. We had occasion to cite several cases bearing directly and indirectly upon this question, under a head where we thought they more properly ranged themselves, viz: the extent of an agent's authority to make admissions binding upon his principal. See note 141. We there, also, had occasion to notice the distinction between such admissions made under the special authority of the attorney or counsel, and the power of the client himself, or his more general agent, while engaged in managing the cause.

(The attorney in a cause may waive irregularities and informalities in the cause so as to bind his client (Hanson v. Haitt, 14 N. H. 56); but cannot waive a substantial right of his client withou his consent (Howe v. Lawrence, 2 New Jersey, 99); or compromise and discharge the claim. Derwort v. Loomer, 21 Conn. 245; Walker v. Scott, 8 Eng. (Ark.) 644; Wilson v. Wadleigh, 36 Maine, 496. See notes 127, 129.)

(8) *Supra.*

that he is the attorney upon the record;(1) yet it has been held, that a letter written to a plaintiff's attorney before action brought, by the attorney who afterwards appears in the cause for the defendant, is not evidence of a fact admitted therein without further proof that the defendant authorized the communication.(2)

When an attorney has been one regularly constituted as the attorney in the cause, admissions made by his managing clerk or agent will have the same effect as if made by himself.(3)

An admission, for the purpose of the trial of a cause, may be used upon a new trial,(4) even where there has been an alteration in the pleadings, if the alteration does not affect the fact admitted.(5)

Generally speaking, admissions made by an attorney are not admissible in criminal cases. Thus, on an indictment for perjury, where it appeared that the attorneys on both sides had agreed that the formal proofs should be dispensed with, and that that part of the prosecutor's case should be admitted, Lord Abinger, C. B., would not permit the case to be tried on these admissions;(6) his Lordship said, in such a case he could not allow any admission to be made on the part of the defendant, unless it is made at the trial by the defendant or his counsel.(7)

Admissions by counsel.

Admissions by counsel stand much upon the same footing as those made by attorneys; and it has been held, with respect to them, that a *special case*, signed by the counsel on both sides, for the opinion of the court above, and stating facts proved at the trial of the cause, is admissible as

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(1) Marshall v. Cliff, 4 Camp. 133; Gainsford v. Grammar, 2 Camp. 9.

(2) Wagstaff v. Wilson, 4 B. & Ad. 339; Burghart v. Angerstein, 6 C. & P. 695; Pope v. Andrews, 9 C. & P. 564. In Marshall v. Cliff (4 Camp. 133), the attorney's letter, relied upon to prove the joint ownership, contained an undertaking to appear for them, which was a step in the cause. In Roberts v. Gresley (3 C. & P. 380), the party, whose letter was produced, had already acted as agent for the defendant.

(3) Griffiths v. Williams, 1 T. R. 710; Standage v. Creighton, 5 C. & P. 406; Taylor v. Willans, 2 B. & Ad. 845, 856; Truslove v. Burton, 9 Moore, 64; Taylor v. Foster, 2 C. & P. 195. See Meyer v. Sefton, 2 Stark. R. 274, as to letter of attorney with client's signature.

NOTE 149.—Where the town agents of the defendant's attorney gave an admission to the plaintiff's attorney that the printed copy of a private act of Parliament should be receivable in evidence without formal proof; held, that it was not necessary to prove the handwriting of such agents, the admission having been made *bona fide*, and under the sanction of the defendant's attorney. Truslove v. Burton, 9 Moore, 64.

As to the powers of attorneys or counsel to make admissions in the cause, which shall bind or affect their client on other occasions, whether such admissions be oral or in writing, by case bill of exceptions, bill of particulars, or demurrer, see notes, *supra*, particularly note 141, at the introduction of the first subdivision to that note.

(4) Elton v. Larkins, 1 Mo. & R. 196; Doe d. Wetherall v. Bird, 7 C. & P. 6. A summons may be taken out to withdraw the admissions.

(5) Langley v. Oxford (Earl), 1 M. & W. 508.

(6) R. v. Thornhill, 8 C. & P. 575.

(7) In cases of felony, it is the constant practice of the judges at the assizes to refuse to allow even counsel to make any admission.

evidence of those facts on a new trial.(1) And where it appears from the whole conduct of a cause, that a particular fact is admitted between the parties, the jury have a right to draw the same conclusion as to that fact, as if it had been proved in evidence; and to draw such conclusion as to all the issues on the record, though the particular fact admitted goes to support only one issue.(2)

It seems doubtful how far general statements made by counsel in addressing the jury, are to be taken as admissions of facts, which it may not be necessary for the other party to prove. In an action of libel relating to a check, to which the defendant pleaded a justification, the plaintiff's counsel in his opening made a full statement of the facts as to the check, which he stated had been given by the plaintiff to a third person, and had afterwards been paid by the plaintiff; but he adduced no evidence on this part of the plaintiff's case; Lord Denman, C. J., ruled, that the counsel for the defendant was entitled to call for the production of the check, after notice, without showing that it was in the plaintiff's possession in any other way than by the opening of his counsel, and that, if the check was not produced, secondary evidence of its contents was admissible.(3) His Lordship observed, that the opening of very particular circumstances, and then not proving them, was a new practice, and was not correct. But in a later case,(4) where trover was brought for a colt, and it was essential, in order to entitle the defendant to notice of action, that it should be shown by him that the colt had been distrained, Pollock, C. B., ruled that the opening of the plaintiff's counsel, who had stated that the colt had been distrained, did not dispense with proof of that fact on the part of the defendant.

Admissions by the defendant's counsel on a former trial have been rejected as evidence against the client on a new trial.(5)

Admission by principal not evidence against surety.

It is a general rule, founded on principles of justice in regard to the relation of principal and surety, that the surety ought not to be affected by an admission made by his principal; although he may be affected by declarations or statements made by the principal, when they are connected

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(1) Van Wart v. Wolley, R. & M. 4. See also Edmunds v. Newman, Id. 5, n. In equity a party has been obliged to produce cases submitted for the opinion of counsel, but not the opinions. Preston v. Carr, 1 Y. & J. 175; Bolton v. Liverpool (Corporation), 1 P. Coop. 22; S. C., 3 Sim. 467; 1 Myl. & K. 88. That a statement prepared by an attorney for the opinion of counsel, is evidence against a party, or those identified in interest with him, see Meath (Bishop) v. Winchester (Marq.), 3 N. C. 211.

(2) Stacey v. Blake, 1 M. & W. 168; by Lord Abinger, C. B., in Bolton v. Sherman, 2 M. & W. 395, 403.

(3) Duncombe v. Daniell, 8 C. & P. 222.

(4) Machell v. Ellis, 1 C. & K. 682.

(5) Colledge v. Horne, 3 Bing. 119.

(Moffit v. Witherspoon, 10 Ired. 185.)

with the business in respect of which the surety becomes bound, and are made by the principal at the time of transacting that business.(1)

Thus where a person had become surety by a bond for the faithful conduct of a clerk, it was held, in an action upon the bond, that an admission by the clerk, made after he was discharged, of various sums which he had embezzled, was not receivable in evidence against the surety.(2) So in an action upon a guaranty to pay for goods sold and delivered to a third person, what such person has admitted respecting the delivery of the goods is not evidence to charge the person giving the guaranty.(3)

Entries made by a deceased person in the course of duty, or by which he has charged himself with the receipt of money, being admissible as against all the world,(4) are of course evidence against a person who has become his surety that he would keep his accounts faithfully.(5)

This will be a proper place for referring to admissions which are receivable as evidence against persons having privity of interest.

Admissions, evidence against privies.

Admissions are not only receivable against the parties who make or authorize them, but also against persons identified in interest with those parties. The rules for the admissibility of such evidence are analogous to those which are found in the doctrine of estoppels, and which govern the admissibility of verdicts, judgments, and depositions. The reader is therefore referred to the second part of this work, which treats of written evidence, for considerable illustration of the present subject. It has, indeed, been necessary to anticipate some portion of what would properly belong to the second part of the work (particularly as regards answers in chancery), for the elucidation of the points which belong to the present chapter.

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(1) See Dunn v. Slee, Holt, 401.

(Nor is a surety affected by a judgment recovered against his principal, adjudging him to have been guilty of fraud and misconduct as a general guardian; the surety not having been a party to the suit (Clark v. Montgomery, 23 Barb. 464; Douglass v. Howland, 24 Wend. 35–58; Coan v. Osgood, 15 Barb. 583; Snell v. Allen, 1 Swan (Tenn.), 208); holding that principal's admission is not admissible against his surety, unless it be a part of the *res gestæ*. Walker v. Forbes, 25 Ala. 139.)

(2) Smith v. Whittingham, 6 C. & P. 78. In Cutler v. Newlin (Manning's Dig. N. P. 137), on the execution of a writ of inquiry on an indemnity bond, an admission by the principal of the amount of damnification was considered by Holroyd, J., inadmissible. In Perchard v. Hamilton (1 Esp. 394), which was an action by a sheriff upon a bond to indemnify him against defaults of his bailiff, a written admission by the bailiff of having received levy money, was held by Lord Kenyon, C. J., to be admissible against the defendant. It was so ruled by him on the ground that the bailiff was in fact the defendant in the action: but there seems to have been no evidence to show that the defendant was indemnified by the bailiff; and as the bailiff was alive, it would appear that he might have been called as a witness.

(3) Evans v. Beattie, 5 Esp. 26.

(4) See by Bailey, B., in Gleadow v. Atkin, 1 C. & M. 423.

(5) Goss v. Watlington, 3 B. & B. 132; Whitnash v. George, 8 B. & C. 556; Middleton v. Melton, 10 B. & C. 317. See also M'Gahey v. Alston, 2 M. & W. 206.

Thus, with regard to privies in blood and privies in law, the declarations of a deceased occupier of land, that he rented it under a certain person, are evidence of that person's seizin against a party claiming as the heir at law of such occupier, to explain the nature of the occupation, and to show that it was not adverse.(1) The declarations of an intestate are evidence against his administrator.(2) But in an action by a special administrator, appointed under 38 Geo. III, c. 87, during the absence from the country of the executor named in the will,(3) it was held, that the declarations of the latter made by him while he was the acting executor, were not admissible against the plaintiff.(4)

With respect to admissions made by persons who have been privies in estate with those against whom the admissions are used, the evidence, after their decease, is generally admissible on a different principle, as being a declaration against interest. And when the persons are alive, the evidence may be admissible, in some cases, as explanatory of acts done or forborne, or of the fact of possession. But without reference to either of these principles, it would seem that an admission by a proprietor or occupier possessing any interest, would be evidence as to the nature and extent of that interest, against a party who was in privity of estate with him.(5) The receipts for a modus, given by a vicar's lessee, are evidence against the vicar, by reason of the privity of estate.(6) An answer in chancery is admissible in evidence against a privy in estate.(7) A statement in a lease by a landlord has been held admissible against a person who

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(1) Doe d. Human v. Pettett, 3 B. & A. 223. If this case is to be treated as a case of admissions, it would be immaterial that the declarant was deceased. But the evidence may be considered also as a declaration explanatory of possession, or as a declaration against interest. See Peaceable d. Uncle v. Watson, 4 Taunt. 16; Doe d. Baggaley v. Jones, 1 Camp. 367. These points are illustrated by the doctrine concerning the admissibility of verdicts against privies in law and in blood. See *post*, Vol. II; Locke v. Norbonne, 3 Mod. 141; Outram v. Morewood, 3 East, 346; Co. Litt. 352 a; Com. Dig. tit. Estoppel, B; 3 T. R. 365.

(2) Smith v. Smith, 3 N. C. 32. The plaintiff was regarded as claiming under the intestate, though, in fact, he need not have done so. See also Humphreys v. Boyce, 1 Mo. & R. 140.

(See also, Jones v. Jones, 1 Foster (N. H.), 219; Smith v. Morgan, 8 Gill, 133; Harvey v. Anderson, 12 Geo. 69; Colgan v. Philips, 7 Rich. (S. C.) 3. See Brown v. Mailler, 2 Kern. 118, per Denio, J.

(3) See Taynton v. Hannay, 7 Ves. 460; S. C., 3 B. & P. 26.

(4) Rush v. Peacock, 2 Mo. & R. 162.

(5) See Doe d. Manton v. Thrupp, 9 Bing. 41; Walker v. Broadstock, 1 Esp. 458; Davies v. Pierce, 2 T. R. 53; Doe v. Rickerby, 5 Esp. 4; Tindal v. Whitrow, 1 C. & P. 22; Doe d. Pritchard v. Jauncey, 8 C. & P. 99. With respect to the amount of requisite interest in a person whose declaration can bind another by reason of privity of estate, see *post* as to *Verdicts*.

(This subject, of the admission of evidence against privies, has been considered in a former place.)

(6) Jones v. Carrington, 1 C. & P. 329. It would seem that the receipts were admissible on a more general ground, as being declarations by persons (deceased) against interest.

(7) Sussex (Earl) v. Temple, Ld. Raym. 310. In this case the court went too far in determining that the answer might be read against persons in occupation of property, on proof that it was the reputation of the county, that the lands had belonged to the person making the answer.

claims under a subsequent lease of the same land.(1) A letter, written by a vicar, in respect of the property of the vicarage, is evidence against his successor.(2)

An admission by a tenant in possession, defendant in an action of ejectment, is evidence against a co-defendant, who defends as a landlord.(3)

But it seems that the mere declarations of tenants will not in general be evidence against their reversioners,(4) and the declarations of a former occupier of the defendant's land have been ruled not to be admissible against the defendant, upon a question whether the plaintiff had an easement in the land.(5) A case, stated for the opinion of counsel, touching the right of presentation to a living by a bishop, was held to be evidence against a subsequent bishop of the same see, on a question touching the right of presentation to the same living.(6) An ancient statement, concerning the payment of tithes of a parish by a modus, signed by the rector for the time being, is evidence against a succeeding rector.(7) An answer to a bill filed in the Court of Exchequer, in a suit instituted for tithe hay by a vicar against the rector and others (owners of lands in the parish), in which answer the defendants disputed the vicar's claim, and declared that the tithes in question belonged to the rector, will be evidence, in an action for tithes by a succeeding rector against owners or occupiers of the same lands, for the tithes of which the former suit was instituted.(8) "It appears to me," said Lord Ellenborough, C. J., "not to be *res inter alios acta*, but *inter eosdem acta;* and was not only evidence, but strong evidence, against the defendant, who stood in the same place, by derivation of title and by legal obligation, as (the former owner of the same land); and (that former owner), upon his oath, in a suit against him by the vicar, has declared that the tithe is due to the rector, and not to the vicar; and now that same person, *in effect* (that is, the present owner, who purchased of the former owner the very lands over which tithes were now claimed), is deraigning the title of the rector in favor of the vicar."(9)

Although ancient books of survey and ancient maps, when they are not

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(1) Crease v. Barrett, 1 C., M. & R. 932. See Doe d. Strode v. Seaton, 2 A. & E. 171.

(2) Doe d. Coyle v. Cole, 6 C. & P. 359.

(3) Doe d. Mee v. Litherland, 4 A. & E. 384.

(4) By Patteson, J., in Tickle v. Brown, 4 A. & E. 378.

(5) Scholes v. Chadwick, 2 Mo. & R. 507.

(6) Meath (Bp.) v. Winchester (Marq.), 3 N. C. 183. The decision was also rested on the ground of the statement being against interest. There was no personal knowledge of the facts contained in the statement, but they were all evidenced by written documents.

(7) Maddison v. Nuttall, 6 Bing. 226. See also De Whelpdale v. Milburn, 5 Pri. 485. Receipts of incumbents have been received upon the same ground, though it would seem that in both cases the declaration was admissible, as being against interest.

(8) Dartmouth (Lady) v. Roberts, 16 East, 334. The suit was abandoned by the vicar, who from that time had acquiesced. See also Travis v. Chaloner, 3 Gwill. 1237; Ashby v. Power, Id. 1239; Benson v. Olive, 2 Gwill. 701; Sussex (Earl) v. Temple, 1 Ld. Raym. 310.

(9) 16 East, 339, 340.

in the nature of public documents, have been in some cases considered as not being legitimate evidence of boundary, even where they might seem, upon principle, to be receivable on the ground that the boundary was a matter of public interest and concern; yet this species of evidence is frequently available by way of admission, where there is a privity of estate between the person against whom the survey or map is used and the person directing it to be made. Thus it was ruled by Holt, C. J., that if A. be seized of the manors of B. and C., and, during his seizin of both, he causes a survey to be taken of the manor of B., and afterwards the manor of B. is conveyed to E., and afterwards there are disputes between the lords of the manors of B. and C. about their boundaries, this old survey may be given in evidence.(1) In like manner, entries of receipts of rents by a deceased steward have been admitted, in a suit between two persons, who both claimed under the employer of that steward.(2)

But as a person cannot be regarded a privy in estate with a subsequent possessor of the estate, except during the time when the estate was in his own possession, it has been held, that an answer in chancery, respecting the title to an advowson, filed by one who had been formerly seized of the advowson, but who had conveyed it away twenty years before the answer, was not admissible against a person claiming the advowson through him.(3) And admissions by a mortgagor, made after he had parted with his interest by a settlement, have been held not to be admissible on behalf of a mortgagee, to show that the money had actually been advanced on the mortgage, the mortgagee seeking to avoid the settlement as being voluntary.(4)

Rule applicable in cases of personalty.

This rule as to privity of estate is generally applied to cases of real property, but the principle is equally applicable in matters relating to personalty, and where a chattel or a personal contract has been assigned, the declarations of the assignor are generally admissible against the assignee.

Thus it has been held, upon an issue between two persons, whether a third person died possessed of certain personal property, that evidence might be given of a declaration, made by that third person, that he had

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(1) Bridgman v. Jennings, 1 Ld. Raym. 734; B. N. P. 283. And see Davies v. Pierce, 2 T. R. 43; Allott v. Wilkinson, 4 Gwill. 1585; 2 E. & Y. 293. That such a survey is not evidence against a stranger; by Holt, C. J., Anon., 1 Ld. Raym. 734. And see 1 Str. 95; 5 T. R. 123; 12 Vin. Ab. 90, pl. 12. It has been said, that an old map has been allowed in evidence, where it came along with the writings, and agreed with the boundaries adjusted in an ancient purchase. Gilb. Ev. 78.

(2) Doe d. Strode v. Seaton, 2 A. & E. 171. As to tithe receipts, see 3 E. & Y., Tithe Cases 1129, 1131. Cases where the evidence would have been receivable as a declaration against interest, have sometimes been determined on the principle under consideration.

(3) Gully v. Exeter (Bishop), 5 Bing. 171.

(4) Doe d. Sweetland v. Webber, 1 A. & E. 733.

assigned the property, the party, against whom the declarations were adduced, claiming under that person.(1)

But where the question was whether certain goods which had been seized under a *fi. fa.* against A. were his property, or the property of the plaintiff, who claimed under a sale; and in order to show that the sale was fraudulent, it was proposed to give in evidence a statement made by A., when the execution went in, and while he remained in possession, it was ruled that the evidence was not receivable.(2) So upon the trial of an issue, directed to ascertain whether certain goods which had been seized by the sheriff under a *fi. fa.* against a third party, at the suit of the defendant, were the goods of the plaintiff, who claimed them under an assignment, it was ruled by Wightman, J., that a statement, made by the third party before the execution went in, was not admissible on behalf of the plaintiff, as the execution creditor did not claim under the third party, but adversely to him.(3) And upon a similar issue, Maule, J., rejected the declarations of the debtor, as to the property in the goods, upon the ground that, if they did not belong to the plaintiff, the defendant would succeed on the issue, whether they belonged to the debtor or to any other person except the plaintiff.(4) An admission by a person who takes a bankrupt's goods in execution, that he knew an act of bankruptcy had been committed, is not evidence against the person who takes the goods by assignment from the sheriff, where the admission is subsequent to the assignment.(5)

With respect to admissions by persons in possession of chattels or negotiable securities being evidence against subsequent holders, which may be thought analogous to admissions by privies in estate, it appears to be a rule, that where a person must recover through the title of another, he is bound by the declaration of the party through whom he claims. Thus, if a person bring an action upon a bill of exchange, the declaration of a person, who, at the time when such declaration was made, was holder of the bill, and who had not parted with it till after it was due, is evidence against the plaintiff, being made by one according to whose title his own must stand or fall.(6) So in an action by the indorsee against the acceptor, where the defence is that the bill was obtained by fraud, declarations of

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(1) Ivat v. Finch, 1 Taunt. 141. The judgment also proceeded on the ground of a declaration against interest; which seems to be a safer ground, as the third person had parted with the possession before the declaration was made.

(2) Roberts v. Justice, 1 C. & K. 93.

(3) Prosser v. Gwillim, 1 C. & K. 95.

(4) Stothert v. James, 1 C. & K. 121.

(5) Deady v. Harrison, 1 Stark. R. 60.

(6) Benson v. Marshall, cited in Shaw v. Broom, 4 D. & R. 731. See also Beauchamp v. Parry, 1 B. & Ad. 89.

the drawer to that effect are admissible, if it can be shown that the plaintiff was privy to the fraud.(1)

But it seems that the analogy with respect to the admissions of privies in estate is not adhered to, where the title to negotiable instruments is derived from persons who have made admissions, but where there is not any existing identity of interest. In such cases, the right of a person holding by a good title is not to be cut down by the acknowledgment of a former holder, that he had no title. Thus, in an action by the indorsee against the maker of a promissory note payable with interest on demand, the declarations made by the payee, whilst the note was in his possession, to the effect that he gave no consideration for it to the maker, were held inadmissible for the defendant, on the ground that the plaintiff could not be identified with the payee, the bill not being overdue at the time of the indorsement.(2) The declarations were not those of a person holding the negotiable security under the same circumstances as the party to the action.

It has been held,(3) that as the indorsee of a promissory note does not claim by the title of the indorser, but has a title of his own as indorsee, he ought not to be affected by any declarations of the indorser,—the note not being taken without consideration, or after it was due,—notwithstanding the declarations were made whilst the indorser was in possession of the note. But where it appears that the indorsee is merely the agent to sue for the indorser, the declarations of the latter, whilst he was holder, are evidence against the former.(4)

Admissions respecting the subject matter of a cause, by a person who at the time of making them had the same interest in such matter as one of the parties to the cause, are admissible in evidence against that party, though the person who made the admissions is alive and might be called as a witness.(5) The same rule applies to admissions of agents, which are receivable in evidence against principals, as being binding upon them. There might seem to be some reason for a distinction between the rule respecting agents, and that which relates to declarations against interest, in-

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(1) Peckham v. Potter, 1 C. & P. 232.

(2) Barough v. White, 4 B. & C. 325; explained in Woolway v. Rowe, 1 A. & E. 116. See also Phillips v. Cole, 10 A. & E. 106; Smith v. De Wruitz, R. & M. 212.

(3) Beauchamp v. Parry, 1 B. & A. 89. An exception is there made as to declarations contemporaneous with the making of an instrument, and the case of Kent v. Lowen (1 Camp. 177), was referred to, where letters from the payee to the maker were admitted, which stated an usurious consideration for the note. It was said, that if the declarations had been made (as in the case of Kent v. Lowen) at the time of the contract, the case might be different. It is to be observed, that in Kent v. Lowen, the letters were the usurious contract itself, and it can make no difference whether an act consist of oral declarations or not. Some confusion is, however, introduced into the case by Lord Ellenborough, stating that evidence of an act done was admissible against persons claiming under those who did the act—whereas the admissibility of the evidence does not appear to depend on the privity of the parties.

(4) Welstead v. Levy, 1 Mo. & R. 138. See also Harrison v. Vallance, 1 Bing. 45.

(5) Woolway v. Rowe, 1 A. & E. 114; Brickell v. Hulse, 7 A. & E. 454.

asmuch as in the latter case, the party to the suit is to be affected by the declaration of a person with whom he has no community of interest, and for whose assertions he is not responsible.

SECTION XI.

Exception to the General Rule as to Hearsay, in Cases of Confessions made by Prisoners.

The confessions of prisoners are received in evidence on the same principle upon which admissions in civil suits are received, viz: the presumption that a person will not make an untrue statement against his own interest. In criminal cases, a deliberate confession carries with it a greater probability of truth than an admission in civil cases, the consequence being more serious and penal: "*habemus optimum testem, confitentem reum.*"(1) But it is to be observed, there may not unfrequently be mo-

(1) See Lambe's Case, 2 Lea. C. C. 554; Gilb. Ev., by Loft, 216; Warwickshall's Case, 1 Lea. C. C. 263; S. C., 2 East P. C. 658.

NOTE 150.—A prisoner may be convicted on his voluntary confession, made to any person, of the greatest crime, although totally uncorroborated by any single circumstance. Such corroboration was holden essential by the older editions of Leach's Crown Law, which was followed by Rozell, J., in State v. Aaron (1 South. 243). But this doctrine stands corrected by the later editions (see that of 1815, Vol. I, p. 311, Wheeling's Case), and the correction was followed by Ewing, C. J., in State v. Guild (5 Halst. 185, 186; 2 Curw. Hawk. ch. 46, § 37, S. P.). Such confession is, in most cases, the highest evidence that can be given. Per Nott, J., in The Corporation of Columbia v. Harrison, 2 Rep. Const. Ct. 215.

Other cases have, however, manifested great distrust of confessions which are not judicial. In one, where a horse was stolen, and two men returned with him, bringing the prisoner, who confessed to the owner that he stole the horse, neither of the bringers being sworn, the court directed an acquittal, though they said it would have been otherwise had the prisoner stated confirmatory circumstances, which had been proved. But a naked confession, unattended with circumstances, is not sufficient. The prisoner might have been misunderstood, or his confession perverted, or he might have been operated upon. The smallest mistake might prove fatal. A confession, from the very nature of the thing, is a very doubtful species of evidence. State v. Long, 1 Hayw. 455. And the courts which go against the necessity of corroborating circumstances, yet agree that the *corpus delicti* must be proved by other evidence, in order to render the confession operative. Thus, in larceny, other proof must be given of the taking of the goods; or, in murder, the fact of death. State v. Guild, 5 Halst. 185.

Confessions by infants are competent, as well as those of adults. Rex v. Thornton, Ry. & Mod. Cr. Cas. 27. "He who is a rational and moral agent, and can merit the infliction of legal sanctions, must be able to detail his motives and acts. If, therefore, the prisoner be of an age to be punished, he was of an age to confess his guilt." Per Southard, J., in Aaron's Case, 1 South. 246; cited by 5 Halst. 189; 4 Bl. Com. 24; York's Case, Fost. 70. And in one case the confessions of a boy under eleven (State v. Aaron, 1 South. 231), and in another under thirteen years of age (State v. Guild, 5 Halst. 163), were received and acted upon in charges of murder. The latter verdict was sustained by the confessions being connected with and fortified by circumstances (Id.); but in the former a new trial was granted, for want of such ingredient. 1 South. 231, 238, 243. As an infant under seven is not capable of crime (per Kirkpatrick, C. J., in State v. Aaron, 1 South. 238), it follows that his confessions are not receivable. And in

all these cases of extra-judicial confession by infants under the age of discretion, it seems desirable, if not essential, that corroborating circumstances should appear. The question of their necessity was much considered in the two cases last cited, as well as their nature, their mode of application, and the cautions under which they are to be received. They are said to be such as serve to strengthen the confession, to render it more probable; such, in short, as may tend to impress a jury with a belief of its truth. They are distinguished from facts which, independent of the confession, will warrant a conviction; for then the verdict would stand, not upon the confession, but upon those independent circumstances. "To corroborate is to strengthen, to confirm by additional security, to add strength. The testimony of a witness is said to be corroborated when it is shown to correspond with the representation of some other witness, or to comport with some facts otherwise known and established. In this view of the subject, the evidence in this cause affords circumstances corroborating, in a singular and remarkable manner, the confessions which were proved. I shall briefly state them. The prisoner said he went to the house of the deceased for the purpose of borrowing a gun. It was proved a gun had been kept there, and that the prisoner knew it. He said she (the deceased) refused him the gun, and accused him of having done mischief to her pig and pigeons. It was proved that she had entertained a belief that such mischief had been done by him. He confessed he had struck her with a yoke. The witness who first saw her after the disaster testified that he found a yoke, and blood on it, lying near her. The prisoner confessed that as he was going out, after she had refused his request, he saw the yoke *by the door,* picked it up and went back. Jonathan Van Kirk, who resided in the house, testified that when he went out about noon to work, the yoke was by the side of the door. The prisoner stated that she was on the hearth. M'Coy, the first who saw her, found her lying in the corner of the fireplace. He stated that she was starching a cap. A cap, says M'Coy, lay on the hearth by the side of her. To Philip Knowles he related the story, and confessed he struck her a first, second, third and fourth time. M'Coy testified there were four wounds—one on the top of her head, one on the right temple, one on the right eye, and one on the under jaw. The minute detail of incidents, and the steady uniformity of his relations to a number of persons, are not among the least striking of the circumstances which mark these confessions. One supposed discrepancy only has been pointed out. To one of the witnesses he said the deceased was sitting by the fire, blowing the fire. To another, that she was starching a cap and stooping down on the hearth. No difficulty, however, seems to exist in reconciling these representations, by supposing that he spoke of different points of time." Per Ewing, C. J., in State v. Guild, 5 Halst. 187, 188. Again; Aaron, a colored boy under twelve years of age, a slave, confessed that he had drowned a child by throwing him into the well. He was seen at play with the child, near the well, shortly before the child was missed, no other person being with them; in searching for the child the prisoner was found up in a cherry tree he pretended the child had gone up the road, looked round and called for him; went to bed at night without his supper; admitted, next morning, he saw the child fall into the well; gave no reason why he neglected to tell of it, but quietly continued his work. When the child was found and taken out of the well, he came up and (seeing the corpse lying on the earth) said, "So, you have found Stephen." These were relied on by Mr. Justice Southard as corroborating circumstances. The State v. Aaron, 1 South. 232, 247. But a new trial was granted in this case. Kirkpatrick, C. J. (at p. 240), says the circumstances were not brought out by the confession. The confession itself was pregnant with no circumstances to give it authority, or in any way to corroborate it. In this Rozell, J., concurred.

Where a confession was made long after the prisoner was arrested and imprisoned, detailing several circumstances which were found to be true, and which, if known by the prisoner at the time of the alleged offence, would tend materially to corroborate his confession, it was held a very laudable caution to submit to the jury whether the circumstances might not have been learned by the prisoner through the information of others, and he enabled in that way to state them, and to charge that, if the jury believed this to be the case, they should disregard the proof of their truth as to any tendency it might have to fortify the confession. The State v. Guild, 5 Halst. 188.

The oral confession to a private person may be received, though the prisoner be examined judicially before a magistrate, who puts his examination in writing. Rex v. Carty, Dublin Oyer and Terminer, 1797, 1 Macnally, 45. Accordingly, on trial for manslaughter, the state read the

tives of hope and fear inducing a person to make an untrue confession, which seldom operate in the case of ordinary admissions.(1) And, further, in consequence of the universal eagerness and zeal which prevail for the detection of guilt, when offences occur of an aggravated character,—in consequence also of the necessity of using testimony of suspicious witnesses for the discovery of secret crimes,—the evidence of confessions is subject, in a very remarkable degree, to the imperfections attaching generally to hearsay evidence. It is to be observed also, that words in criminal cases are often misreported through ignorance, inattention or malice, and extremely liable to misconstruction, and that the evidence cannot be disproved by negative evidence, in the same manner as facts.(2) For these reasons, the statements of prisoners are often excluded from being given in evidence, in cases where they would be unobjectionable as the admissions of a party to a civil suit.

Confessions made in examinations.

Confessions of prisoners are often made in the course of their examina-

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written confession of the prisoner, made before the magistrate, and then offered evidence of his conversations on other occasions than the examination. This was objected to, but admitted and held well. "Otherwise, if a criminal had twenty times acknowledged the commission of a fact, and should afterwards refuse to confess it upon an examination before the justice, for the very purpose of preventing any proof of his former acknowledgments, he would, by his own acts, defeat the ends of justice." State v. Wells, Coxe, 424, 429.

Where primary evidence cannot be obtained, as by the production of counterfeit money, the confession may be used as secondary evidence of its contents. A confession of the prisoner was accordingly received that he had counterfeited guineas, though the guineas were not produced, being out of the power of the prosecution. The State v. Phelps, 2 Root, 87.

The following case was decided upon the point of relevancy: On trial for murder by poison on the high seas, an offer was made to prove that the prisoner, after his arrival at Philadelphia, and after the alleged crime committed, proposed to the witness to take passage with him to Baltimore, to mingle arsenic with the food of the crew, so that they would vomit, when he, the prisoner, should be called on to attend them as physician; and he would then administer arsenic again in such quantity as would destroy them, and then he and witness would go off with the vessel—adding, that *he had had experience of it.* This was admitted; the conversation in respect to the passage being necessary to explain what is italicised, which, so connected, became material; but otherwise would not be. United States v. Tardy, 1 Peters' C. C. Rep. 458.

(1) See Fost. Cr. Law, 243; 4 Bl. Com. 357. Instances have occurred of persons confessing themselves guilty of crimes of which they were innocent; and of innocent persons acting under the imputation of crimes in a manner affording a strong presumption of guilt. See Harrison's Case, cited 1 Lea. C. C. 264, n. See also the confessions of witches: Mary Smith's Case, 2 How. St. Tr. 1049; Case of the Essex Witches, 4 Id. 817; Case of the Suffolk Witches, 6 Id. 647; Case of the Devon Witches, tried by Lord Hale, 8 Id. 1017.

(2) See Fost. Cr. Law. 243. See also the speech of Mr. Adams, in Crossfield's trial for high treason (26 How. St. Tr. 57), where it is observed, that the person relating the confession is generally relieved from the apprehension of punishment; and that what people have said upon a subject shocking or otherwise exciting, is usually repeated with exaggeration. And see by Alderson, B., in R. v. Simons, 5 C. & P. 540, where a prisoner's conversation with his wife was repeated differently by the witnesses; by Parke, B., in Earle v. Picken, 5 C. & P. 542, n. *supra;* Coleman's Case, cit. Joy on Conf. 108. See further 2 Russ., Cr. & M., by Greaves, 824, n.; Greenl. Ev. § 214.

tion before magistrates. These examinations are taken in the course of a judicial proceeding, and according to prescribed forms; consequently the evidence of confessions contained in them is obviously free from many of the objections incident to various other species of hearsay evidence. The principles applicable to confessions in general apply to such as are contained in examinations before magistrates, but as the latter are required to be taken in writing, it has been thought expedient to treat of examinations apart from the general subject. A more particular account of such examinations, and the mode of proving them, will be found in the second part of the work, which, however, is unavoidably anticipated in some measure in the present section. Various points also, as to the verbal proof of confessions made in the presence of magistrates, will be considered in the chapter on Secondary Evidence.(1)

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(1) NOTE 151.—A prisoner, being under examination before a magistrate on a charge of felony, a statement was made in his presence by the solicitor for the prosecution, which the witness called to prove it said, he believed had been taken down in writing; for this reason oral evidence was refused. Rex v. Hollingshead, 4 Carr. & Payne, 242. And if it appear that the examination of the prisoner was reduced to writing, oral evidence of such examination cannot be received, nor anything which should properly have been inserted. M'Kenna's Case, 5 C. H. Rec. 174, 176, before Colden, Mayor. The written examination must be produced. Robetaille's Cases, before Colden, Mayor, 5 C. H. Rec. 171. And in one case the same court said, if the magistrate profess to take the examination according to the statute, oral testimony of it shall not be received. Collins' Case, 4 C. H. Rec. 139. But if it appear that in fact a confession made before a magistrate was not reduced to writing by him, it is admissible in evidence. The case in which such testimony was received was one of maiming, a misdemeanor; but was said to stand on the same ground as a felony. The English practice was admitted to be different, but the court say there is an impropriety in admitting a confession made before a private man, and not one made before a justice because he has omitted to perform his duty. The statute is only directory, and the state ought not to be prejudiced by the omission. State v. Irwin, 1 Hayw. 112. The English doctrine was conceded on the authority of two old cases misreported in Leach. Rex v. Jacobs, Leach, 285, and Hinxman's Case, Id. 286 (old edition). But these cases were afterwards corrected by the learned reporter in the subsequent editions, by which they appear to have all along conformed to the doctrine as laid down in North Carolina. The doctrine of those cases in truth was, that where the confession clearly appears not to have been reduced to writing, oral evidence of it may be received, though it was before the magistrate officially. This correction may be seen by consulting the 2d ed. of Leach, 254, 255; and the 3d ed., 349; and see Macnally, 49, 50, to the same point. In Hall's Case (Macnally, 40), it was also held that if the confession be not taken in writing, oral evidence of it may be given. S. C., *post*, note 153. And so of a confession to a magistrate when a prisoner is not before him for the purpose of examination. Collins' Case, before Colden, Mayor, 4 C. H. Rec. 139. And of acts of the prisoner done before the magistrate, may be proved by parol, though they took place while the examination was going on, and were not detailed in writing. Robetaille's Cases, before Colden, Mayor, 5 C. H. Rec. 171.

So if the examination be taken in writing before the committing magistrate, and by reason of some irregularity, it is inadmissible as a written examination, parol evidence of what the prisoner said at the time of the examination, may be received. In this case the examination was before the coroner, who was allowed to state from memory what the prisoner said on the occasion of the examination, as to so much as was inquired for. And the prisoner was found guilty, and afterwards executed. Rex v. Reed, 1 Mood. & Malk. 403.

See R. S. of New York, pt. 4, ch. 2, tit. 2, § 16, stated *post*.

Where the complaint of the prosecutor was reduced to writing in the police, and the confession of the prisoner followed, stating that "the charge in the foregoing affidavit is true;" and further, that he obtained goods by false pretences from several persons not named in the indictment; held that such a confession, so referring to an affidavit, which neither was, nor could be given in evidence, should have no influence with the jury. Steel's Case, 5 Cit. H. Rec. 5.

2 R. S. of New York, pt. 4, ch. 2, tit. 2, § 14, stated *post.*

But where a prisoner, when before the committing magistrate, was sworn by mistake, being taken for a witness, and as soon as the mistake was discovered, the deposition which was begun was destroyed, and the prisoner cautioned, and after this he made a statement, this was held receivable in evidence. Rex v. Webb, 4 Carr. & Payne, 564.

If it be taken in a case of misdemeanor, it is also inadmissible, being first regularly proved; and it was read in such a case before the now statute (2 R. S. 708, stated *post*), authorizing it. Steel's Case, 5 C. H. Rec. 5. And see State v. Irwin, 1 Hayw. 112, stated *ante.*

The following is the statute of New York on this subject. By pt. 4, ch. 2, tit. 2, § 12, persons arrested under a warrant issued for any offence, are to be brought before a magistrate; a proper return on the warrant is to be indorsed and signed, and the warrant delivered to the magistrate. By § 13, the magistrate is then to examine the complainant and witnesses on oath in the prisoner's presence.

By § 14. "The magistrate shall then proceed to examine the prisoner in relation to the offence charged. Such examination shall not be on oath; and before it is commenced, the prisoner shall be informed of the charge made against him; and shall be allowed a reasonable time to send for and advise with counsel. If desired by the person arrested, his counsel may be present during the examination of the complainant and the witnesses on the part of the prosecution, and during the examination of the prisoner."

By § 15. "At the commencement of the examination, the prisoner shall be informed by the magistrate that he is at liberty to refuse to answer any question that may be put to him."

By § 16. "The answer of the prisoner to the several interrogatories shall be reduced to writing by the magistrate, or under his direction. They shall be read to the prisoner, who may correct or add to them; and when made conformable to what he declares is the truth, shall be certified and signed by the magistrate."

Under the stat. of Phil. and Mary, it does not appear to be necessary that the magistrate caution the prisoner, or warn him of the effects of his examination as evidence (Macnally, 38), or that he is not bound to confess, or that his confession should be voluntary, or that it may be used in evidence against him. People v. Maxwell, before Riker, Recorder, New York General Sessions, 1 Wheel. Cr. Cas. 163. But even under the English statute of Phil. & Mary, or 7 Geo. IV, his statement ought not to be taken till the evidence against him is gone through; and he should then be asked if he has anything to say in answer to the charge. This was strongly suggested as the proper course by Garrow, B., who, however, received a confession made before the evidence had been gone through; but expressed strong doubts of its legality. Rex v. Fagg, 4 Carr. & Payne, 530.

On one occasion, the confession was drawn out by questions put by the magistrate, the prisoner first having been refused professional assistance, though he had requested to be allowed the aid of an attorney; and though the confession was held technically receivable, Littledale, J., adverted to counsel having been refused, and thought the case ought not, for that reason, to be further pressed; and the prisoner was acquitted. Rex v. Ellis, Ry. & Mood. N. P. Rep. 432.

It has often been ruled by the criminal courts of New York, that a questioning of the prisoner by the justice forms no objection to his examination being read. People v. Smith, 1 Wheel. Cr. Cas. 54, New York General Sessions, before Riker, Recorder, Oct. term, 1822. And this was allowed though the whole examination stood by way of question and answer; and one question was improper, viz: whether the prisoner had not before been guilty of petit larceny. People v. Smith, before Riker, Recorder, New York General Session, Oct. term, 1822, 1 Wheel. Cr. Cas. 54. The same general doctrine was held before Holroyd, J., at Carlisle spring assizes, 1824. 2 Stark. Ev. 52, note.

See the statute of New York as to this, *ante.*

It is not necessary that the examination should be signed by the prisoner, in order to make it evidence. People v. Johnson, before Riker, Recorder, 1 Wheel. Cr. Cas. 193. And Lambe's

Whole confession to be produced.

As was observed in treating of admissions, it is necessary that the whole of what a prisoner has said, on the occasion of making a confession, should be related entire. This rule did not prevail in early times, when it was usual, in state trials, to select arbitrarily from a prisoner's examination any part that might be prejudicial to him, though the whole examination, if taken together, might have had a different effect.(1) It has been seen

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Case has always been considered a leading one in this country. Id.; Pennsylvania v. Stoops, Addis. 381, 383, S. P.

Where the confession is made to the district attorney, and by him reduced to writing, he may, notwithstanding, give parol evidence of it. The writing being a mere memorandum, need not be produced. Patton v. Freeman et al., Coxe's Rep. 113. See Rex v. Hollingshead, 4 Carr. & Payne, 242.

Where a confession has been signed by a prisoner, it is read by the officer of the court; but where the examination has been taken down by some person, and not signed by the prisoner, the person who took it down is called as a witness, and he states what the prisoner said, refreshing his memory from the paper. This was done by a magistrate in the case of Rex v. Jones (Carr. Supp. 13), and by a magistrate's clerk, who had taken down what the prisoner said before the committing magistrate, in the case of Rex v. Watkins, tried before Mr. Justice Bosanquet, at the Oxford spring assizes, 1831. See note *a* to the case of Rex v. Swatkins, 4 Carr & Payne, 548.

(There are three kinds of confession: 1. A confession in open court of the prisoner's guilt, which is conclusive, and renders any proof unnecessary. 2. The next highest kind of confession is that which is made before a magistrate. 3. The lowest is that which is made to any other person, and requires to be sustained by proof of corroborating circumstances. The People v. Hennessey, 15 Wend. 147. A confession to a magistrate, who told him beforehand that it would be better for him to make a full confession, is not admissible. The People v. Ward, 15 Wend. 231. In a case of confession out of court, the *corpus delicti* need not be fully proved; even slight circumstances will be sufficient to sustain a conviction. The People v. Badgley, 16 Wend. 53. See Ward v. The People, 3 Hill, 395.

When a confession is induced by threats or by a promise or hope of favor, held out to the accused by a magistrate or by the officer making the arrest, it is not admissible in evidence against him (The State v. Bostick, 4 Harring. 563; Commonwealth v. Taylor, 5 Cush. 605); and the effect is the same if the hope of favor be held out to the accused by a third person in presence of the officer. Morehead v. The State, 9 Humph. 635. It is no objection to the admissibility of the confession that it is made by a servant to her mistress (Regina v. Moore, 12 Eng. Law & Eq. 583; Regina v. Sleeman, 22 Id. 606); or by a slave to a person in whose charge he is placed by his master tied and bound (Spence v. The State, 17 Ala. 192; Seaborn v. The State, 20 Id. 15; The State v. Vaigneur, 5 Rich. 391); but see as to confessions to a private person induced by hope. Stephen v. The State, 11 Geo. 225; Van Buren v. The State, 24 Miss. 512; The Commonwealth v. Morey, 1 Gray (Mass.), 461; Jim, a slave v. The State, 15 Geo. 535; Wyatt v. The State, 25 Ala. 9.

An extra-judicial confession is not sufficient to uphold a conviction, or an indictment for murder, unless the death of the murdered person is shown by other evidence. Stringfellow v. The State, 26 Miss. (4 Cush.) 157. If a confession leads to a discovery of the remains of the deceased, that part of the confession leading to the discovery is admissible, though made in the hope of immunity. The State v. Motley, 7 Rich. (S. C.) 327.)

(1) See, amongst many other instances, the declaration of Garnet, in his handwriting, read upon his trial for the Gunpowder Plot. In the original confession, in the State Paper Office, there are letters in Sir E. Coke's handwriting, pointing out to the officer of the court what he was to read, and which produce quite a different effect from that of the whole declaration taken together. 2 Jardine Crim. Tr. 357.

that the rule laid down in The Queen's Case,(1) respecting admissions and confessions, requires not only that those parts of a conversation should be received which explain or qualify the language of a confession, but such, also, as are not connected with the confession, provided they relate to the subject matter of the charge.(2) And though it may, in strictness, be

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(1) 2 B. & B. 298.

(2) The ground assigned by Abbott, C. J., that it would not be just to take part of a conversation as evidence against a party, without giving to the party, at the same time, the benefit of the entire residue, seems open to exception. *Vide supra*, p. 413, 415, *On Admissions.* See, also, Prince v. Samo, 7 A. & E. 634, 635; *Supra*, p. 415.

NOTE 152.—A witness, in giving a conversation with a prisoner, though others are named and implicated in the same conversation, must give the whole, including the names, exactly as it occurred, and if the other persons are on trial and cannot be affected by it, it is for the judge to tell the jury so. Rex v. Hearne, 4 Carr. & Payne, 215. And so, too, of a prisoner's confession in an examination before a magistrate, it must be read with the other names in it just as it is. Rex v. Clewes, 4 Carr. & Payne, 221. So of a letter from one of the prisoners. Rex v. Fletcher, 4 Carr. & Payne, 250.

This seems to be the only natural place in the text, relating to the confessions of prisoners, where the doctrine can come in, that their confessions, as well as all others, shall be taken together; and that, when given in evidence by the prosecution, their confessions, like those of any other party, shall be received as evidence in favor of themselves.

To the first of these heads the whole doctrine, which we brought forward and illustrated by many cases, *ante*, note 118, of what shall be comprehended as parts of one entire confession, the exclusion of declarations made at other times, and in note 122 the comparative weight due to the exculpatory branch of the confession, and how it may be contradicted, with other matters treated in those notes, will be found almost literally applicable; and we shall, therefore, avoid repeating those matters here.

That the confessions of a criminal shall be taken together, in the ordinary sense of that phrase, is extremely well settled. Per M'Kean, C. J., at the close of his charge, in Respublica v. M'Carty, a case of treason, 2 Dall. 86. This has been expressly extended to the examination before the magistrate. Hicks' Case, 1 C. H. Rec. 66; People v. Weeks, N. Y. Gen. Ses., Oct. 1818, Jud. Repos. 138; People v. Johnson, N. Y. Oyer & Term., Edwards, C. Judge, presiding, 2 Wheel. Cr. Cas. 377. Though it was said, in another case, that the district attorney might read such part of the written examination as he pleased, and the prisoner could not demand to have the whole read. People v. Jordine, N. Y. Gen. Ses., Oct. 1818, Jud. Repos. 107, 108. *Quere.* The contrary was declared to be well settled in People v. Johnson, *supra.*

But per C. J. M'Kean, at the close of his charge in Respublica v. M'Carty, *supra*: "Though the whole confession must be considered together, yet the jury may, unquestionably, on this as on every other point of evidence, believe one part and disregard the other." To what extent this may be done, will appear by the following cases: The prisoner was indicted for secreting counterfeit money. He had confessed that it was true he had counterfeit money, but he received it from a good man on New River, but would not name the person, and that he had destroyed nine of the dollars. Afterwards, while drunk, he said he was a counterfeiter, or was accused of passing counterfeit money, which, the witnesses did not agree; but they agreed that he said he had counterfeit money, and would pass as much as he pleased. Afterwards, he said he had it from one Hart, of New River; afterwards, that he had it from a good man, had never attempted to pass it, and would never pass any. He showed thirteen dollars, and threw it into a mud hole. The court charged that confessions, made at the same time, were all to be taken together, and the jury was to draw such inferences from them as the truth of the case warranted; that they were not bound to credit the whole. On error upon a bill of exceptions, it was held that the charge was too unqualified; that no part of the confession could be rejected, unless it was proved to be untrue; that the jury could not arbitrarily reject that part which went in discharge of the prisoner, and go upon that part only which criminated him. Tipton v. The State, Peck's Rep.

doubted, whether there is sufficient reason for admitting those parts of a prisoner's statement, which relate to circumstances or facts in his favor, except in reference to their use for explaining or qualifying his confession, yet in practice such parts are commonly received, together with the other parts, for the consideration of the jury.

With respect to the effect of what the prisoner may have said favorable to himself in making a confession, the same rule prevails as in the case of

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308. And see *infra*, Rex v. Jones, and Rex v. Higgins. On trial of an indictment for larceny, the theft was proved, and on examination, the prisoner stated that he had the property in his possession, but denied that he had stolen it. The two sitting aldermen (the mayor dissenting) held this *prima facie* sufficient, and that the prisoner should be put to account for the possession. The mayor told the jury that, in his opinion, the whole case resting in the prisoner's confession, that must be taken together, and did not make out a case. Verdict, not guilty. People v. Weeks, Gen. Sess., Oct. term, 1818, Jud. Repos. 138.

If a prisoner, charged with murder, say in his confession, which is read in evidence against him, that he was present at the murder, but took no part in the commission of it, this is evidence for him as well as against him; but the judge will not direct an acquittal, as the jury may believe one part of the confession and disbelieve another. However, if it is meant to be charged that the prisoner did more than is stated in the confession, there ought to be some evidence to show that. Rex v. Clewes, 4 Carr. & Payne, 221.

On the trial of a larceny of a ram, proved to have been stolen and traced to the prisoner's house, the carcass being found concealed in his bed, where he was himself; it came out, also, in the evidence for the prosecution, that he there said his brother had brought the carcass. Parke, J., told the jury they were not bound to take the exculpatory part of the confession as true, merely because it was given in evidence, but should say, looking at the whole case, whether they thought the prisoner's statement consistent with the other evidence. Rex v. Steptoe, 4 Carr. & Payne, 397.

How far a declaration, made by a prisoner, shall be received in his own favor, on the ground that the prosecution have used it against him, may be gathered from the following cases, in connection with which see Tipton v. The State, *supra*. On trial of an indictment for child murder, the prosecution proved by some witnesses that the prisoner confessed she cut the child's throat, and others said she declared it was stillborn. Her counsel insisted on an acquittal being directed, and cited a case before Garrow, B., in which, on trial for larceny, in addition to the prisoner's possession of the goods stolen, his statement before the magistrate was put in that he had bought the goods; upon which an acquittal was directed. Bosanquet, Sergt., said he should hold the same thing in such a case. If a prosecutor uses the prisoner's declarations, he must take the whole together; and if there be no other evidence incompatible with it, the declaration so adduced must be taken as true. But if, after the whole of the statement of the prisoner is given in evidence, the prosecutor is in a situation to contradict any part of it, he is at liberty to do so; and then the statement of the prisoner, and the whole of the other evidence, must be left to the jury precisely as in any other case where one part of the evidence is contradictory to another. And he took that course with this case. Rex v. Jones, 2 Carr. & Payne, 629. A case precisely like the one decided by Garrow, B., came before Parke, J. The prisoner was proved to have possessed and sold the article stolen shortly after the felony committed; and the prosecutor proved his examination, wherein he said the article had been honestly bought and paid for. Parke, J., said the declaration thus became evidence for the prisoner; but he put it to the jury whether they would believe it, and they found him guilty. Rex v. Higgins, 3 Carr. & Payne, 603. See, also, the cases to the same point, cited *ante*, note 117, viz: Rex v. Steptoe, 4 Carr. & Payne, 397; Smith v. Blandy, Ry. & Mood. N. P. Rep. 257; Cray v. Hall, cited in Ry. & Mood. N. P. Rep. 258; Remmie v. Hall, Mann. Dig. 464, also cited and explained in Smith v. Blandy; People v. Scott, N. Y. Gen. Sess., Sept. term, 1818, Jud. Repos. 50; and Rex v. Clewes, 4 Carr. & Payne, 221.

admissions; the jury may believe one part of the prisoner's statement and disbelieve another. Thus, where a prisoner was indicted for stealing a piece of cloth, and it was proved that he had sold it very soon after it was lost, at a place distant from the residence of the prosecutor, and the prisoner's examination was given in evidence, in which he stated that the cloth was honestly bought and paid for, Park, J., observed, "that in consequence of the prosecutor using what the prisoner had said as part of his evidence, it became evidence for the prisoner as well as against him, but still it was like all evidence given in any case, and it was for the jury to say whether they believed it."(1)

It has been supposed, where a prosecutor uses a prisoner's statement, that he gives to the parts favorable to the prisoner more weight than would properly belong to a party's assertion of his own innocence, and that the facts contained in such favorable part of the prisoner's statement, are to be considered as established until disproved.(2) It may be doubted, however, whether these opinions are well-founded, when it is considered that the original object of introducing the whole of a prisoner's statement is merely to guard against any misapprehension of the prisoner's meaning, as to the terms which he has used in his confession of guilt.(3) It is clearly competent for the prosecutor to contradict the parts of a prisoner's statement which are favorable to him."(4)

Statement inculpating another.

If the statement of an accused party is given in evidence, wherein he inculpates another person by name, the whole of the statement, including the name of such person, must be given, but the judge will caution the jury that the statement is not evidence against such person, unless it was made in his presence.(5)

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(1) R. v. Higgins, 3 C. & P. 604. The prisoner was found guilty. The statement might have been adduced by the prosecutor for the purpose of identifying the prisoner as the person selling the cloth. See R. v. Steptoe, 4 C. & P. 397. The point may not unfrequently arise, where a prisoner admits killing a man, but at the same time states facts, which, if true, would reduce the crime to manslaughter; and, in such a case, different questions will arise, according as there is, or is not, other evidence produced. See R. v. Clewes, 4 C. & P. 226; R. v. Greenacre, 8 C. & P. 35.

(2) See R. v. Jones, 2 C. & P. 629. It was there said by Bosanquet, Sergt., that if there is not evidence in the case, independently of the prisoner's statement, which is incompatible with the parts of it favorable to the prisoner, these must be taken to be true. See Id., a case before Garrow, B. A similar opinion appears to have been expressed by Littledale, J., in R. v. Clewes, 4 C. & P. 226.

(3) See R. v. Lloyd, cit. 2 Russ., Cr. & M., by Greaves, 868.

(4) By Bosanquet, Sergt., in R. v. Jones, 2 C. & P. 629.

(5) R. v. Hearne, 6 C. & P. 315; R. v. Clewes, Id. 221; R. v. Fletcher, Id. 250; S. C., 1 Lew. C. C. 107; R. v. Walkley, 6 C. & P. 175; Hall's Case, 1 Lew. C. C. 110; Foster's Case, Id. But see Maudsley's Case, Id., and Barstow's Case, Id., where Park, J., ruled otherwise, and said he did not like the decision in R. v. Fletcher (*supra*), as he did not think it the fair way. In R.

A confession may, in some cases, be collected or inferred from the conduct and demeanor of a prisoner, on hearing a statement affecting himself. And such evidence is admissible, though the statement be made in the presence of the prisoner by his wife, and whether he answers or not.(1) As such statements frequently contain much hearsay and other objectionable evidence, and as the demeanor of a person upon hearing a criminal charge against himself is liable to great misconstruction, evidence of this description ought to be regarded with much caution. It has been decided that the deposition of a witness, or the examination of another prisoner, taken in a criminal case before a magistrate, is not admissible in evidence, merely because the party affected by it was present, or might have had an opportunity of cross-examining or of commenting on the evidence. The party is prevented from interposing at his will and pleasure, and, therefore, the same inference ought not to be drawn from his silence or his demeanor, as is frequently done in the case of conversations.(2)

Effect of confession.

A prisoner's confession is sufficient ground to warrant a conviction, although there is no corroborating proof of his having committed the offence with which he is charged.(3) But a confession is obviously not conclusive evidence against a prisoner, and when it involves matter of law as well as of fact, is to be received with more than usual caution.(4) It would seem, also, upon principle, that some proof must be given that the

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v. Walkley (*ut supra*), however, Gurney, B., said the point had been much considered by the judges.

On a joint presentment of two persons for adultery, the admission of one is admissible, but is not evidence against the other. Frost v. The Commonwealth, 9 B. Mon. 362; Sheffield v. Sheffield, 2 Texas, 79. So, the confession of an accomplice not made in the presence of the prisoner, is inadmisssible on an indictment for a felony, notwithstanding a conspiracy is shown between them. Hunter v. Commonwealth, 7 Gratt. 641. Nor is one of two persons jointly indicted for a felony, a competent witness for the other, though tried separately. McIntyre v. The People, 5 Selden, 38.

(1) R. v. Bartlett, 7 C. & P. 832; R. v. Smithies, 5 Id. 332.

(2) R. v. Appleby, 3 Stark. R. 33; Melen v. Andrews, M. & M. 336; Turner's Case, 1 Moo. C. C. 347. In R. v. Edmunds (6 C. & P. 164), Tindal, C. J., received a statement upon oath, made by a deceased person on the occasion of a summary conviction in the presence of a prisoner, who had made answer to the statement. He said he received it, not as a deposition, but only as a statement which had produced an answer from the prisoner, like any conversation.

(3) In R. v. Eldridge (R. & R. C. C. 440), the court thought there was sufficient evidence to confirm the confession. In R. v. Falkner (R. & R. C. C. 481), the only other evidence was, that the prisoner had sent a message to the party alleged to have been robbed, and who did not appear, to prevent his appearance. In R. v. White (R. &. R. C. C. 508), and R. v. Tippet (Id. 509), no person could swear that the property had been actually stolen, though there was strong confirmatory evidence that the theft was probable; the report states, that most of the judges were of opinion, that without the confirmatory evidence the jury might have convicted on the prisoner's confession. See also R. v. Yend, 6 C. & P. 176; R. v. Fellows, 2 Russ., Cr. & M., by Greaves, 123.

(4) *Vide supra*, Admissions of matters of law. See Philps' Case, 1 Mo. C. C. 271; where a prisoner's statement, as to the ownership of a vessel, was negatived by the Ship-registry Act.

offence which the prisoner confesses to have committed, has been, in fact, committed.(1)

Upon an indictment for bigamy, a deliberate admission made by the prisoner, that he had been lawfully married to the first wife, has been held(2) to be sufficient evidence to establish that fact, without further proof of the actual marriage, even though the first marriage took place in a foreign country; in which case, in the absence of such admission, it would be necessary to prove that the marriage was legal. But in a later case,(3) where there was reason to suppose that the prisoner might, for a particular purpose, have stated an untruth, it was ruled that an admission by him, that he had married two wives, and detailing the circumstances of the first marriage in Ireland, was not, of itself, sufficient.

In all such cases there can be no question that such an admission is receivable, and the only question will be as to the degree of weight to be attached to it, which must, of course, depend upon the circumstances in each particular case.

It has been considered necessary in all cases, previous to receiving a confession in evidence, to inquire whether it has been voluntary. The

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(1) In Wheeling's Case (Leach, 311, n. *a*), it is stated to have been determined by Lord Kenyon, C. J., that a prisoner might be convicted on his own confession, though totally uncorroborated by any other evidence; but this case is too briefly reported to be relied upon. See Greenl. Ev. § 217, n. And see R. v. Tuff, 5 C. & P. 167. In R. v. Edgar (2 Russ., Cr. & M. by Greaves, 826), Patteson, J., is reported to have said: "Could a man be convicted of murder on his confession alone without any proof of the person being killed? I doubt whether he could." In the United States the prisoner's confession, when the *corpus delicti* is not otherwise proved, has been held insufficient for his conviction. See Greenl. Ev. § 217. Instances have occurred, in cases where a crime has caused great public excitement and notoriety, that persons have actually delivered themselves up to the officers of justice upon a self-accusation of having perpetrated the crime; though their innocence has afterwards been proved beyond all question.

NOTE 153.—It was held, in one case before the General Sessions in the city of New York (Radcliff, Mayor, presiding), that even a full confession of guilt before the magistrate was insufficient to warrant a conviction, there being no other proof of the *corpus delicti*, *i. e.*, that a felony had been committed; which it was said must be shown before the examination could be read. Hope's Case, 1 C. H. Rec. 150. But in another and subsequent case in the same court, Dec. 1822, before Riker, Recorder (1 Wheel. Cr. Cas. 107, 108), the doctrine in the text is recognized; though it is said to be very desirable that some evidence other than the mere confession should be adduced. And in Hall's Case (Macnally, 40), it was held that a conviction may follow on oral evidence of such confession, the magistrate having omitted to commit it to writing; and that a conviction may follow though it be wholly uncorroborated.

(On a trial for murder, the *corpus delicti* must be proved by other evidence. Stringfellow v. The State, 26 Miss. (4 Cush.) 157. See also Guild's Case, 5 Halst. 163, 185; Long's Case, 1 Hayw. 524).

(2) R. v. Newton, 2 Mo. & R. 503; S. C. *ut* R. v. Simmonsto, 1 C. & K. 164; before Wightman, J., (after consulting with Cresswell, J.) See, also, Truman's Case, 1 East P. C. 470; R. v. Upton, Gloucester Spring Ass. 1839, cit. 1 Russ., C. & M., by Greaves, 218. Such an admission may be rebutted by proof that the first marriage was void. Anon., cit. 3 Stark. Ev. 894, n. *m*.

(3) R. v. Flaherty, 2 C. & K. 782, before Pollock, C. B.

(The confession is not enough, the marriage must be proved. The People v. Humphrey, 7 John. 314; Gahagan v. The People, 1 Parker C. R. 378.)

usual questions are, whether the prisoner has been told that it would be better for him to confess, or worse for him if he did not confess, or whether any language to that effect has been used. "The object of the rule relating to the exclusion of confessions is, to exclude all confessions which may have been procured from the prisoner by leading him to suppose that it will be better for him to admit himself to be guilty of an offence which he really never committed.(1)

The cases, probably, are rare in which such unfounded self-accusations occur, or at least where a jury would be misled by them; and certainly the rule occasions, in a multitude of instances, the escape of the guilty. There is a general feeling, not unfounded, that the rule has been extended much too far, and been applied in some cases where there could be no reasonable ground for supposing that the inducement offered to the prisoner was sufficient to overcome the strong and universal motive of self-preservation. The doctrine has also been attended with much inconvenience, in consequence of the nice distinctions, and numerous and sometimes contradictory decisions to which it has given rise.(2)

Admissibility of confession question for judge.

The question whether a confession has been made under such circumstances as to be admissible in evidence, being the subject of a preliminary inquiry, is for the decision of the judge, and not of the jury.(3) And where a confession has been admitted, and it afterwards turns out that it

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(1) By Littledale, J., in R. v. Court, 7 C. & P. 487. See, also, by Eyre, C. B., in Warwickshall's Case, 1 Lea. C. C. 263, 264.

NOTE 154.—Confessions, which are obtained from the accused by his being improperly operated upon, are, as will be seen by almost all the cases we shall have occasion to cite upon the question of their admissibility, incompetent evidence; and should, as such, be entirely withheld by the court from the jury. They are to be received or rejected by the court upon a preliminary inquiry into the circumstances under which they are obtained. Bell's Case, Macnally, 43; Commonwealth v. Chubbock, 1 Mass. Rep. 144; The same v. Knapp, 10 Pick. 477, 496; Rex v. Nate, cited Chetw. Supp. to Burn J. 101; 6 Petersdorff, 82. And on the other hand when received, the jury cannot reject them as incompetent, though they may disregard them as incredible, from the circumstances under which they were obtained. Commonwealth v. Knapp, 10 Pick. 477, 496, 497.

We are aware that the cases have fluctuated upon the point whether these questions of competency shall go to the court or jury, some allowing that the latter is the course, especially where there is doubt (Williams' Case, 1 Cit. H. Rec. 149; Bowerhan's Case, 4 Id. 136, 138; Stage's Case, 5 Id. 178; per Kirkpatrick, C. J., in Aaron's Case, 1 South. 240; Commonwealth v. Dillon, 4 Dall. 116); others confining them to the court (Milligan and Welchman's Case, 6 C. H. Rec. 69; Commonwealth v. Knapp, 10 Pick. 477, 496, 497;) insomuch that a very able tribunal, not long since, considered the question a vexed one. State v. Guild, 5 Halst. 184, 185. It will be found, however, ordinarily to have been treated like a point of competency in any other case, and, therefore, to have been passed upon by the court.

(2) See R. v. Row, R. & R. Cr. Ca. 153; R. v. Thompson, Leach, 292; R. v. Cass, Leach, 293, n. See, also, on this subject Bentham's Rationale of Judicial Evidence, B. v, ch. vi, sect. iii; Ed. Rev. Vol. 40, p. 166, 169.

(3) *Supra*, Ch. 1.

was not properly receivable, the judge will strike out the evidence from his notes, and direct the jury to dismiss it from their consideration.(1)

Nature of inducement that will exclude confession.

The general rule upon this subject may be thus stated: A promise of benefit or favor, or threat or intimation of disfavor, connected with the subject of the charge, held out by a person having authority in the matter, will be sufficient to exclude a confession made in consequence of such inducement, either of hope or fear. The prosecutor,(2) or the prosecutor's wife,(3) or attorney, or the prisoner's master or mistress,(4) or a constable, or a person assisting him in the apprehension or custody,(5) or a magistrate acting in the business, or other magistrate, has been respectively looked upon as having authority in the matter.(6) And the same principle applies, if the inducement has been held out by a person without authority, but in the presence of a person who has such authority, and with his sanction, either express or implied.(7) Thus, in the case of The King agt. Pountney,(8) a prisoner, being in the custody of a constable upon a charge of felony, was taken by the constable to an inn, where the innkeeper, in the hearing of the constable, held out an inducement to confess, whereupon the prisoner confessed in the constable's hearing; Alderson, B., though he received the evidence, said he entertained a strong opinion against its admissibility, and that, if it had been necessary, he would have reserved the point for the opinion of the judges.(9) In the later case of The King agt. Taylor,(10) the prisoner, who was servant to the prosecutor, made his confession, while in custody, in the presence of the prosecutor's wife, who was present when the inducement was made, and expressed no dissent; and Patteson, J., said the mistress of the pris-

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(1) R. v. Boswell, Car. & M. 584; R. v. Garner, 18 L. J., (N. S.) Mag. Ca. 1.

(2) R. v. Thompson, 1 Lea. C. C. 291; R. v. Cass, Id. 293; R. v. Jones, R. & R. 152; R. v. Jenkins, Id. 492.

(3) R. v. Upchurch, R. & M. C. C. R. 465.

(4) R. v. Upchurch, *ut supra;* R. v. Taylor, 8 C. & P. 733; R. v. Hearn, Car. & Mo. 109; R. v. Hewett, Id. 534.

(5) R. v. Morton, 2 Mo. & R. 514; R. v. Swatkins, 4 C. & P. 548; R. v. Mills, 6 C. & P. 146; R. v. Shepherd, 7 C. & P. 579. A woman placed with a female prisoner by a constable, to prevent her escaping, is a person in authority for this purpose. R. v. Enoch, 5 C. & P. 539.

(6) R. v. Drew, 8 C. & P. 140; R. v. Cooper, 5 C. & P. 535.

(7) See R. v. Drew, 8 C. & P. 140; R. v. Laugher, 2 C. & K. 225; R. v. Simpson, 1 Moo. C. C. 410; R. v. Garner, 18 L. J. (N. S.) Mag. Ca. 1.

(8) 7 C. & P. 303.

(9) The prisoner was acquitted.

(10) 8 C. & P. 733.

NOTE 155.—It will be seen by the following cases what inducement is or is not sufficient to exclude an extra-judicial confession, made either to the person offering the inducement or to another, and to what kind of prosecution the objection applies.

The captain of a vessel said to one of his sailors, suspected of having stolen a watch: "That unfortunate watch has been found, and if you do not tell me who your partner was, I will commit

you to prison as soon as we get to Newcastle; you are a damned villain, and the gallows is painted in your face;" on which the sailor confessed. Held not admissible against him. Rex v. Parratt, 4 Carr. & Payne, 570. So, where a man said to an accused boy, if you will confess you will probably get clear. State v. Guild, 5 Halst. 163, 167, 168. So where, in the presence of the prosecutor, one stranger told the prisoner if he would confess, being in custody, his confession could not be used against him; and another stranger told him, that being young, if he would confess, it would be more to his credit. State v. Roberts, 1 Dev. 259. So, where the surgeon said to a girl who was charged with administering poison with intent to murder, "You are under suspicion of this, and you had better tell all you know." Rex v. Kingston, 4 Carr. & Payne, 387. So, where the prosecutor said to the prisoner, on his apprehension, "he only wanted the money, and if the prisoner gave him that, he might go to the devil;" in consequence of which the prisoner said, on delivering part, that it "was all he had left;" a majority of the judges held such evidence not receivable. Rex v. Jones, C. C. M. & R. 152; S. C. cited, 1 Burn J. 565. So, where on a stolen bank bill being found on the prisoner, the prosecutor observed: "Unless you give a more satisfactory account, you shall be taken before a magistrate;" and the prisoner then confessed having stolen the bill; the court were of opinion that this amounted to a threat to prosecute; and therefore the confession was inadmissible. They said he understood that his confession would save him from being taken before a magistrate. Rex v. Thompson, 1 Leach, 291. While the prisoner was in custody on a charge of burglary, he said to the officer having him in charge: "If you will give me a glass of gin I will tell you all about it." The officer gave him two glasses of gin, and he made a confession of his guilt. But this was held inadmissible. Nor would the court allow a subsequent confession before the magistrate to be read, the manner of the first confession not appearing to him, and he, of course, having taken no pains to remove its influence. Rex v. Sexton, *Cor.*, Best, J.; Chetw. Supp. to Burn J. 103; S. C. 6 Petersd. 83.

But mere advice to tell the truth, after a promise so to do, will not exclude the confession. Thus where, after the prisoner had offered to confess and tell the truth of a murder, the witness advised her so to do; and then, going out of the house to confess to the witness, a rude voice followed (in what terms, the case does not state). The confession was held admissible. But the court said: "The evidence of such confessions is liable to a thousand abuses. They are made by persons generally under arrest, in great agitation and distress, when each ray of hope is eagerly caught at, and frequently under the delusion, though not expressed, that the merit of a disclosure will be productive of personal safety. To disclose the confession is odious as a breach of confidence, which it is at all times. The confession is made in want of advisers, under circumstances of desertion by the world, in chains and degradation, with spirits sunk, fear predominant, hope fluttering around, purposes and views momentarily changing, a thousand plans alternating, a soul tortured with anguish, and difficulties gathering into a multitude. How easy is it for the hearer to take one word for another, or to take a word in a sense not intended by the speaker! And for want of an exact representation of the tone of voice, emphasis, countenance, eye, manner and action of the one who made the confession, how almost impossible is it to make a third person understand the exact state of his mind and meaning. For these reasons such evidence is received with great distrust, and under apprehensions for the wrong it may do. Its admissibility is made to depend on its being free of the suspicion that it was obtained by any threats of severity or promises of favor, and of every influence—even the minutest. State v. Fields & Webber, Peck's Rep. 140.

Nor will the confession which follows be excluded even where undue influence is exerted, if it be left in doubt whether it had no kind of effect on the mind of the prisoner. Francis Knapp having been indicted as principal, with Joseph J. Knapp and G. C. as accessories, and being on trial for the murder of J. W., the prisoners' confessions were offered in evidence. The facts upon which their admissibility arose were stated by the Rev. H. Coleman, thus: "I went to the prisoner's cell with his brother, N. P. Knapp. N. P. said: 'Well, Frank, Joseph has determined to make a confession, and we want your consent.' The prisoner said, in effect, he thought it hard or not fair, that Joseph should have the advantage of making the confession, since the thing was done for his benefit; 'I told Joseph, when he proposed it, that it was a silly business, and would only get us into difficulty.' N. P., as I supposed to reconcile Frank to Joseph's confessing, told him that if Joseph was convicted there would be no chance for him; but if he (Frank) was convicted, he might have some chance for procuring a pardon. N. P. then appealed to me;

and asked me if I did not think so. I told him I did not know. I was unwilling to hold out any improper encouragement." It was now objected that any farther confessions would be inadmissible, on the ground that a hope of pardon was held out; and Wilde and Morton, J's (*dissentiente*, Putnam, J.), were at first of this opinion; but all the judges at this stage supposed that the counsel for the prosecution intended to prove the prisoner's assent. The counsel then disavowed any such object, and stated that the ulterior testimony would be, that he refused his assent to Joseph's confessing. The court then said that, such being the case, it was obvious that the suggestions made had, in fact, exerted no influence over the prisoner's mind; and being free from influence, his confessions were, of course, equally admissible as if the attempt had never been made. The witness, Mr. Coleman, then answered that no assent was given or refused, which, the court said, left the matter in doubt whether the subsequent confessions were caused by the inducement held out; that it lay with the prisoner to bring his confession within the exception. Commonwealth v. Knapp, 9 Pick. 496, 500 to 510.

The distinction whether the person who seeks to influence the confession held any authority or connection with the prosecution, has not always been strictly attended to. It has been recently noticed with more particularity than usual in England, and the following cases give the result: The confession of a prisoner to one person is evidence, though induced by another, if that other had no authority. Thus, where a prisoner had made certain confessions to her attending surgeon; some time after, a woman present said to her she had better tell all. On objection, Park, J., and Hullock, B., said, that as the surgeon held out no inducement, and the woman had no sort of authority, holding no office of constable, or any other, nor being prosecutrix, it must be presumed the confession was free and voluntary. The case would be different if the inducement had come from any one holding any office or authority. No confession followed the advice of the woman immediately; but some time after, to another person, the prisoner, without any inducement held out, confesses. The two judges had not the least doubt that the confession was admissible. Rex v. Gibbons, 1 Carr. & Payne, 97. To this case the learned reporter adds, in a note, Rex v. Hardwicke, before Wood, B., at Nottingham, 1811 (cited also in the text), where the prisoner's confession before a magistrate, made after the constable's wife had told him he had better confess, was held admissible; which, he adds, could only have been on the ground that the constable's wife was a person having no authority or influence. "I believe," he adds, "no case has decided that a confession *to* a person in no authority, after threat or promise *by that person*, is admissible in evidence. Rex v. Dunn, *infra*, *acc.* And in the subsequent case of Rex v. Tyler & Finch (1 Carr. & Payne, 129), the prisoner Finch, being locked up alone in a room, was told by *a man* that the other prisoner had told all, and he had better do the same, to save his neck; and on this Finch confessed to the constable. On objection, Hullock, B., held, that as the promise (if any) was by a person wholly without authority, the subsequent confession to the constable, who had held out no inducement, must be considered as voluntary, and was therefore evidence. See Milligan and Welchman's Case, stated *ante*, wherein it was held that a confession to a third person, made after the person who arrested the prisoner had obtained a confession by undue influence, might be received, if the person who arrested was absent. *Quere.* On trial for stealing a hymn-book, one Fieldhouse testified that, on the prisoner offering to sell the book to him, he told the prisoner he had better tell where he got it. Bosanquet, J., stopped the witness, and said: "You must not tell what he said." Scott, for the prosecution, said the witness was not a person in any authority. Bosanquet, J., said, any person offering an inducement would exclude a confession to that person. If made to another, it often became a nice question. Rex v. Dunn, 4 Carr. & Payne, 543.

The prisoner being in custody of constable A., constable B. came in, and A. left, when the prisoner immediately confessed to B. Held, that to prevent collusion between constables in such a case, A. should be called to negative all inducements before the confession should be received, as B. did not caution the prisoner not to confess. But it appearing, on further examination, that the prisoner was not then detained as an accused party, but merely as an unwilling witness, the testimony was received without putting the prosecution to call the other constable. Rex v. Swatkins, 4 Carr. & Payne, 548.

Whether one or more of the jury of inquest before the coroner, taking the accused boy aside and telling him he had better confess the whole truth, shall be considered undue influence? *Quere.* State v. Aaron, 1 South. 231, 240.

A confession obtained by a promise from one concerned in the prosecution, that the prisoner shall be a state's evidence, is inadmissible. Thorn's Case, 4 C. H. Rec. 81, 85, 86. So a confession made under a notion derived from a magistrate of being admitted a witness for the crown. Per Lord Mansfield in Rex v. Rudd, 1 Leach, 115. So of any disclosure made to the authority examining, or to the state's attorney, under such circumstances that the prisoner considered himself a witness (The State v. Thompson, Kirby, 345), or when he applied to the state's attorney to be admitted as a witness; and this on the ground of policy. The State v. Phelps, Id. 282. So *semb.* of the testimony given by an accomplice received to testify on motion, on account of the implied promise of pardon. Per Duer, Circ. Judge, People v. Whipple, 9 Cowen's Rep. 707. But in Commonwealth v. Knapp (10 Pick. 477, 489 to 495), where an accomplice was promised by the attorney-general, that if he would testify, he should not be prosecuted, and he promised to testify and made a full disclosure, but afterwards refused to testify, his confession was received as evidence against him. So would be the confessions of a prisoner, while he is persuading any one to use their influence to have him examined against his associates. The State v. Thompson, Kirby, 345.

To work an exclusion, the influence must have arisen from the assurance of some temporal advantage. Urging and obtaining confessions upon religious considerations will not have that effect. That question was mooted in the following case. The prisoner was suspected of setting fire to an out-house. Her mistress pressed her to confess, and told her, among other things, if she would repent and acknowledge her guilt, God would pardon her; but she concealed from her that she would not forgive her herself. She confessed. The next day another person, in her mistress's sight, though out of her hearing, told her her mistress said she had confessed, and drew from her a second acknowledgment. Lord Eldon, C. J. (C. P.), allowed the confessions in evidence, and the prisoner was convicted. The jury on having the confessions offered to them, said they thought the first had been made under the hope of favor here, and the second under the influence of having made the first. On a case reserved, the judges held these points were not for the jury; but if Lord Eldon agreed with the jury, which he did, the confessions were not receivable. But many of them thought the expressions not calculated to raise a hope of favor here; and if not, the confessions were evidence. Rex v. Nate, cited Chetw. Supp. to Burn J. 101; 6 Petersd. 82.

This question of religious influence was afterwards directly decided. The prisoner being in custody on a charge of murder, requested the attendance of a chaplain, who had several interviews with him; and repeatedly urged the importance of his confessing himself to God; but he was not sure but that he might, at some times have spoken of confession generally, without saying to God. He also urged on the prisoner the importance of making temporal reparation for the injuries he had committed, and satisfying the violated laws of the country. These things were all urged upon religious considerations, and on assurance that such confessions, &c., would be of religious benefit, and tend to the prisoner's acceptance with God. The prisoner appeared to be strongly impressed. And he sent for the jailor, and after being admonished by him, that what he said would be used as evidence against him, he confessed the murder. He also confessed to the mayor, after the same admonition from him; and being warned to say nothing but what was right. Held, by the twelve judges, except Hullock, B., absent, that the confession was admissible. They assigned no reasons, but the ground evidently was as stated in the marginal note, that "a confession made in consequence of persuasion by a clergyman, not with any view of temporal benefit, is admissible." The counsel for the crown insisted that if the persuasion would render the confession inadmissible, yet the impression was countervailed by the warning from the mayor. The same thing was contended for at the trial, where Littledale, J., presided; and he refused to put it on that ground, saying anything the mayor said could not do away the effect which the chaplain had produced on the mind of the prisoner. Rex v. Gilham, Ry. & Mood. Cr. Cas. 186 to 205.

By undue means of obtaining a confession, the law generally alludes to illegal influence. The abstract objection that the confession was made while the prisoner was in jail, or otherwise confined in a legal way, though for the very crime confessed, has never been recognized as an objection, but expressly denied. Rex v. Derrington, 2 Carr. & Payne, 418; People v. M'Collister, before Riker, Recorder, 1 Wheel. Crim. Cas. 392. And it was denied, though the prisoner

oner, who was present at the time of the inducement, must be understood, as she expressed no dissent, to have sanctioned the inducement; and the inducement must be taken as if held out by the wife, and coming from a person in authority over the prisoner; for this reason only the evidence was rejected.

But a confession made in consequence of an inducement held out by a person who has no authority, and cannot reasonably be supposed to have any, is not liable to the suspicion or presumption of being untrue. It is not likely that an inducement, held out by a person having no authority, would have the effect of prevailing on a prisoner to make an untrue confession to him; on the contrary, he would, probably, be particularly cautious as to what he stated to such person to his own disadvantage. It has been decided, therefore, that a confession made to a person who held out an inducement, but who had no authority whatever in the matter, is not to be excluded by reason of such inducement. In the case of The King agt. Row,(1) where some of the prisoner's neighbors, who had nothing to do with his apprehension, prosecution, or examination, had admonished the prisoner to tell the truth and consider his family, it was held, that a confession was receivable, on the ground that the advice to confess was not given or sanctioned by any person who had any concern in the business. This case was followed by other decisions to the like effect.(2) Some doubt was expressed upon this subject in the case of The King agt. Spencer;(3) a statement was there offered in evidence, which a prisoner had made to a person, who, without any authority of any kind, told him it would be better for him to confess; Parke, B., said, he would receive

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was a boy only fourteen years of age, who had been confined without food nearly a whole day. Rex v. Thornton, Ry. & Mood. Cr. Cas. 27.

Nor will the confession be excluded, though disclosed by a palpable breach of confidence on the part of an officer, the prisoner being in jail, under his charge. Thus, where a prisoner in jail on a charge of felony, gave a letter, addressed to his father, to the turnkey, who, on the prisoner's request, and before it was delivered, promised to put it in the post-office, but in fact sent it to the prosecutor; yet the letter was held admissible in evidence against the prisoner; ruled by Garrow, B., who said the same thing had been ruled before by Gould, J. Rex v. Derrington, 2 Carr. & Payne, 418.

The objection does not apply to a civil prosecution for the recovery of damages, though the injury for which the action is brought be such that on trial of an indictment for the injury, the confession would be excluded. Thus in a civil prosecution for a criminal fraud to recover damages, the confessions of the defendant (objected to because obtained by a promise of pardon from the district attorney) were offered in evidence against him. The court said the promise did not appear; but at any rate it would only protect the party in a public prosecution, and they received the evidence, saying it could not be withheld, even on grounds of public policy. Patton v. Freeman and others, Coxe's Rep. 113.

(1) R. & Cr. Ca. 153. See R. v. Pountney, and R. v. Taylor, *supra*, p. 544.

(2) R. v. Gibbons, 1 C. & P. 97; R. v. Hardwicke, cited Id. 98, n. Nott. L. Ass. 1811; where the inducement was held out by the constable's wife some days before the commitment. R. v. Tyler, 1 C. & P. 129; R. v. Richards, 5 C. & P. 318.

(3) 7 C. & P. 776. See also R. v. Dunn, 4 C. & P. 543; R. v. Kingston, Id. 387; R. v. Slaughter, Id. 544, n.; R. v. Downing, 1 Tayl. Ev. 589, n.

the evidence if pressed, but that there was a difference of opinion among the judges, whether a confession made to a person who has no authority, after an inducement held out by that person, is receivable. This doubt seems now to be removed. For, in the later case of The King agt. Taylor,(1) where the inducement was similar, and from a person who had no authority, the same objection was taken; two cases were cited as in point, and the case of The King agt. Spencer, was referred to as showing the existing doubt among the judges; but Patteson, J., said: "It is the opinion of the judges, that a confession is receivable, unless there has been some inducement held out by some person in authority." It seems settled, therefore, for the present, that under ordinary circumstances, a confession is not to be excluded on account of its having been made under an inducement held out by some person who had no authority of any kind in the matter.

In the case of The King agt. Simpson,(2) the confession of a girl fifteen years old, which had been occasioned by many applications by the prosecutor's relations and neighbors, amounting to threats and promises, was held by all the judges not to be admissible; though none of the threats or promises were actually made by, or in the presence of, a person having authority. The girl was charged with setting fire to her master's house; on the day of the fire, the mother of the prosecutor's wife spoke to the prisoner in the prosecutor's house in the presence of the prosecutor's wife, who was very deaf, and of the prisoner's mother, and held out to her what in law would be considered an inducement to confess. The prisoner denied the charge. On the same day she was taken before a magistrate. On the next morning the prosecutor's mother-in-law saw the prisoner again, on the road to her house; and again charged her with the offence, which she again denied. Soon after H., a neighbor of the prosecutor's (who had previously charged the prisoner with having set the house on fire), came up and joined them, and said to the prisoner: "Don't be so bold, perhaps you will have to go to S. to-morrow," which was the place where the magistrates met. He also told her that perhaps somebody would come forward to-morrow who saw her do it. He also said, "if you be guilty go along with Mrs. B. (the prosecutor's mother-in-law), and beg your master's and mistress's pardon, and get away, and be better in future, and we shall not seek after you;" and he added, "never mind your wages, I'll give you a few shillings out of my pocket." He also told her, it would be better for her to confess. After he went away the prosecutor's mother-in-law went with the prisoner to the prosecutor's house, and talked to her about the fire all the way; and after they got there they went out of the house, and she said to the prisoner: "Now, Sarah, you lighted the bunch of matches, and put it into the thatch of the house;" before she said that,

(1) 8 C. & P. 733.
(2) R. & M. C. C. R. 410.

she told the prisoner that, if she went to S. again, she would be a great deal worse off, and she said to her several times, both going along the road to the prosecutor's house, and also in the house, and also when she spoke to her out of doors, that it would be a great deal better for her if she would confess, and a great deal worse for her if she did not confess. Littledale, J., at the trial, allowed evidence to be given of what the prisoner said, reserving the question as to the admissibility of the evidence, for the opinion of the judges. It appeared that when the prosecutor's mother-in-law said to the prisoner: "Now, Sarah, you lighted the bunch of matches, and put it into the thatch;" the prisoner said, "Yes, I did." The prosecutor's mother-in-law then told her daughter (the prosecutor's wife), what had passed, and she then came out, and in the presence of the mother-in-law, asked the prisoner what she did it for; whether it was for anything against the family? She said, "No." The mother-in-law asked her if any one persuaded her to do it? She said, "No," and that she had no malice. The prisoner in her defence asserted her innocence, and said that her mistress had told her that if she would confess to it she should have her liberty, and she added, that she confessed on purpose to get her liberty, and that they frightened her to do it.

It can scarcely be doubted, that the prisoner was wearied, if not worried, into making a confession, and considering her tender years, and the relationship in which the person who continually pressed her to confess, stood with regard both to her master and her mistress, there can be little doubt that the girl would be under an impression, and not an unreasonable one, that the threats and promises were held out to her by one who had the means of carrying them into execution.(1)

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(1) See Joy on Conf. 9, 10, and 2 Russ., C. & M. by Greaves, 842, n.

NOTE 156.—"As the human mind under pressure of calamity is easily seduced, and liable in the alarm of danger to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail, a confession, whether made upon an official examination or in discourse with private persons, which is obtained from the defendant either by the flattery of hope or by the impression of fear, however slightly the emotions may be implanted, is not admissible evidence; for the law will not suffer a prisoner to be made the deluded instrument of his own conviction." 2 Curw. Hawk. 595, cited from Leach's Hawk. and approved in State v. Aaron, 1 South. 239. And see State v. Fields, stated *ante*, note 155.

The prisoner was threatened by the prosecutor, that unless he confessed the larceny charged on him, he would be sent to the state prison; whereupon he confessed, and repeated the same confession the next day in the police office, in the prosecutor's presence, when the magistrate wrote it down. The case went to the jury without objection; but Radcliff, Mayor, charged, that although *prima facie* a confession made in the police office should be presumed to have been taken freely and voluntarily, yet should the jury believe from the circumstances, that at the time the confession was reduced to writing the mind of the prisoner was under the influence of fear previously excited, it would be their duty to reject such written confession equally with the other. Verdict not guilty. Williams' Case, 1 C. H. Record, 149. A boy twelve years and five months old, accused of murder, was encouraged to confess by a promise of impunity, "If you will confess, you will probably get clear," by one among several who were interrogating him. His examination was taken the next day before the magistrate, who cautioned him solemnly and repeatedly to tell nothing but the truth, but knew nothing of the previous practices with the

Where a person has made a confession in the hope of obtaining a reward or pardon from government, and of being admitted queen's evidence, his confession is admissible against him, unless it appear, that, at the time of making the confession, he knew that a reward had been offered; if he was aware of the offer, before he made the confession, it would not be admissible.(1)

If a party has been admitted queen's evidence, and has confessed, and upon the trial refuses to give evidence, his own confession will be evidence against himself.(2)

Suspicion of inducement given, to be removed.

For the purpose of introducing a confession in evidence, it is unnecessary, in general, to do more than negative any promise or inducement held out by the person to whom the confession was made.(3) However, if there be any probable ground to suspect inducement in obtaining the confession, such a suspicion ought, in the first instance, to be removed. In a case where a constable, having a prisoner in custody, left the room where the prisoner was detained, when another constable entered the room, on which the prisoner at once made a confession to him, it was held necessary for the prosecutor to call the first constable, for the purpose of proving that he had not held out any inducement.(4)

Where an inducement has been held out to the prisoner by a prosecutor

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boy. He confessed; but the examination was rejected, on the presumption that the boy's mind was not clear of the previous influence. State v. Guild, 5 Halst. 163, 167, 168, 178, 179. The justice, after the high constable had arrested the prisoner, told his wife in his presence in the afternoon, that if what she had told him was true, it would be better for the prisoner to confess; and the next morning, before the committing magistrate, he did confess, though then cautioned by him not to expect any favor; but the court refused to receive the confession against the prisoner. They said they would presume the influence lasted till the examination. People v. Robertson, before Riker, Recorder, N. Y. Gen. Sess. Nov. Term, 1822; 1 Wheel. Cr. Cas. 66. A confession made before the police clerk, after a threat to the prisoner by one of the marshals while bringing her to the office, that if she did not tell all she knew, she would be put into the dark room and hanged, was rejected. People v. Rankin, New York O. and T., before Van Ness, J.; 2 Wheel. Cr. Cas. 468, 469.

With respect to a police confession, made after a promise by the prosecutrix to the prisoner, and before the prisoner's apprehension, the effect of which did not appear to have been counteracted, the New York general sessions say: "The confession before the police officers, we have ever received as good evidence; although before the prisoner was apprehended, a promise of favor may have been made by persons not attached to that department." *Per Curiam*, including Radcliff, Mayor, in Charity Jackson's Case, 1 C. H. Rec. 28. See note 155, and *post*, 157.

(1) R. v. Boswell, Car. & M. 584. See also R. v. Dingley, 1 C. & K. 637; Berigan's Case, 1 Ir. Circ. Rep. 177; Joy Conf. 27; 1 Russ., Cr. & M., by Greaves, 831. But see Hall's Case, 2 Lea. C. C. 559.

(2) R. v. Burley, 2 Stark. Ev. 13; by Pollock, C. B., in R. v. Dingley, 1 C. & K. 640.

(3) R. v. Clewes, 4 C. & P. 233.

(4) R. v. Swatkins, 4 C. & P. 550. It was afterwards shown that the prisoner was not under any charge at the time, but that the first constable was detaining him as an unwilling witness; and the evidence was received.

or by a person in authority, it seems, in general, that a confession made to such persons at a subsequent time would not be receivable;(1) that is, unless it were clear that by a full explanation and caution they afterwards put an end to all inducement, and left the prisoner to speak or not, freely and without bias, as if no inducement had ever been made. If a person of authority, such as a magistrate, holds out an inducement to confess, a confession afterwards to a person of an inferior authority, as a turnkey, seems not to be admissible. Such a confession has been held not to be receivable, where the inferior officer did not caution the prisoner.(2)

Caution after inducement.

Although an inducement has been held out by a prosecutor, constable, or other person, yet, if the magistrate before whom he is afterwards taken distinctly warns him that what he says may be given in evidence against him, a confession, made after such caution, will be receivable.(3) In a case, tried before Bayley, J.,(4) where it appeared that the prisoner, on being taken into custody, had been told by a person who came to assist the constable that it would be better for him to confess; but, on his being examined before the committing magistrate on the following day, he was frequently cautioned by the magistrate to say nothing against himself; a confession, under these circumstances, before the magistrate, was held to be clearly admissible.

In another case, it appeared that a constable told the prisoner he might do himself some good by confessing; the prisoner afterwards asked the magistrate if it would be any benefit to him to confess: on which the magistrate said he could not say it would, and the prisoner then declined confessing; but afterwards, in his way to prison, he made a confession to another constable, and he confessed again in prison to another magistrate; the judges were unanimous in holding that the confessions were admissible in evidence, on the ground that the magistrate's answer was sufficient to efface any expectation which the constable might have raised.(5)

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(1) See R. v. Nate, 1 Burn J., by D'Oyly & Wms. 1086; 2 Russ., Cr. & M., by Greaves, 832, 833; R. v. Sexton, Id.; R. v. Smith, Id. And see 2 East P. C. 658.

(2) R. v. Cooper, 5 C. & P. 535.

(3) R. v. Howes, 6 C. & P. 404. And see 11 & 12 Vict. c. 42, *post*, Vol. II.

(4) R. v. Lingate, Derby Lent Ass. 1815, MS.

(5) R. v. Rosier, Easter Term, 1821, MS.

(So, where the prisoner confesses under an inducement, and then makes a confession after he has been distinctly apprised by the officer making the arrest that the offence cannot be settled. Ward v. The People, 3 Hill R. 395. Where the confession is not made to a person in authority; as where the prisoner confessed to the prosecutor, after he had been put in jail, the latter saying he thought it better for all concerned for the guilty party to confess, more honorable in all cases; the confession was received. The Commonwealth v. Morey, 1 Gray (Mass.), 461. To exclude the confession, it must appear to have been drawn from the prisoner by threat, or promise of some advantage, such as escape from, or mitigation of punishment. Smith v. The Commonwealth, 10 Gratt. 734. It must be voluntary, not induced by hope or fear. Spears v. Ohio, 2 Ohio (N.

So where a magistrate had told a prisoner charged with murder, that, if he was not the man who struck the fatal blow, and would disclose all he knew respecting the matter, he would use his influence to protect him; but on subsequently receiving a letter from the secretary of state, refusing a promise of pardon, he communicated its contents to the prisoner; it was held, that a confession which the prisoner afterwards made to the coroner, who had also duly cautioned him, was admissible.(1)

S.), 583; Stephen v. The State, 11 Geo. 225. If it appear in evidence that the prisoner's hopes or fears had been previously practiced upon, it must be shown that he was warned of the consequences before making the confession. Van Buren v. The State, 24 Miss. 512; 22 Eng. Law & Eq. 604; 12 Id. 590; Commonwealth v. Taylor, 5 Cush. 605.)

(1) R. v. Clewes, 4 C. & P. 221.

NOTE 157.—State v. Guild, 5 Halst. 163, 179 to 181, stated *infra;* Commonwealth v. Boyer, 2 Wheel. Cr. Cas. 149, 150. The prisoner was committed for arson, and was visited in the jail by various persons, among whom were the inspectors of the prison; and various means were used to persuade and terrify him into a confession. A short time after his commitment, he made a full and apparently voluntary confession to the mayor; nothing, however, having been done to remove the influence of previous promises or threats. His confessions were received, but the jury acquitted him. They were told that they might decide on the credit to be given to the confessions; and that merely cherishing the hope of mercy would not, though the confessions were made under such influence, render them inadmissible. Though the prisoner, in this case, was acquitted of the arson, he was afterwards indicted, and convicted on the same facts of a misdemeanor. The Commonwealth v. Dillon, 4 Dall. 116.

The prisoner, charged with conspiring to obtain money from a bank, was arrested on civil process at the suit of the bank, and remained with the arresting officer several days, at the house of the president of the bank, who promised him favors if he would confess. He did so, after a considerable lapse of time from the promise made, and immediately afterwards said the confession was free and voluntary; yet the court presumed the confession, and everything which followed, were influenced by the promise; and said it made no difference whether the confession was made to one having a concern in the administration of justice or not. Thorn's Case, before Colden, Mayor, 4 C. H. Rec. 81.

The prisoner being arrested for a burglary, was told by a stranger, in presence of the prosecutor, that, being in custody, his confession could not be used as evidence against him; and another stranger told him that being young, if he would confess, it would be more to his credit. He accordingly confessed; and two or three days after, there being no immediate influence exercised, he made a fuller confession. Both held inadmissible, though corroborated by circumstances; as the latter might have been made under the first influence. This shall be presumed to continue till palpably done away. State v. Roberts, 1 Dev. 259.

But, as intimated by the last case, the presumption of a continuing influence may be repelled; and then a subsequent confession becomes admissible. Rex v. Sexton, stated *ante*, note 155. Thus where the prisoner, being arrested by D., was induced to confess by a promise from D., the court would not receive a subsequent confession made to D., or any one in D.'s presence; but said that a confession to a third person, D. being absent, would be receivable. Milligan & Welchman's Case, before Riker, Recorder, N. Y. Gen'l Sessions, 6 C. H. Rec. 69, 77, 78. *Quere.* See *ante*, note 155, and *post* in this note.

It will abundantly be seen by the page and note last referred to, that a previous undue influence may be so completely countervailed by a subsequent influence, as to render an after confession admissible. See also *ante*, note 156.

Again; an infant under fourteen had been wrought upon by assurances of favor: "If you will confess, you will probably get clear," to confess a murder, in consequence of which his then confession and the examination before the magistrate were refused as evidence. But, after lying in jail five months, and being told by a stranger, and by a magistrate whom he knew, that he must

It is not a valid objection to a confession before a magistrate, that the prosecutor, who was present, first suggested to the prisoner that he had better speak out, if it appear that the magistrate or his clerk immediately checked the prosecutor, desiring the prisoner not to regard him, but say what was proper.(1)

If a confession has been received in evidence, and it afterwards appears that it had been made under such an inducement as would render it inadmissible, the judge will strike the evidence of the confession from his notes.(2)

Property found in consequence of confession.

Though a confession may have been obtained by means of undue inducements, yet if, in consequence of the information obtained from the prisoner, any fact relative to the offence is brought to light, such as the discovery of the property stolen, it is competent to give in evidence the fact that the property has been discovered conformably with the prisoner's information. The statement as to his knowledge of the place where the property is to be found, being confirmed by the fact of the finding, is thus proved to be true, and not to have been fabricated in consequence of any inducement. It is competent, therefore, to inquire, whether the prisoner stated that the property would be found by searching a particular place, and to prove that it was found there.(3) Upon this, the jury would have

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not expect to escape, but must expect death, he made a full and circumstantial confession, repeating it to various persons. Held admissible in evidence against him. And the court deny what is said in Stark. Ev. pt. 4, p. 49: "Where a confession has once been induced by such means, all subsequent admissions of the same or the like facts must be rejected, for they may have resulted from the same influence," to be law. The court adopt this rule: "Although an original confession may have been obtained by improper means, subsequent confessions of the same, or of like facts, may be admitted, if the court believe, from the length of time intervening, from proper warning of the consequences of confession, or from other circumstances, that the delusive hopes or fears under the influence of which the original confession was obtained, were entirely dispelled." State v. Guild, 5 Halst. 163, 179 to 181. See *ante*, note 156.

Before reading the prisoner's confession to a coroner, it appeared he had been visited by B., who was a clergyman and magistrate. Yet held that the prosecution need not call B., though the prisoner might, before reading the confession, to prove that some inducement was held out. On his being called by the prisoner, it appeared that B. told the prisoner that if he was not the person who struck the fatal blow, and would tell all he knew, he (B.) would use his endeavors and influence to prevent anything happening to him; and that if he, the prisoner, did not make a disclosure, some one else would probably do so. After this, B. wrote to the secretary of state, who returned an answer that mercy could not be extended to the prisoner, which B. communicated to the prisoner. After this, the prisoner sent for the coroner, and wished to make a statement. The coroner told him if he did so, it would be used as evidence against him. The prisoner made the confession. Held, that it was admissible as evidence against him, for all hopes of the prisoner must have ceased, when he made the confession. Rex v. Clewes, 4 Carr. & Payne, 221. And see Gilham's Case, Carr. Supp. 61.

(1) Edwards's Case, East. Term, 1802, MS.

(2) R. v. Garner, 2 C. & K. 920.

(3) On this subject see R. v. Warwickshall, 1 Lea. C. C. 263; R. v. Butcher, Id. 265, n.; R. v. Mosey, Id.; R. v. Lockart, Id. 386; R. v. Grant, and R. v. Hodge, 2 East P. C. 658; R. v.

to consider whether the prisoner, who knew of the concealment of the property, had not himself concealed it or was privy to the concealment.

In the case of The King agt. Gould,(1) on a trial for burglary, the statement of the prisoner that he had himself disposed of property which

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Thurtell, Joy, Conf. 84. It seems formerly to have been thought, that no part of the confession could be given in evidence, but only the actual discovery of the property. See R. v. Harvey, 2 East P. C. 658.

NOTE 158.—Though some have thought otherwise, the latter cases are uniform to the point that a circumstance tending to show guilt may be proved, although it was brought to light by a declaration inadmissible, *per se*, as having been obtained by improper influence. Holt's N. P. Rep. 498, note; Charity Jackson's Case, 1 C. H. Rec. 28; Tucker's Case, 5 Id. 164; 2 Curw. Hawk. 595, cited and approved in State v. Aaron, 1 South. 235. Conceded by Emmet, *arg.* in Milligan & Welchman's Case, 6 C. H. Rec. 69, 78. And held in The State v. Motley, 7 Rich. S. C. 327; The State v. Vaigneur, 5 Rich. 391.

(1) 9 C. & P. 364.

NOTE 159.—Though, as we saw in the last note, the fact or circumstance discovered in consequence of a disclosure obtained by improper influence, be admissible as an independent fact, disconnected with the disclosure, yet there are very respectable authorities which deny that the disclosure itself may be shown in connection with it, or be in any way coupled with it or explained by it. 2 Curw. Hawk. 595, cited and approved in State v. Aaron, 1 South. 235; Charity Jackson's Case, 1 C. H. Rec. 28; Milligan & Welchman's Case, 6 C. H. Rec. 69, 77, 78, *sem.b;* State v. Roberts, 1 Dev. 259. Yet there is a strong current of authority running with the text, that both the disclosure and the fact or circumstance connected with it, and going to its corroboration, shall also be received in evidence, and they go to the jury with their joint force. This was so held where a boy, being threatened, admitted that he stole the prosecutor's bearskin and concealed it in the oven, where it was found. Stage's Case, 5 C. H. Rec. 177, 178, before Colden, Mayor. And similar ground was taken by the same learned judge, charging the jury in Tucker's Case (5 Id. 164, 166). What may be considered corroborating circumstances, see *ante*, note 155, cases of State v. Guild, and State v. Aaron, in connection with the foregoing cases cited in this note and those which now follow. On trial for murder, it appeared that two men met the prisoner and he produced some money of the deceased. They then charged him with the crime, and beat him because he denied it. They tied him and ordered him to produce the deceased's money. He then led them to a swamp and showed the residue; acknowledged the murder and the manner of it; viz: striking on the left side with a club, as the deceased rode along the road; said he dragged the body out of the road, and left the club lying by it; covered the body with brush where the old road formerly ran, about ten or twelve yards from the present road. Some time afterwards, about four miles distant, he pointed out a log, not far from the road, as containing the deceased's saddle-bags. All these circumstances were proved to be true, and the deceased's clothes were found with the bags. It was objected that the prisoner's confession, being extorted, could not be received; that the circumstances showed his knowledge, but his confession alone showed his commission of the crime. But the court said a confession, though extorted, which relates a number of circumstances (established by other proof), with which the prisoner could not well be acquainted but as a perpetrator of the crime, is admissible, and may go to the jury. State v. Moore, 1 Hayw. 482. In The State v. Jenkins (2 Tyl. 377), it was said a confession is evidence though extorted, but the jury are to determine its weight; and if extorted or obtained by promises, it should be disregarded, unless supported by corroborating facts. Where a fact has been ascertained, *e. g.* the finding of a weapon, in consequence of a prisoner's confession improperly obtained, as by encouragement to hope for a pardon, yet such fact may be shown; and also that it was ascertained in consequence of such confession, though without such ascertainment, the confession would have been inadmissible. Commonwealth v. Knapp, 9 Pick. Rep. 496, 511.

It is hardly necessary to observe, that though the confession be obtained by influence and

had been in the house, and concealed it in a place named by him, was held to be admissible in evidence, although other parts of his statement (being considered questionable) were not brought forward. The whole of what he said respecting the concealment of the property was admitted. But the judge in such a case would direct the jury—and so, it is understood, did direct in that case—that his statement must not be taken as proof that he himself had concealed the property, but merely as evidence that he knew of, or was privy to, the concealment—from which, together with the rest of the evidence, they would consider whether it was probable that he concealed it himself.

Where inducements have been held out, which would render a confession inadmissible, and the prisoner, under such inducements, has delivered property to the prosecutor, there may be a question, how far proof may be given of what the prisoner has said on the delivery, in answer to questions put to him, or to a demand made. Words used by him confessing guilt are not admissible as proof of his guilt: but proof of what he said, on delivering the property, would be admissible for the purpose of showing that he delivered it as the stolen property. In the case of The King agt. Griffin,(1) a prisoner was charged with stealing a guinea and two promissory notes: after inducements to confess, it was held, that the prosecutor might prove, not only that the prisoner brought him a guinea and a note, but that he also gave them up, as the guinea and one of the notes that had been stolen from him. In the case of The King agt. Jones,(2) when the prosecutor asked the prisoner for the money which the prisoner had taken out of his pack, and at the same time held out inducements to confess, whereupon the prisoner produced a sum of money, stating that it was all he had left of it, it was held that this evidence ought not to have been received. The distinction between these cases seems to be, that, in the former, the admission went only to this point—that the property had been stolen; but in the latter there was an implied admission by the prisoner that the property had been stolen *by himself.*

If a prisoner's statement (obtained by threat or promise), of his having concealed property, is not admissible against him as proof of the fact of having himself concealed the property, though the property is found so concealed; still less is it admissible against other persons to implicate them in the guilt of the transaction. Thus, in the case of The King agt. Jenkins,(3) where a prisoner was induced by a promise from a prosecutor to confess his guilt, and after that confession he carried the officer to a

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therefore inadmissible, yet, being accompanied with the possession of the stolen goods, such possession must be accounted for by the prisoner in the usual way. Stage's Case, 5 C. H. Rec. 177, 178, before Colden, Mayor.

(1) R. & R. Cr. Ca. 151.

(2) R. & R. Cr. Ca. 152.

(3) R. & R. Cr. Ca. 492.

particular house, as the house where he had disposed of the property, and pointed out the person to whom he had delivered it; the person denied knowing anything about it, and the property was never found; it was held, that not only the confession, but the fact of the prisoner's carrying the officer to the house in question, were inadmissible in evidence.

Nature of inducement.

With regard to the nature of the inducement, which will have the effect of excluding a confession made under its influence, it must contain a threat of some disadvantage, or a promise of some advantage, to the party charged.

Thus, such expressions as the following have been held to suggest a sufficient inducement: "If you do not tell who your partner was, I will commit you to prison;"(1) "Unless you give me a more satisfactory account I will take you before a magistrate;"(2) or, "If you will tell me where my goods are, I will be favorable to you;"(3) "I only want my money, and if you give me that, you may go to the devil;"(4) "You had better tell all you know."(5) And the same effect has been given even to the following expressions, probably under the notion that they were calculated to excite undue alarm or hope in the mind of the party charged: "It is of no use to deny it, for there are the men and the boy who will swear they saw you do it;"(6) "What you say, I shall take down, and it will be used for you, or against you at your trial;"(7) "You must be very careful in making any statement to me, or any body else, that may tend to injure you, but anything you can say in your defence, we shall be ready to hear, or send to assist you;"(8) "You had better not add a lie to the crime of theft."(9)

If the words used are ambiguous, but might be considered by the party charged, as a threat or promise, it seems the confession will not be admissible; thus, where a prisoner was told that he ought to tell whatever was the truth, but he must be very careful, as he was sure to be committed; and the prisoner thereupon made a statement, Littledale, J., would not admit it in evidence.(10)

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(1) R. v. Parratt, 4 C. & P. 570. And see R. v. Upchurch, 1 Moo. C. C. 465.

(2) R. v. Thompson, 1 Lea. C. C. 291. And see R. v. Richards, 5 C. & P. 318; S. C., *nom.* R. v. Griffiths, 2 Russ., Cr. & M., by Greaves, 831, 838; R. v. Hearn, Car. & M. 109.

(3) R. v. Cass, 1 Lea. C. C. 293, n.

(4) R. v. Jones, R. & R. 152.

(5) R. v. Kingston, 4 C. & P. 387. For further instances, see R. v. Partridge, 7 C. & P. 551; R. v. Thomas, 6 C. & P. 353; R. v. Walkley, 6 C. & P. 175.

(6) R. v. Mills, 6 C. & P. 146.

(7) R. v. Drew, 8 C. & P. 140.

(8) R. v. Morton, 2 Mo. & R. 514.

(9) R. v. Shepherd, 7 C. & P. 579. See as to this case, Joy Conf. 8, and 2 Russ., Cr. & M., by Greaves, 829. And see R. v. Enoch, 5 C. & P. 539; R. v. Taylor, 8 C. & P. 733.

(10) R. v. Williams, 2 Russ., Cr. & M., by Greaves, 832.

In a late case,(1) where a married woman was apprehended on a charge of felony, and her husband, in the presence of the constable, told her, if she knew anything about it to tell the truth; Pollock, C. B., rejected the evidence of the statement which she had made in consequence; but it appears, his Lordship was partly induced to do so, upon the ground that her statement tended to exonerate the husband, and might be considered as made under his coercion.

But it seems that a mere exhortation to tell the truth, not conveyed in such a manner as to induce the party charged to suppose that it will be better or worse for him to admit his guilt, or under such circumstances as to imply coercion, will not have the effect of excluding a subsequent confession. Thus upon a charge of forgery, where a magistrate had told the prisoner to be sure to tell the truth, on which he made a statement, the statement was received in evidence."(2) "It can hardly be said," observed Littledale, J., "that telling a man to be sure to tell the truth, is advising him to confess what he is not really guilty of."

An inducement held out to an accused party, with reference to the offence with which he is charged, will not exclude a confession of another offence, of which he was not suspected at the time the inducement was held out,(3) unless the two offences formed part of the same transaction.(4)

The inducement held out to the prisoner to confess must be of a temporal nature, and have some reference to the charge. Thus, a confession drawn from the prisoner by a clergyman, or other person, by means of spiritual exhortation, is not on that account inadmissible.(5)

A promise by a constable to a prisoner, that if he would confess, he should see his wife, has been held not to render inadmissible a confession made in consequence of such promise; no hope of favor being held out as to the charge upon which the prisoner was in custody.(6)

In one case,(7) where a prisoner in custody had offered to tell the officer all about the matter with which he was charged, if he would give him a glass of gin, and having obtained the gin made a confession, Best, J., re-

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(1) R. v. Laugher, 2 C. & K. 225.

(2) R. v. Court, 7 C. & P. 486. See further Wright's Case, 1 Lew. R. 48; R. v. Holmes, 1 C. & K. 248.

The Commonwealth v. Morey, 1 Gray (Mass.) 461; Carroll v. The State, 23 Ala. 28; Regina v. Sleeman, 22 Eng. Law & Eq. 606; 12 Id. 583, 590.

(3) R. v. Warner, 2 Russ., Cr. & M., by Greaves, 845.

(4) R. v. Hearn, Car. & M. 109.

(5) Gilham's Case, Ry. & M. Cr. C. 186; Wild's Case, Id. 452. See R. v. Radford, cit. Id. 186; 2 Russ., Cr. & M., by Greaves, 852, n.; R. v. Nutt, 2 Id. 832; R. v. Hewett, Car. & M. 536. See also 5 Jur. 473, 495.

Regina v. Sleeman, *supra.*

(6) R. v. Lloyd, 6 C. & P. 393. In R. v. Green (6 Id. 655), the prisoner's statement was received after his saying, that "if his handcuffs were taken off, he would tell."

(7) R. v. Sexton, Burn J., D'Oy. & Wms. 1086.

fused to receive it. But the authority of this case does not appear to rest on any principle.

The circumstance that some deception has been practiced, in order to obtain a prisoner's confession, will not render it inadmissible in evidence: as where a person promised a prisoner, that what he had to say should go no further;(1) or even took an oath to that effect.(2) Where a prisoner asked the turnkey, if he would put a letter in the post, and upon his promising that he would do so, gave him the letter; it was detained by the turnkey, and given in evidence as a confession.(3) In another case, artifice was used to induce a prisoner to suppose that some of his accomplices were in custody, under which mistaken supposition he made a confession, and it was admitted in evidence.(4) In another, where a constable, in order to extract a confession, assumed the prisoner's guilt, asking her how she came to poison her uncle, a confession made in answer was admitted.(5) In these cases, there was no reason to suppose (which is the main point to be considered), that the inducement held out was calculated to produce an untrue confession, or lead the prisoner to suppose that it would be better for him to admit himself guilty of an offence which he had not in fact committed.

A confession by a prisoner to a constable in whose custody he is, the prisoner being drunk at the time, is not on that account inadmissible.(6) As to the weight or effect of such evidence, that is a matter upon which the judge will observe.

A confession, obtained without threat or promise, has been received, notwithstanding it was elicited by questions put by a stranger(7) or a constable.(8) But the practice of putting questions by a constable is reprobated by most of the judges; and in a case where it appeared that the

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(1) R. v. Thomas, 7 C. & P. 345.

(2) R. v. Shaw, 6 C. & P. 372.

(3) R. v. Derrington, 2 C. & P. 418.

(4) Burley's Case, 1818, MS.

(5) By Littledale, J., Warwick Ass., MS.

Carroll v. The State, *supra*.

(6) R. v. Spilsbury, 7 C. & P. 187. The facts of the case, as reported, do not warrant the marginal note, which is as follows: "*Semble*, if a constable give him (the prisoner) liquor to make him drunk, in the hope of his saying something, that will not render the statement inadmissible, but it will be matter of observation for the judge in his summing up." It is not to be inferred from the case, that a confession—so immorally, not to say, criminally extorted—would be received. See R. v. Sexton, *supra*, p. 558.

(7) R. v. Wild, R. & M. C. C. R. 452. And see R. v. Shaw, 6 C. & P. 372; where the questions had been put by a fellow prisoner.

(8) R. v. Thornton, R. & M. C. C. R. 27. The prisoner was a boy, fourteen years old, and the confession was made after he had been without food for nearly a whole day. The constable repeatedly told him, that there was no doubt of his being guilty, and repeatedly asked him who was concerned with him. See also R. v. Kerr, 8 C. & P. 176; R. v. Gibney, Jebb C. C. 15; R. v. Hughes, Id. 39.

constable was in the habit of interrogating prisoners in his custody, Patteson, J., threatened to cause him to be dismissed from his office.(1)

It was ruled in one case, by Holroyd, J., that the fact of the person being in unlawful custody when he made the confession would render it unavailing.(2) This, however, seems questionable. If the prisoner were to believe the apprehension unlawful, that would make him careful not to disclose anything against himself: if he should suppose it lawful, that also would make him careful not to make his situation worse, nor in any respect to prejudice himself.(3)

Confessions before magistrate.

The previous cases exemplify the general principles upon which confessions, made by persons charged with offences, are admissible in evidence; and they have reference generally to confessions when made extra-judicially—that is, when the party is not before a magistrate. Confessions that are made before a magistrate will be treated of in another portion of this work:(4) but it may be proper to remark, in this place, that the statute 11 & 12 Vict., c. 42, requires that the committing magistrate shall, in all cases, caution the accused before he calls upon him to say anything in answer to the charge.

Questions frequently arise as to the admissibility of remarks or statements which are made by the prisoner when before the magistrate, while the evidence is being taken, and which are not committed to writing. The consideration of this subject will be resumed in another part of this work; but it may be stated here, as a general rule, that such remarks or statements are admissible, when there is no reason to suppose that they have been induced by a promise or threat.

Statement by person under charge, examined on oath.

The examination of a prisoner before a magistrate, if taken upon oath and put into writing, is not admissible against him on his trial.(5) This rule applies to the case where the prisoner was before the magistrate,

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(1) Hill's Case, Liverpool Spring Ass. 1838, cit. Rose Cr. Ev. 48. See also R. v. Kerr, 8 C. & P. 176. In like manner, the examination of a prisoner before a magistrate, consisting of answers to questions put by the magistrate, have been received. R. v. Ellis, R. & M. 432; R. v. Jones, 7 C. & P. 239; R. v. Rees, Id. 568; R. v. Bartlett, Id. 832. See R. v. Wilson, Holt, 597, *contra*; which, together with a case decided by Holroyd, J., were referred to in R. v. Ellis. See 11 & 12 Vict. c. 42, § 18, *post.*

(2) Ackroyd's Case, 1 Lew. C. C. 49.

(3) See Thornton's Case, 1 Lew. Cr. Ca. 49; Ry. & Moo. C. C. 27.

(4) Vol. II, Chap. 1, *Of Examinations.*

In the state of New York, the statute, as above cited, requires that at the commencement of the examination, the prisoner shall be informed by the magistrate, that he is at liberty to refuse to answer any question that may be put to him. 2 R. S. 794 (3d ed.)

(5) R. v. Smith, 1 Stark. R. 242; R. v. Rivers, 7 C. & P. 177; R. v. Lewis, 6 C. & P. 162; R. v. Pikesley, 9 C. & P. 125.

under the criminal charge on which he is afterwards tried: his examination in such a case, taken on oath, is not to be received against him in support of the charge on which he was so examined. As an examination it is irregular; for the modern statutes, which regulate the proceedings of magistrates on criminal charges brought before them,(1) make a distinction between the examination of a prisoner, and the informations of those who make the charge—the informations (but not the examination of the prisoner) being especially required to be on oath. Since the statement upon oath cannot be received as a judicial proceeding or formal examination—is it admissible as a confession? There are objections to it also in that form; the oath imposed on the prisoner, especially while in custody, is likely to operate as a constraint, or as a kind of compulsion; the statement, therefore, cannot be considered as completely free and voluntary. And the objection would appear to apply with greater force in cases where an ignorant witness has been examined upon oath, without a distinct previous warning that he was not bound to answer questions which had a tendency to criminate himself.(2) It has been held that a statement, in the heading of the examination, that the prisoner was sworn, is conclusive, and that proof of his not having been sworn is inadmissible.(3)

The principle of these decisions has been somewhat extended in some cases, where it has been held that a statement made upon oath by a party, who has been examined as a witness, with reference to the offence for which he has himself been afterwards tried, is not receivable against him.

Thus, in the case of The King agt. Lewis,(4) it appeared that the prisoner, among other persons, was summoned before a committing magistrate upon an investigation in a matter of felony, but no person was specifically charged with the offence; the prisoner was sworn and made a statement; the other persons also were examined, and made depositions; at the conclusion of the examination, the prisoner was committed for trial on the depositions of the others. This statement was held to be not receivable against the prisoner. When she was summoned to appear, suspicion attached to her; and the case bears a strong resemblance to that of an individual examined on oath under a charge. The judge said he did not think the examination perfectly voluntary.

In the case of The King agt. Davis,(5) one of several persons, when before the committing magistrate, was examined on oath as a witness

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(1) 7 Geo. IV, c. 64, § 2; 11 & 12 Vict. c. 42, §§ 17, 18, *post*, Vol. II. The old statutes which formerly regulated their proceedings were to the same effect. 1 & 2 P. & M. c. 13; 2 & 3 P. & M. c. 10.

(2) See Vol. II, Chap. 9, Sect. 2, *Of the Privilege of Witnesses in refusing to answer.*

(3) So held by Park, J., in R. v. Rivers, 7 C. & P. 177. See on this case, *post*, Vol. II. And see R. v. Wheeley, 8 C. & P. 250; R. v. Pikesley, 9 C. & P. 124.

(4) 6 C. & P. 162. In R. v. Walker (cited by Gurney, B., Id.), an affidavit by a prisoner, made in a suit in Doctors' Commons, was read against him,

(5) 6 C. & P. 177.

against the others upon a charge of felony, and, after examination, was charged as a prisoner and committed for trial, the judge held that what he said as a witness before the magistrate could not be used against him upon the criminal charge. It does not appear from the report that this individual was taken as a prisoner before the magistrate; but there were circumstances sufficient to raise a suspicion of guilt, and sufficient also to show that the statement was not perfectly voluntary.

So the examination of a party upon oath, taken before a coroner, on an inquest upon the body of a deceased person, has been held to be inadmissible on the trial of the same party for the murder of the deceased.(1)

In a late case,(2) where a man and his wife were tried for poisoning their child, it appeared that a coroner's inquest had been held upon the body of another child of theirs, and that upon the inquest the mother had been examined upon oath, no suspicion attaching to her at that time, and that she had signed her deposition, and that afterwards she was brought before the coroner, and charged with poisoning both the children, and she was told by the coroner that she might make any statement she liked to the jury, and that what she said would be taken down in writing. Her deposition was then read over to her, and she said she had a further statement to make, which she made, and it was written down and read over to her, but she refused to sign it. Erskine, J., received both the deposition and the subsequent statement, reserving the point for the consideration of the judges; but as the evidence was only received as against the woman, and was expressly so left to the jury, and she was acquitted, their lordships thought it unnecessary to consider whether it had been properly received or not.

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(1) Anon., 4 C. & P. 255, n. *b*, by Park, J.; R. v. Wheeley, 8 C. & P. 250, by Alderson, B.; R. v. Owen and others, 9 C. & P. 238, by Gurney, B.; the examination had been received by Williams, J., in a previous trial, against the same prisoner, for a rape upon the deceased, and the point was reserved for the consideration of the judges; but the prisoners were acquitted. See 9 C. & P. 83. In R. v. Clewes (2 Russ., Cr. & M., by Greaves, 860, n. *w*), it appears that the grand jury asked Littledale, J., whether the examination of a prisoner, who was examined on oath before the coroner as a witness, could be admitted as evidence against the same person, when subsequently indicted for the murder of the person on whose body the inquest was held; and the judge answered, "Whatever any prisoner says, at any time, against himself, is evidence, and, therefore, such a statement is admissible." Upon the Anonymous Case (4 C. & P. 255, n.) being mentioned to his Lordship, he seemed to entertain doubts upon the point, but directed the grand jury to receive the evidence, and leave the point for discussion upon the trial. The point does not appear to have been afterwards raised. See 4 C. & P. 221.

(2) R. v. Sandys, Car. & M. 345.

Where the *party accused* is sworn before the coroner, his testimony is inadmissible the same as if given before any other magistrate; but if he appears voluntarily, and gives testimony before any accusation has been made against him, his statement is admissible in evidence against him on the trial of an indictment for the crime. The People v. Hendrickson, 1 Parker, C. R. 406; Case of Boughton, 7 Iredell (N. C.), 96; The People v. Thayers, 1 Parker C. R. 595; 1 Smith N. Y. State R. 384.

Statement by person, not under charge or suspicion, on oath.

The principle of the decisions, however, clearly does not apply to a statement made by the prisoner, in an examination upon oath before a magistrate, when he was not in custody, but examined against another person on a distinct charge, provided, of course, there has been no inducement given to confess, and no promise of favor or of a reward for information; a statement so made by one in his capacity of witness, who was perfectly free to refuse answering any questions that had a tendency to expose him to a criminal charge, seems to be clearly admissible. And it may be laid down generally, that a statement upon oath by a person, not being a prisoner, and when no suspicion attached to him, the statement not being compulsory, nor made in consequence of any promise of favor, is admissible in evidence against him on a criminal charge.(1) Thus, where a prisoner had been examined upon oath respecting a distinct charge against another person, Parke, B., received the evidence of the examination.(2)

Where a prisoner, before the committing magistrate, was sworn by mistake (being supposed to be a witness), but his deposition was afterwards destroyed, and he was cautioned, a subsequent statement which he made was received.(3)

It has been ruled also, that an examination before a committee of the House of Commons was evidence in the trial of a misdemeanor;(4) though it was objected, that the person, against whom the admission was used, had been compelled to appear before the committee, and would have been punishable, as for a contempt of the House, on refusal to answer the question. But on the other hand, if a witness has been obliged to answer upon oath questions tending to criminate himself, after claiming the protection of the judge,(5) what he says must be considered to have been obtained by compulsion, and not be given in evidence against him.(6) In a prosecution for forgery, a deposition by the prisoner, taken on oath before commissioners of bankrupt, has been adjudged to be admissible in evidence against him;(7) and sworn answers in a suit in chancery have been admitted in evidence against the defendants in that suit, who were prosecuted by the plaintiff on a charge of conspiracy.(8) In one case it was held, that the balance sheet of a bankrupt, given on oath under his commission,

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(1) R. v. Tubby, 5 C. & P. 530, referred to in R. v. Lewis, 6 C. & P. 161. See also R. v. Walker, cit. C. & P. 162.

(2) R. v. Haworth, 4 C. & P. 254.

(3) R. v. Webb, 4 C. & P. 564.

(4) R. v. Merceron, 2 Stark. R. 366.

(5) See *post*, Vol. II.

(6) R. v. Garbett, 2 C. & K. 474, by a majority of the judges.

(7) R. v. Wheater, 2 Moo. C. C. 45; S. C., 2 Lew. C. C. 157.

(8) R. v. Goldshede, 1 C. & Kir. 657. See also R. v. Highfield, cit. 2 Russ., Cr. & M. by Greaves, 859.

was not admissible against him upon a criminal charge for concealing his effects.(1)

In prosecutions for perjury, the statements of the party on oath are necessarily used against him.

When a prisoner is on his trial for one felony, a confession relating to a distinct and separate felony will not be receivable.(2)

Confessions not evidence against others.

With respect to the prisoner's liability to be affected by the confessions of others, a marked distinction exists between the branch of law now under consideration, and that which has been considered in treating of admissions.

In former times, it was usual to admit the confessions of prisoners, even of such as had afterwards been executed, as evidence against others, and this at a period when torture was not unfrequently applied in order to obtain confessions; as, for example, upon the trials of Sir N. Throgmorton, the Earl of Essex, and Sir W. Raleigh, and upon the trials for the Gunpowder Plot.(3) One of the earliest reported instances of the change of practice occurs in the resolution of the judges in Tong's Case,(4) that the confession of one is only evidence against himself, and cannot be used against any other parties, whom he may have confessed to have been engaged with him in the commission of the offence. Even when the confession is made before a magistrate, in the presence of another prisoner, it will not be evidence against the latter.(5)

Thus, the confession of a prisoner charged with larceny, made before a magistrate, in the presence of the alleged receiver, containing statements implicating the receiver as well as the principal himself, is inadmissible against the receiver.(6) In a recent case,(7) upon an indictment against A. for stealing, and B. for receiving, where A. had pleaded guilty, Pat-

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(1) R. v. Britton, 1 M. & R. 297, by Patteson, J., and Alderson, B.

(2) R. v. Butler, 2 C. & K. 221.

But on a trial of a principal, in the second degree, the confession of the principal in the first degree may be shown in connection with the record of conviction. Studstill v. The State of Georgia, 7 Geo. 2.

(3) See also Abingdon's Case, 2 How. St. Tr. 16; Sir M. Foster's Discourse, 234; where the practice is justly stigmatized. Prisoners were told, that the trial *par gens de lour condition*, meant confessions of accomplices. In Sir W. Raleigh's Case, Sir E. Coke says, that the *law presumes* a man will not accuse himself for the purpose of accusing another. With regard to torture, see notes on Fortescue, *de laudibus legem Angliæ;* Jardine On the Use of Torture in England.

(4) Kel. 18, res. 5, temp. Car. II; 6 How. St. Tr. 227. And see Hevey's Case, Lea. C. C. 232.

(5) R. v. Appleby, 3 Stark. R. 33. And see Child v. Grace, 2 C. & P. 193; Melen v. Andrews, M. & M. 137, *supra.*

See, also, Hunter v. Commonwealth, 7 Gratt. 641; Frost v. Commonwealth, 9 B. Mon. 362. Otherwise as to the declarations and acts of one acting in concert with prisoner in a homicide. Malone v. State of Georgia, 8 Geo. 408.

(6) Turner's Case, 1 Ry. & M. C. C. R. 347.

(7) R. v. Swinnerton, Car. & M. 593.

teson, J., refused to receive a statement which he had made before the magistrate in the presence of B. His Lordship said: "When before a magistrate, a prisoner is called upon to answer the depositions taken on oath; but he is not called upon to make any answer to the statement of another prisoner." In one case where the principal and receiver were indicted together, and the principal pleaded guilty, Wood, B., refused to allow this plea to establish the fact of the stealing against the receiver.(1) But in another case upon an indictment against B. alone, for receiving property alleged to have been stolen by A., the indictment also stating that A. had been convicted thereof, Bosanquet, J., held that the record of the conviction of A. was evidence against B., although it appeared thereby that A. had pleaded guilty to the charge.(2) His Lordship said that whatever is evidence against the principal is *prima facie* evidence of the principal felony as against the accessory; and if the principal is convicted on his own confession, that is *prima facie* evidence of his guilt as against the accessory, but not conclusive. In this case, it is to be observed, the indictment contained an averment that the principal had been convicted, so that the record of the conviction would be evidence to support that averment, if it was a material one.

Upon trials for treasonable and other conspiracies, questions have arisen respecting the admissibility of statements made by co-conspirators. These have been adverted to in treating of the distinction between original and hearsay evidence. Such statements are receivable, when they accompany, or when they are in the nature of acts for which all parties concerned in the conspiracy are responsible; but they are not receivable when they are in the nature of narratives, descriptions, or confessions.(3)

Confession in case of treason.

The statute 7 Wm. III, c. 3, § 2, enacts, that no person shall be indicted, tried, or attainted of high treason or misprision of high treason, "but upon

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(1) Anon., cit. in Turner's Case, 1 Ry. & M. C. C. R. 348.

We have seen that where two persons are indicted together for a felony, one of them cannot be a witness for the other, though tried separately; and a confession is a species of testimony. People v. Williams, 19 Wend. 377. As to the credit due to the testimony of an accomplice, see People v. Davis, 21 Wend. 308; People v. Costello, 1 Denio, 83; People v. Whipple, 7 Cowen, 707; Hunter v. Commonwealth, 7 Gratt. 641.

(2) R. v. Blick, 4 C. & P. 377.

Studstill v. Georgia, 7 Geo. 2.

(3) Hardy's Trial, 24 How. St. Tr. 452, 475, where Thelwall's letter was considered to be a narrative merely.

Malone v. Georgia, 8 Geo. 408; Glory v. The State, 8 Eng. (13 Ark.) 236; showing that the declarations of a conspirator may be shown against a co-conspirator, though not made in his presence. Cowles v. Coe, 21 Conn. 220. If made after the commission of the offence, they are not admissible (The State v. Dean, 13 Ired. 63); or if made in reference to a former transaction (Kidder v. Lovell, 14 Penn. State R. 214. See, also, The State v. Simons, 4 Strobh. 266; and Williamson v. Commonwealth, 4 Gratt. 547.

the oaths of two lawful witnesses, either both to the same overt act, or one of them to one, and another of them to another overt act of the same treason, unless he shall willingly, and without violence, in open court, confess the same." Sir Michael Foster expresses an opinion,(1) that the legislature intended by this section to require two witnesses to support a conviction, in all cases, except where the prisoner confessed the treason upon his arraignment in open court; and that to warrant a conviction there must be proof of the overt acts upon oath, not merely proof of the confession of the overt acts: as the former statutes of treason(2) contained a similar enactment to that of the statute of Wm. III, but with the omission of the words, "in open court." "But," he adds,(3) "perhaps it may now be too late to controvert the authority of the opinion in 1716 (in Francia's Case),(4) warranted as it hath been by later precedents." All the judges, on a conference preparatory to that case, held, that a confession of the overt acts, if proved by two witnesses, is sufficient evidence to warrant a conviction. The same construction of the statute had been previously adopted in Gregg's Case,(5) by six judges against two; and was afterwards acted upon in Berwick's Case,(6) by Willes, C. J., and Abney, J., against the opinion of Foster, J. But in all these cases, the confession which was given in evidence had been made upon an examination before a magistrate, or person having authority to take it; and Sir Michael Foster, yielding his opinion to that of the other judges, as to the effect of a confession made under such circumstances, still insists that the rule in Francia's Case should not be extended further than that case warrants, and ought not to be applied to confessions made in the presence of persons having no authority.(7)

In all cases of high treason, when the prisoner's confession is offered in evidence as confirmatory of the testimony of the witnesses, it is clearly

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(1) See Fost. Disc. 240, 241, 243; Willis's Case, Id. 241; S. C., 15 How. St. Tr. 622; Smith's Case, Fost. 242.

(2) 1 Edw. VI, c. 12, and 5 Edw. VI, c. 11.

(3) Fost. Disc. 243.

(4) See Fost. Rep. 11; Mr. J. Burnett's MSS., cit. 1 East P. C. 133; Kel. 18.

(5) 1 East P. C. 134; S. C., 14 How. St. Tr. 1375.

(6) A. D. 1746; Fost. Rep. 10; S. C., 18 How. St. Tr. 370.

(7) Fost. Disc. 243. See also 4 Bl. Com. 356.

NOTE 160.—"No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court." Const. U. S. art. 3, § 3. The statute is to the same effect. 2 Laws U. S. 92. "No person shall be convicted upon any indictment for treason, but by the testimony of two lawful witnesses to the same overt act, or one witness to one overt act, and another witness to a different overt act, of the same treason. But if two or more distinct treasons, of divers kinds, be alleged in any indictment, one witness to prove one treason and another witness to prove a different treason, shall not be deemed two witnesses to the same reason, within the provisions of this section." § 15, 2 R. S. N. Y. 735. § 16; "In trials for treason, no evidence shall be given of any overt act that is not expressly laid in the indictment; and no conviction shall be had upon any indictment for the said offence, unless one or more overt acts be expressly alleged therein."

admissible, though proved by a single witness.(1) And with regard to all facts merely collateral, which do not conduce to the proof of the overt acts, it may be laid down as a general rule, that whatever was evidence of them at common law is still good evidence under the statute of William.(2) Such collateral facts may therefore be proved by a confession on the testimony of a single witness.

If the overt act of high treason, alleged in the indictment, is the assassination of the queen, or any direct attempt against her life or her person, it is plain, from the provision of the statute 5 & 6 Vict. c. 51(3) (which enacts that in such cases the prisoner shall be tried according to the same order of trial and upon the like evidence as if he stood charged with murder), that a confession proved by a single witness will be sufficient to convict the prisoner. And the overt acts themselves may be proved by a single witness. In these cases, the rule of the common law is restored.

CHAPTER IX.

OF THE EXCLUSION OF SECONDARY EVIDENCE, AND OF THE RULE WHICH REQUIRES THE BEST EVIDENCE TO BE GIVEN.

THE law excludes such evidence of facts as, from the nature of the thing, supposes still better evidence behind in the party's possession or power. The rule has been sometimes expressed in these terms—that the *best* evidence must always be given.(4) Other writers have stated the rule to be—that the law requires the highest evidence of which the nature of the thing is capable.(5) The precise import of the rule cannot be clearly comprehended without reference to its application in various instances.

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(1) R. v. Willis, 15 How. St. Tr. 622, 624, 643; Fost. Disc. 241. And see R. v. Crossfield, 26 How. St. Tr. 56, 57.

NOTE 161.—Respublica v. Roberts, 1 Dallas, 39, 40, and Respublica v. M'Carty, 2 Dallas, 86, S. P.

(2) Post. Disc. 240, 242.

(3) See also 39 & 40 Geo. III, c. 93.

NOTE 162.—But per M'Kean, C. J., in Respublica v. M'Carty (2 Dall. 88): "Most of the authorities seem to lean against the admission of the party's confession in the presence of two witnesses, as sufficient for conviction, unless made at the time of committing the criminal act, or before a magistrate duly authorized." As to what constitutes the crime of treason, see U. States v. Pryor, 3 Wash. C. C. 234; Same v. Hoxie, 1 Paine, 265; Same v. Vigol, 2 Dall. 346; Same v. Mitchell, Id. 348; Ex parte Bollman, 4 Cranch, 75; People v. Lynch, 11 John. R. 549; U. States v. Hanway, 2 Wallace, jr., 139.

(4) B. N. P. 293.

(5) Bac. Ab. tit. Evidence I.

The principle of the rule under consideration is founded on the presumption that there is something in the better evidence which is withheld, which would make against the party resorting to inferior evidence. Although, in some instances, this presumption may not be very strong, yet the general effect of the rule is to prevent fraud, and to induce parties to bring before a jury the kind of evidence which is least calculated to perplex or mislead them.(1)

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(1) See Gilb. Ev. 13; B. N, P. 293. See also what is said by Lord Tenterden, C. J., in Vincent v. Cole, M. & M. 258, as to the imperfection of parol testimony concerning written instruments.

NOTE 163.—Legal writers seem entirely agreed that the foundation of the rule is as stated in the text. Where a party proposes to introduce secondary evidence, under circumstances which clearly presuppose that higher evidence is within his power, it is very natural to presume that he does so from some secret and sinister motive, conscious, perhaps, that should the higher evidence be adduced, it would give a complexion to the case by no means favorable, if not directly adverse to his interest. 2 Ev. Poth. 147, 148; 3 Starkie's Ev. 389, 390; Swift's Ev. 157; Macnally's Ev. 234; 1 Chitty's Cr. Law, 566; Strother v. Barr, 5 Bing. 399, per Best, C. J.

And the reason of the rule limits the extent of its application; consequently, it does not operate where the law itself obviates the presumption of fraud, which would otherwise arise. Hence, in general, to prove that a person is a public officer, it is sufficient to show that he acted as such; for then, in the absence of evidence to the contrary, it is to be presumed that he was duly and legally appointed. 3 Starkie's Ev. 392, 393. So, where a document is of a public nature, a copy is sometimes admitted, for the production of the original is dispensed with, on account of the inconvenience resulting from the frequent removal of such papers, and therefore the absence of the original affords no presumption of fraud. 3 Starkie's Ev. 393. And in a variety of cases where the opposite party has admitted the facts sought to be established, or by his conduct precluded himself from denying them, primary evidence is dispensed with. Indeed, the whole doctrine as to secondary evidence of written instruments, when applied to the common instance of the best evidence being proved to be unattainable, rests upon much the same principle; all presumption of fraud is there, of course, repelled, and the rule, after first disarming the parties of the means of imposition, suffers itself to be relaxed as circumstances in justice shall require, by the admission of the next best evidence. Per Haywood, J., Ingram v. Hall, 1 Hayw. Rep. 193, 206. See, also, 9 Petersd. Abr. 157, note; per Thompson, J., Milnor v. Tillotson, 7 Peters, 99, 101; United States v. Reyburn, 6 Id. 352.

The secondary evidence, however, must in all cases be in itself competent; for the rule is never so far relaxed as to allow evidence to be given intrinsically illegal, as hearsay for instance, merely because a party happens to be so unfortunately situated, that it is the best of which his case is susceptible. 2 Ev. Poth. 147; 3 Chitty's Bl. 368, note; Pentland v. Somers, 2 Serg. & Rawle, 23. And see Johnson v. Chase, 1 Tyl. Rep. 449; Bonnet's Lessee v. Devebaugh, 3 Binn. 175.

And on the other hand, the rule is not to be extended to such a rigorous extreme as to debar a party from justice because he originally neglected to furnish himself with the highest possible assurance of the disputed facts; for then two witnesses would be better than one, a hundred better than two, and so on progressively. A writing would be better than a parol contract, a deed better than either, and a record better than all. Per Haywood, J., Ingram v. Hall, 1 Hayw. Rep. 193, 206. See, also, 2 Ev. Poth. 148.

Nor does the rule operate in any case to *exclude* evidence, merely because it is not all nor the most satisfactory which might be adduced, when the evidence offered and that which is withheld is all of the same general quality or grade (3 Starkie's Ev. 391; Liebman v. Pooley, 1 Starkie's Rep. 167; Macnally's Ev. 342; 9 Petersd. Abr. 155, note; 1 Chitty's Crim Law. 567); but in such case, it in general goes no farther than to forbid that evidence which is, in its nature, merely circumstantial, shall be received, when direct and conclusive evidence may be had. Commonwealth v. James, 1 Pick. 375; 1 Big. Dig. 322, § 11. This is forcibly illustrated by Governor v. Roberts (2 Hawks' Rep. 26). There, the secretary of state was called as a witness, to produce

The present rule is satisfied by the production of the best *attainable* evidence. In requiring the production of the best evidence applicable to each particular fact, it is meant that no evidence of a nature merely substitutionary shall be received when the primary evidence is producible.

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certain papers belonging to the office of the comptroller. It appeared that the comptroller was absent on a visit, and before his departure, he had deposited the keys of the office with the secretary, requesting him to attend to any applications at the office during the absence of the former; the comptroller had not been summoned to attend court, and the secretary testified that he attended as the agent, or on behalf of the comptroller, with the papers. Under these circumstances, it was held that, though the testimony of the comptroller would be more satisfactory than that of the secretary, yet both being oral, and both, therefore, of the same *grade*, either was competent to be submitted to the jury. "If," as is well observed by Henderson, J., who delivered the opinion of the court in the above case, "the rule was that the most full and satisfactory evidence should be produced, it would follow that where it appeared there were others present, they should be also produced; or where a person, from his situation, had a better view of the transaction, one who had a less favorable position should not be received; or where it appeared that another could give a more detailed account of the affair, one who could not give so full a one should be excluded, although there may be no doubt as to his knowledge of the facts to which he deposes."

Particular instances of the application of the rule under consideration, to cases where a writing of any kind exists, evidentiary of the facts sought to be established, will be found in a subsequent part of this work, and the requisite proof dispensing with the production of the best evidence, the doctrine of notice to produce papers under the control of the opposite party, the kind of evidence admissible, after a foundation has thus been laid for introducing that which is inferior in its character, together with various other matters connected with this head, will there be fully treated of and the illustrations given.

It should be observed here, however, that wherever written evidence exists of the facts sought to be proved by parol, whether the existence of such evidence appear on the direct or cross examination of the witness introduced, makes no difference. Its disclosure, at any period of the trial, brings its importance into view as the best evidence. Hence, though a party may conduct his examination so as to prove the contents of a writing, and keep its existence out of sight, if it turn out that it is the highest evidence, and should have been produced by him; whenever its existence appears, the inferior evidence given will be excluded altogether. Boone v. Dyke's Legatees, 3 Monroe, 529, 531; Rex v. The Inhabitants of Padstow, 4 Barn. & Adol. 208, S. P. So, though the writing be not the foundation of the action, but comes in question collaterally, the highest evidence of its execution must be produced. Roberts v. Tennell, 3 Monroe, 247, 250. And the original in such cases, as in others, must be shown or its non-production legally excused. Cope v. Arberry, 2 J. J. Marsh. 296.

The following decisions may, perhaps, be most appropriately introduced by way of concluding this note. Upon an information for passing a counterfeit sixteen penny piece, it was held that, before any evidence of its want of genuineness could be received, the piece itself must be produced. State v. Osborn, 1 Root's Rep. 152. So, in ordinary cases of a writing charged to be a forgery. State v. Blodget, Id. 534. But where the information was for counterfeiting only, and the prosecutor had never been able to get hold of the money, he was allowed to prove the defendant's confession respecting his having made counterfeit pieces of the denomination specified in the information, without producing them. State v. Phelps, 2 Root's Rep. 87.

In a case before Lord Kenyon, at Nisi Prius, a witness was asked whether the plaintiff's bushel measure had not been tried and found to correspond with the public Belford bushel. But his Lordship was of opinion that the question could not be asked, inasmuch as "the best evidence the case would admit of was a production of both measures in court, and a comparison of them before the jury." Chenie v. Watson, Peake's Addit. Cas. 123. *Sed quere.*

By substitutionary evidence is meant such evidence as implies the existence of primary or more original information.

If a party offer a copy of a deed or will where he ought to produce the original, this raises a presumption that there is something in the original deed or will which would make against the party; and therefore the copy, in such case, is not evidence. And the rule being general in its application, it would not be sufficient to rebut this presumption in any particular case, so as to let in the substitutionary evidence. Thus, it would be of no avail to prove that the copy tendered in evidence was in every respect quite correct, it would still be inadmissible while it was in the power of the party to produce the original. But if he prove the original deed or will to be in the hands of the adverse party, who refuses to produce it after receiving a regular notice for that purpose—or if he prove that the original has been lost or destroyed without his default—no such presumption can reasonably be made, and a copy will be admitted, because such a copy is the best evidence that can be adduced.(1)

Evidence of this nature is usually termed *secondary* evidence, it not being original or primary.

Where there is no substitution of evidence, but only a selection of weaker for stronger proofs, or an omission to supply all the proofs capable of being produced, the rule is not infringed: the rule of law does not require the strongest possible assurance of a fact.(2) If a deed, for

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(1) Gilb. Ev. 13; B. N. P. 293; Garnons v. Swift, 1 Taunt. 507; Henry v. Leigh, 3 Camp. 499. See *post*, Vol. II, *Of Secondary Evidence.*

(2) NOTE 164.—Questions respecting the admissibility of evidence are entirely different from those which respect its sufficiency and effect. Columbian Ins. Co. v. Lawrence, 2 Peters' Rep. 25, 44, per Marshall, C. J. And in general, if the distinction of written and unwritten, or direct and circumstantial, does not exist between the evidence offered and what is withheld, that which is offered will be admitted, though less satisfactory than some other which the party might adduce. No rule of law requires *all* the evidence, or the *strongest* evidence of the matter in dispute; but only that is excluded, which, from the nature of the case, supposes evidence superior in *quality* or *grade* behind, in the power of the party. See per Daggett, J., Barnum v. Barnum, 9 Conn. Rep. 242, 248, 249, and Ainsworth v. Greenlee, 1 Hawks' Rep. 190; also the remarks of Henderson, J., Governor v. Roberts, 2 Hawks' Rep. 26, and the authorities cited in connection with that case, note 163. See likewise 1 Big. Dig. 322, § 11. Accordingly, where a bill purported to be accepted by S. R., Market Place, Birmingham, it was held that the result of inquiries made at Birmingham by the prosecutor, who was not acquainted with the place, was evidence for the jury to prove the non-existence of the party whose name was used, though neither the best nor the usual evidence in such cases. "A banker from Birmingham, or an overseer," it seems, would have been the most satisfactory witness. Rex v. King, 5 Carr. & Payne, 123. See, also, Rex v. Backler, Id. 118. But even after such testimony has been introduced, the same principle which dictates the rule requiring the best evidence may frequently be advantageously applied in assigning to it its due importance in the scale of credibility. For, as has been justly observed by Mr. Evans, "when weaker and less satisfactory testimony is tendered in support of a fact, the nature of which will admit of elucidation from proofs of a more direct and explicit character, the same caution which rejects evidence of an inferior degree, when higher evidence might be produced, will awaken suspicion; and it will reasonably be supposed that a more perfect exposition of the subject would have laid open deficiencies and objections which a more

example, or a will, is attested by several subscribing witnesses, the execution may be proved by one of them: or, if none of those witnesses can be produced, proof of the signature of one witness will be sufficient; for the proof is, as far as it goes, complete, and not inferior in its kind to any that can be produced: nor can it be inferred merely from the absence of further proof of the same kind, that such additional proof would be inconsistent with that already produced.(1) Even the testimony of a deceased subscribing witness, given on a former trial, if otherwise admissible, may supersede the necessity of calling a survivor.(2)

Upon the same principle, for the purpose of proving handwriting, it is not necessary to call the supposed writer himself.(3) So, where a notice

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obscure and uncertain representation was intended to conceal. But there is still an important distinction to be attended to: the rules for the admission of evidence are absolute and imperative and will not admit of any relaxation from considerations of inconvenience and expense; whereas in forming a judgment upon the adequacy of testimony, in particular cases, circumstances which remove the cause of suspicion may also be admitted to obviate the effect." 2 Ev. Poth. 149. And so they may be, where the rule operates in its utmost rigor. See *ante*, note 163. But considerations of mere *inconvenience* and *expense* would probably have no influence in laying a foundation for secondary evidence, and this is doubtless what the learned writer intends.

We have already remarked (*ante*, note 163), that the rule which forbids the substitution of inferior for primary evidence, is never relaxed so far as to authorize the introduction of mere hearsay, or other evidence intrinsically incompetent. Within that principle, letters or private papers written by a third person are excluded, because their contents are inferior to the testimony of the individual by whom they were written. Vasse v. Mifflin, 4 Wash. C. C. Rep. 519. See, also, *post*, of the text, and the notes. In Cotton v. James, however (Mood. & Malk. 273), letters bearing post-marks before an act of bankruptcy, and found in the alleged bankrupt's possession after it, containing statements material to the act of bankruptcy, were held admissible against the bankrupt, without calling the writer, as evidence to show that he received intimation of particular facts, though not to prove their truth. The testimony of a witness, taken down in writing by a magistrate, cannot be used as evidence in chief of the facts stated by him; it may, however, be used to contradict and impeach him. State v. M'Leod, 1 Hawks' Rep. 344. And where, in an action for malicious prosecution, the plaintiff introduced the justice, before whom the complaint charged as malicious was made, who being sworn and examined in chief, was cross-examined by the defendant, and the Common Pleas allowed him to testify on such cross-examination, as to what the witnesses sworn to on the complaint before him, though objected to, upon writ of error brought, the Supreme Court reversed the judgment upon that ground; holding, that to substitute the relation of the justice, under such circumstances, for the testimony of the witnesses, was a violation of the plainest rules of evidence. Richards v. Foulke, 3 Hamm. Rep. 52.

(1) See Ansty v. Downing, 2 Stra. 1253; B. N. P. 264. A different rule prevails in equity with regard to wills. See Gresl. Ev. 120.

(2) Wright v. Doe d. Tatham, 1 A. & E. 3.

Under a recent English statute the attesting witness need not be called, where no attestation is requisite; the instrument may be proved in the same manner as if there were no attesting witness to it (17 & 18 Vict. c. 125, enacted in 1854); it may be proved by the admission of the party executing it (Hall v. Phelps, 2 John. R. 451; Sloan v. Ehle, 16 Id. 201; Palmer v. Manning, 4 Denio, 131; Pentz v. Winterbottom, 5 Id. 51); or by proof of the signature of the attesting witness, and that he is beyond the jurisdiction of the court. People v. Rowland, 5 Barb. 449.

(3) R. v. Hurley, 2 Mo. & R. 473. On a bank prosecution, it was not thought necessary to *disprove* the cashier's handwriting, by calling the cashier. Hughes's Case, 2 East P. C. 1002; M'Guire's Case, Id.; Case of Bank Prosecutions, R. & R. 378. In an early case it was thought

had been given to produce a letter, written by a plaintiff to a defendant, it was held, that its contents might be proved by any person acquainted with them, although it was in the plaintiff's power to produce the clerk who wrote the letter.(1)

Proof of negative, when not necessary.

In prosecutions, where it is necessary to prove that the act with which the prisoner is charged was done without the consent or against the will of some other person (as upon indictments for unlawfully killing deer or taking fish), it is not in general indispensably necessary to call that person as a witness on the part of the prosecution, in order to prove the negative, namely, that he did not give his consent.(2)

Some misapprehension as to the nature and extent of the rule has been

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necessary to disprove handwriting, by calling the party whose receipt had been altered. Smith's Case, 2 East P. C. 1000.

(1) Liebman v. Pooley, 1 Stark. R. 167. On an indictment for perjury, it is not necessary to call the clerk who wrote the jurat. R. v. Benson, 2 Camp. 508. See 2 Burr. 1189.

NOTE 165.—In an action for a malicious prosecution in North Carolina, the plaintiff, to establish his case, offered the proceedings before the magistrate, had in the prosecution charged as malicious, and verified the same by witnesses who proved the magistrate's handwriting. The Supreme Court held this was correct; for though the best evidence is required, yet the rule does not require the strongest possible assurance. "Whether a signature is proved by the person who made it, or by one acquainted with the handwriting, the *kind* of proof is exactly the same. They are both primary, since the knowledge of both is acquired by the same means; although it may be that the evidence of the writer is in degree stronger than the other." Ainsworth v. Greenlee, 1 Hawks' Rep. 190. But in M'Kee v. Executors of Myers (Addison's Rep. 31), where the plaintiff sought to prove an order drawn by the defendant's agent, and signed by such agent, with the defendant's name; held, that the agent must be called, as the best evidence. *Per Curiam:* "This is not the case of a note or order, subscribed by the maker or drawer; in that case, if there be no subscribing witness, proof of handwriting is sufficient; here the person who wrote the note and subscribed the name is uninterested, is the best witness, and ought to be here." This case, however, seems anomalous. The fact of the agency was made out; and where a person who is the acknowledged agent of another, makes a contract by letter or other writing, proof of the agent's handwriting, has, we believe, been very uniformly considered sufficient evidence of the contract without calling the agent. Daniel v. Hill, Norris' Peake, 40; Fairlie v. Hastings, 10 Vesey, jun., 126, S. P.

(2) Allen's Case, 1 Mo. Cr. Ca. 154; R. v. Hazy, 2 C. & P. 458. And see R. v. Hurley, 2 Mo. & R. 473. At one time it appears to have been thought necessary to call the owner as a witness. R. v. Rogers, 2 Camp. 654.

There are several classes of cases to be more fully noticed hereafter, in which the plaintiff is called upon to allege and prove a negative. Thus, in an action against a common carrier, the plaintiff alleges, among other things, the delivery of the goods to the carrier for transportation to the place named, *and that they have not been delivered there.* Edwards on Bailments, 566. Or in an action for a penalty, given by statute, unless a general form of declaring is expressly authorized, the complaint must set forth the particular acts or *omissions* which constitute the cause of action. Cole v. Smith, 4 John. R. 193; Bigelow v. Johnson, 13 Id. 428; 15 Id. 5; The People v. Brooks, 4 Denio, 469. So where a statute pronounces certain acts unlawful, such as traveling on the Sabbath, "unless in cases of charity or necessity, &c.," the plaintiff must in his complaint negative the exceptions (First Baptist Church, &c., v. U. & S. R. R. Co., 6 Barb. 313; Street v. Smith, 1 B. & Ad. 94); and it is a general principle that the plaintiff must prove the allegations in his complaint. 1 Greenl. Ev. § 78.

occasioned by the case of Williams v. The East India Company,(1) where the question was whether the defendants had put on board the plaintiff's ship some articles of a combustible and dangerous kind, without giving due notice of their nature to the master of the ship, or to any other person employed in its navigation. It appeared in evidence at the trial, that the goods were delivered by the officer of the defendants, with a written order to the plaintiff to receive them, in which order nothing was said as to their nature; that they were received by the chief mate of the plaintiff's ship, who had since died; and that no other person was present at the time of the delivery. It was further proved, by the captain of the ship and the second mate, that no communication had been made to either of them, nor, as far as they knew, to any other person on board. Upon this evidence, the plaintiff, who had to prove the negative, was nonsuited, on the ground that he had not given the best evidence of the want of notice, which it was in his power to produce, by calling the company's officer, who delivered the articles on board. And the nonsuit was afterwards affirmed by the Court of King's Bench. "The best evidence," said Lord Ellenborough, C. J., in delivering the opinion of the court, "should have been given, of which the nature of the case was capable. The best evidence was to have been had, by calling, in the first instance, upon the persons immediately and officially employed in the delivering and in the receiving of the goods on board, who appear in this case to have been the first mate on the one side, and the military conductor, the defendant's officer, on the other: and though one of these persons, the mate, was dead, that did not warrant the plaintiff in resorting to an inferior and secondary species of testimony (namely, the presumption and inference arising from a non-communication to the other persons on board), as long as the military conductor, the other living witness, immediately and primarily concerned in the transaction of shipping the goods on board, could be resorted to; and no impossibility of resorting to this evidence, the proper and primary evidence on the subject, is suggested to exist in this case." It is to be observed, that the evidence in this case, which was received, was not secondary in its nature, inasmuch as it would have been admissible, notwithstanding what was said to have been the primary evidence had been produced; and it is difficult to consider upon what principle it could have been substituted for such primary evidence, in case of its failure in consequence of the death of witnesses. The case, therefore, appears to be one in which there was a failure of the proper measure of proof, and not a substitution of secondary for primary evidence.(2)

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(1) 3 East, 192.

(2) On the subject of what is the proper measure of proof in cases similar to that in the text, see Koster v. Reed (6 B. & C. 19). The strength of proof required will depend materially on the facility afforded to the opposite party for explanation or contradiction. By Lord Tenterden, C. J., in R. v. Burdett, 4 B. & A. 162. See further, on this subject, *post*, *On Presumptions*.

The rule relates to the *quality* of evidence, not *quantity*.

That the rule in question relates only to the quality, and not to the quantity or strength of the evidence, is further illustrated by the cases, in which it has been held that the entries or hearsay statements of deceased persons are receivable in evidence, notwithstanding the same facts might be proved by living witnesses. Though all information must be traced to its source, if possible, yet, if there are several distinct sources of informa-

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NOTE 166.—Mr. Starkie considers Williams v. The East India Company, cited in the text, as an instance of mere failure in the measure of proof; he takes for granted that the testimony of the captain and second mate was at all events admissible, and from this endeavors to show, that the case is not one coming strictly within the principle which forbids the substitution of inferior for primary evidence. 3 Starkie's Ev. 396. It is true, the testimony was received at the trial without objection, as it seems from the report; but the language of the court plainly imports that they regarded it as not only insufficient, but utterly incompetent. Lord Ellenborough, who delivered the opinion, commences that portion of it relating to this subject, with a distinct application of the rule requiring the best evidence; after which it is remarked, that "the best evidence was to have been had by calling, in the first instance, upon the persons immediately and officially employed," &c.; and throughout the whole, the testimony of the captain and second mate is spoken of as "inferior and secondary," while that of the conductor is treated as the "proper and primary evidence." Indeed, we understand his Lordship as denying, in unequivocal terms, that the plaintiff had a right to resort to the testimony of the former, so long as the impossibility of procuring that of the latter was not shown.

No good reason is perceived, therefore, for taking this case out of the class in which our author has placed it, as a strong illustration of the rule requiring the highest evidence; for, although that rule does not usually operate by way of exclusion, where the evidence offered and that which is withheld is all parol (see *ante*, note 163); yet there are instances of its application to the more or less adequate representation of facts. 2 Ev. Poth. 149; Swift's Ev. 157. The testimony of the captain and second mate, under the existing aspect of the case, was nothing more than presumptive or circumstantial evidence; and where that which is positive and direct in its character, is within the power of a party, the former is secondary (3 Starkie's Ev. 515; 2 Ev. Poth. 340); and being so, its inadmissibility would seem to follow as an inevitable corollary.

In Massachusetts, where, upon an indictment for having in possession a counterfeit bank note, it appeared that the note was passed to one P., who suffered it to remain out of his hands for a long time, during which it was lodged with a magistrate, who might have been produced as a witness; held, that the testimony of P. and his wife, who swore positively to the note from certain accidental marks upon it, was improperly received, unless they had made a private artificial mark upon it; and also, that the testimony of the magistrate was indispensable, upon the general principle requiring the best evidence. Commonwealth v. Kinnison, 4 Mass. Rep. 646. Upon an indictment, however, against a miller for stealing, where it appeared that P. sent barilla to the defendant's mill, and after it was ground, a mixture of three-fourths barilla, and one-fourth plaster of paris, was returned by the same truckman who took the barilla to the mill, it was held that the government need not produce the truckman to prove that it was not adulterated in the transportation, although there was merely circumstantial evidence of its having been done by the miller. Commonwealth v. James, 1 Pick. 375. But note, that the gist of the action was the *stealing* not the *adulteration* of the barilla; whereas, in Williams v. The East India Company, the fact of notice not having been given, was the direct foundation of the prosecution.

In larceny of the wife's wearing apparel, she is not only a competent witness to identify them, but the most proper one. And it seems not necessary to produce the husband, to prove non-consent to the taking in such case; for, "it is unreasonable to suppose, in the absence of proof, that the husband should sell his wife's clothes; and still more unreasonable that he should gvie them away." The People v. Williams, 3 Wheel. Crim. Cases, 18.

tion as to the same fact, it is not, in general, necessary to show that they have all been exhausted before secondary evidence can be resorted to. Thus, an entry made by a deceased collector is proof of the fact of the money having been paid, without calling the persons who paid it to him.(1)

One of the most ordinary occasions to which the present rule is applicable, relates to the substitution of oral for written evidence. The qualifications under which oral evidence may sometimes be received, notwithstanding the existence of written evidence, will be more particularly considered in the second part of this work; in the present place, it is only material to inquire in what cases it is not allowable to substitute entirely the one for the other.

First, then, oral evidence cannot be substituted for any instrument in writing (which is not merely the memorandum of some other fact), the existence of which instrument is disputed, and its production material to the issue between parties, or to the credit of the witnesses. One advantage, derived from the application of this rule, is, that the court acquires a knowledge of the whole contents of the instrument, which may have an effect very different from a statement of a part. "I have always," says Lord Tenterden, C. J.,(2) "acted most strictly on the rule, that what is in writing shall only be proved by the writing itself. My experience has taught me the extreme danger of relying on the recollection of witnesses, however honest, as to the contents of written instruments. They may be so easily mistaken, that I think the purposes of justice require the strict enforcement of the rule." But the same learned judge observed, in another case,(3) that much injustice is frequently done by a rigid adherence to the rule, where a party is turned round for want of a stamp, or put to the unnecessary expense of the penalty and stamping an instrument, which has nothing to do with the particular subject matter of the action.

This rule, however, does not apply where the instrument in question is shown to be destroyed or lost, or where the party who relies upon it is otherwise incapacitated from producing it.

It was decided in The Queen's Case,(4) that it is not allowable, on cross-examination, in the statement of a question to a witness, to represent the contents of a letter, and to ask the witness whether he wrote a letter to any person with such contents, or to the like effect; because the counsel might thus put the court in possession of a part only of the contents of a

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(1) By Park, J., in Middleton v. Melton, 10 B. & C. 327, 328. The rule as to the proof of instruments by subscribing witnesses, some of whom are dead, is otherwise, in consequence of the intervention of another principle. See Wright v. Doe d. Tatham, 1 A. & E. 3.

(2) In Vincent v. Cole, M. & M. 258. See, also, by Best, C. J., in Strother v. Barr, 5 Bing. 151.

(3) Reid v. Batte, M. & M. 414.

(4) 2 B. & B. 286. See, also, Crowley v. Page, 7 C. & P. 789.

written paper. And even if the witness acknowledges the letter to be in his handwriting, he cannot be questioned as to its contents, but the whole letter must be read in evidence. So, where the inquiry was as to the existence of allotments made by inclosure commissioners in another mode than in the execution of their award, it was considered that, if such allotments were made, they must be in writing, and therefore the minutes of the commissioners were the primary evidence of them, and no other evidence of such allotments could be given until a search had been made after the minutes.(1)

Rule as to substituting *oral* evidence.

Oral evidence cannot be substituted for any written conveyance or contract.(2) The written instrument in such cases may in some measure be regarded as the ultimate fact to be proved, especially where the question relates to the proof of deeds and negotiable securities; and the principal object of committing contracts of every kind to writing is for preserving a memorial of them, more lasting and more authentic than oral testimony. Accordingly a plaintiff is not permitted to recover in an action for use and occupation, or in ejectment, where there is a written contract of tenancy, or upon any contract which is in writing, without producing it.(3) If it

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(1) Bendyshe v. Pearse, 1 B. & B. 460.

(2) B. N. P. 246.

(3) Brewer v. Palmer, 3 Esp. 213, recognized in Ramsbottom v. Tunbridge, 2 M. & S. 434; Fenn d. Thomas v. Griffith, 6 Binn. 533; R. v. Castle Morton, 3 B. & A. 588. As to policies of insurance, see R. v. Gibson, R. & R. 138; R. v. Doran, 1 Esp. 127; R. v. Ellicombe, 1 Mo. & R. 260; S. C., 5 C. & P. 522.

NOTE 167.—The case of Doe dem. Wood v. Morris, cited in the text, simply decides that, in order to exclude parol evidence of a contract, it must appear that the contract was reduced to writing: there, the landlord who brought ejectment, proved payment of rent by the defendant, and notice to quit; but on cross-examining his witness, it appeared that an agreement in writing, relative to the land in controversy, was produced on a former trial; the witness, however, did not know the contents of it, and it was not shown that the agreement related to the existing tenancy between the plaintiff and the defendant. Upon a motion made to set aside the verdict, Lord Ellenborough, in giving judgment, makes use of these words: "How can we say that the plaintiff ought to have been nonsuited for the want of giving the best evidence of the tenancy, unless it appeared there was other and better evidence of it in an agreement in writing between the landlord and his tenant, which the landlord kept back? Enough ought, at least, to appear, to show that the paper not produced was better evidence of the terms of the tenancy than the evidence which was received."

Where, in support of a general count for use and occupation, the plaintiff offered to prove the acknowledgment of the defendant, that he had hired and occupied the premises during the period in question, agreeing to pay therefor a certain sum; and it appeared that, during such period, there was an outstanding written agreement for a lease of the premises in the hands of the plaintiff, which, through failure of the event on the happening of which it was to take effect, never became operative; held, that in the absence of evidence to show that such acknowledgment referred to the written agreement, the evidence offered was admissible. Buell v. Cook, 5 Conn. Rep. 206. But if the occupation had been founded in fact upon the agreement, though it was defective and authorized no such occupancy, it must have been produced as the best evidence. Id., per Hosmer, C. J. And where the plaintiff brought his action to recover the value of certain

comes out upon cross-examination of the plaintiff's witnesses, that there is a written agreement, he must produce it; but if he makes out a *prima facie* case, without showing that there was any written contract, the other

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fixtures, and it appeared that there was a written memorandum respecting the manner in which the value should be ascertained, signed by the plaintiff, but not by the defendant; held, that such writing need not be produced by the plaintiff. Wilson v. Bowie, 1 Carr. & Payne, 8. So in an action for work and labor, the plaintiff having proved the value of the work done and closed his case, one of the defendant's witnesses swore there was a memorandum in writing, containing an estimate at which the work was to be done; and produced a copy, unstamped, in the plaintiff's handwriting, not signed by either party; and held, upon the authority of Doe dem. Wood v. Morris (*post*, 578), that the plaintiff was not precluded from recovering, as it did not appear whether the original memorandum was in existence. Stevens v. Pinney, 2 Moore's Rep. 349, cited in the text from 8 Taunton, 328. But in another case, where the action was for work, a witness for the plaintiff, on cross-examination, stated that the work had commenced under a written contract; but that certain items which the plaintiff relied on were not contained in it; and held, that the plaintiff could not recover without producing the written agreement, though a particular item was proceeded on, after an admission by the defendant that it was an extra. Vincent v. Cole, 1 Mood. & Malk. 257. The plaintiff's counsel in this case proposed to Lord Tenterden, C. J., who presided, that his Lordship should look into the agreement, which was in court unstamped, to see whether it comprehended the item sought to be recovered; but this was refused, because of the great inconvenience of such a course. And in ejectment, a witness of the plaintiff was called to prove that the defendant succeeded one A. T., who occupied under the plaintiff, and through whom the defendant claimed. On his cross-examination, the witness stated he had drawn an agreement in writing between the plaintiff and A. T., relative to the premises in question, and that he had frequently heard the latter say he held under the plaintiff, but not that he held under that agreement. The court considered that the existence of a written lease having been shown by the plaintiff's own witness, he was bound to produce it as the best evidence, and so decided. Fenn dem. Thomas v. Griffith, 4 Moore & Payne, 299. See Doe v. Harvey, 8 Bing. 239, stated *post*.

So, wherever there is a written lease between the parties, and the terms of it come in question in any way, the lease itself must be produced as the highest evidence. Thus, in Brewer v. Palmer (3 Esp. Rep. 213), Lord Eldon, in an action for use and occupation, nonsuited the plaintiff because of the non-production of the written lease. This, though a Nisi Prius case, is a leading one, and was confirmed by the King's Bench in Ramsbottom v. Tunbridge (2 Maule & Selw. 434). Other authorities are to the same import. See Hodges v. Drakeford, 1 New Rep. 271. In Cotterill v. Hobby (4 Barn. & Cress. 465), the action was case for an injury to the plaintiff's reversionary interest; H. was called as a witness, and testified that he was tenant to the plaintiff under a written agreement; and held, that such agreement must be produced to prove the terms of holding. See Strother v. Barr, 5 Bing. 136. So, to prove a settlement of a pauper pursuant to 6 Geo. IV, c. 57, § 2, by the *bona fide* renting of a tenement for a year at £10; if the agreement between the landlord and the tenant was in writing, it must be produced. Rex v. The Inhabitants of Merthyr Tidvil, 1 Barn. & Adol. 29; Rex v. The Inhabitants of Padstow, 4 Id. 208. See, also, Rex v. The Inhabitants of Castle Morton, 3 Barn. & Ald. 588; *sed contra*, see Rex v. The Inhabitants of Holy Trinity, 7 Barn. & Cress. 611; S. C., 1 Mann. & Ryl. 444. And in trespass for mesne profits, where the plaintiff having proved a judgment in ejectment against P., offered to prove by a son of P. that he put the defendant in possession; it appearing, however, that he had done this under a written agreement; held inadmissible, and that the writing must be produced, to show who was the defendant's landlord, and the terms upon which he occupied. Doe v. Harvey, 8 Bing. 239. See Fenn dem. Thomas v. Griffith, 4 Moore & Payne, 299, *supra*.

Whether a father had a deed written of certain negroes to his children, and, immediately after delivery of the negroes, executed the deed; in trover, brought by such children for the negroes, held, that they must produce the deed as the best evidence. Foster v. Cherry, 2 Nott & M'Cord, 367.

party, if he relies on that written contract, will have to produce it;(1) otherwise the plaintiff might, on a mere assertion of the defendant, be nonsuited for the non-production of a written instrument, which, if it had been produced, might turn out not to apply to the contract in question. It is not sufficient for nonsuiting the plaintiff that his witness states there is a written agreement *relative* to the land.(2) Nor is it sufficient, for necessitating the plaintiff's production of a written agreement, that one of his witnesses has stated, on cross-examination, that he has heard from the plaintiff's attorney of there being such an agreement.(3)

In like manner, if the case on the part of the plaintiff has been proved, and it does not appear that the contract was in writing, he is not to be nonsuited by the defendant's producing an unstamped written instrument purporting to contain the terms of the contract,(4) even although that the plaintiff has had notice to produce the instrument.(5)

The question how far the admissions of a party to a suit will dispense with the production of written instruments, has been already fully discussed.(6)

Where the single fact of the occupation of land is in issue, such fact may be proved by payment of rent,(7) declarations of the tenant, or other parol evidence sufficient to establish it, notwithstanding it appears that the holding is under an agreement, in writing.(8) So where a tenant was to hold lands according to certain rules in writing under which a former tenant held, but the length of his term was agreed on orally, it was held, that it was not necessary to produce the rules, where the object was merely to show the expiration of the term.(9) But where the question is not merely as to the occupation of land,(10) but as to the person under whom

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(1) R. v. Padstow, 4 B. & Ad. 208; Fenn d. Thomas v. Griffith, 6 Bing. 533; Reed v. Deere, 7 B. & C. 261, 266; Stevens v. Pinney, 8 Taunt. 327; R. v. Rawden, 8 B. & C. 708.

The terms and existence of a written contract cannot be proved by parol evidence, unless its non-production has been first accounted for or excused. Creed v. White, 11 Humph. 549; Smith v. Smith, 1 Sand. 206; Marshall v. Hany, 9 Gill, 251; Yarborough v. Hudson, 19 Ala. 653. If lost, or if recorded, and the record of it burnt, and the original destroyed, the contents may be proved by parol. Dowrey v. Logan, 12 B. Mon. 236; Bosworth v. Bryan, 14 Mis. 575; Wade v. Wade, 12 Ill. 89; De Lane v. Moore, 14 How. U. S. 253. The entire contents must be proved. Sizer v. Burt, 4 Denio, 426.

(2) Doe d. Wood v. Morris, 12 East, 237; Doe d. Shearwood v. Pearson, cit. Id. 238, and 5 Bing. 150.

(3) Watson v. King, 3 C. B. 608.

(4) Fielder v. Ray, 6 Bing. 332.

(5) Magnay v. Knight, 1 M. & G. 944.

(6) *Supra*, Chap. 7, Sect. 12, *Of Admissions by Parties to the Suit.*

(7) See Doe d. Lord v. Cargo, 6 C. B. 90.

(8) R. v. Holy Trinity, Hull, 7 B. & C. 611, commented on in Strother v. Barr, 5 Bing. 136, 138.

(9) Hey v. Moorhouse, 6 N. C. 52.

(10) Doe v. Harvey, 8 Bing. 241. In Strother v. Barr (5 Bing. 136), the Court of Common Pleas were divided upon the question, whether, in an action for injury to the reversion, it is competent

it is held, or to whom the demise was made,(1) or what amount of rent was reserved,(2) or whether any rent was due,(3) if there be a lease or a written agreement, showing the fact, it must be produced.

Collateral writing need not be produced.

In like manner, where a written communication or agreement between parties is collateral to the question in issue, it need not be produced; as where the writing is a mere proposal, or memorandum, which has not been acted upon;(4) or where, during an employment under a written contract, a distinct and separate order is given by parol.(5) But if the work has been commenced under an agreement in writing, and the plaintiff's claim is for extra work, and it does not clearly appear that such work was separate from that included in the agreement and done under a distinct order, the plaintiff will be compelled to produce the original agreement; for it may be of importance with respect to the extra work, as furnishing some evidence of the rate at which such work should be paid for.(6)

On the question whether a judge, in such a case, may examine an unstamped agreement, in order to see whether it referred to items claimed independently of it, Lord Tenterden, C. J., has observed, such a practice would be attended with much inconvenience.(7)

It has been held that written proposals made pending a negotiation, might be admitted, without a stamp, as forming a step in the evidence of the contract.(8)

In action to recover document.

Where the action is not brought upon an instrument for the non-performance of its terms, but in tort for its conversion or detention, its production is not necessary, and the plaintiff may give parol evidence to show

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to prove the occupier's holding by parol, when he holds under a written agreement. See Cotterill v. Hobby, 4 B. & C. 465.

(1) R. v. Rawden, 8 B. & C. 708.

(2) R. v. Merthyr Tidvil, 1 B. & Ad. 29.

(3) Augustien v. Challis, 1 Exch. 279.

(4) Doe d. Bingham v. Cartwright, 3 B. & A. 326; Dalisen v. Stark, 4 Esp. 163; Hawkins v. Warre, 3 B. & C. 690; Wilson v. Bowie, 1 C. & P. 8; Ramsbottom v. Tunbridge, 2 M. & S. 434; R. v. St. Martin's, Leicester, 2 A. & E. 210; R. v. Wrangle, Id. 514; Ingram v. Lea, 2 Camp. 521; Trewhitt v. Lambert, 10 A. & E. 470.

So as to a written offer of compromise. Snodgrass v. Branch Bk. at Decatur, 25 Ala. 161. So a receipt, or a mere bill of parcels, receipted, for goods sold, need not be produced to prove delivery or a sale. Southwick v. Hayden, 7 Cowen, 334; Dunn v. Hewitt, 2 Denio, 637.

(5) Reid v. Batte, M. & M. 413.

(6) Vincent v. Cole, M. & M. 257; S. C., 3 C. & P. 481; Buxton v. Cornish, 12 M. & W. 426.

(7) In Vincent v. Cole, *ut supra*, overruling the dictum of Bayley, J., in R. v. Pendleton, 15 East, 449. See by Parke, B., in Buxton v. Cornish, 12 M. & W. 430.

(8) Drant v. Brown, 3 B. & C. 665; Bethell v. Blencowe, 3 M. & G. 119; Edgar v. Blick, 1 Stark. R. 464.

its identity, without giving notice to the defendant to produce it,(1) or even though the defendant offers to produce it.(2) As was remarked by Sir James Mansfield, C. J.,(3) there is no distinction, as to this purpose, between written instruments and other articles, between trover for a promissory note, and trover for a wagon and horses.

Rule as to substituting *written* evidence.

The instances which occur on the subject of this rule, most commonly relate to the reception of oral testimony; but the principle of the rule applies equally to the substitution of secondary written testimony. Thus, on the trial of a person charged with having willfully, with intent to injure an insurance company, set fire to a house, which he had insured at the company's office, it was held not allowable to prove the insurance by the books of the company, without previous regular notice to the prisoner to produce the policy.(4)

So, if it should be material for a plaintiff, in reply to the case of the defendant, to prove the contents of a registered deed, which is in the defendant's possession, the memorial of the deed would not be admissible for that purpose, unless there had been previously a notice given to the defendant to produce the original;(5) and numerous other instances might be cited to the like effect.

The rule has reference to the substitution of evidence, whether it be of the same or of inferior degree.

Where it is necessary to show the contents of a manuscript, a printed paper purporting to be a copy of it, is not receivable without notice to produce the manuscript;(6) but with regard to printed papers, all of them worked off at the same impression are originals, in the nature of duplicate originals; and if one or more can be traced to the possession of a party, another impression will be evidence against him without notice to produce.(7) Thus, when it is wanted to show that a party had notice of what

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(1) Bucher v. Jarret, 3 B. & P. 143; How v. Hall, 14 East, 274; Scott v. Jones, 4 Taunt. 865; Read v. Gamble, 10 A. & E. 597. See also Dover v. Maestaer, 5 Esp. 92; Bayne v. Stone, 4 Esp. 13; Davis v. Reynolds, 1 Stark. R. 115; S. C., 4 Camp. 267.

The action is notice, where the defendant is shown to be in possession. Bissel v. Drake, 19 John. R. 66; Hays v. Riddle, 1 Sand. 248. See also Decker v. Mathews, 2 Kernan R. 313.

(2) Whitehead v. Scott, 1 Mo. & R. 3.

(3) In Jolley v. Taylor, 1 Camp. 143. These cases overrule Cowan v. Abrahams, 1 Esp. 50.

(4) R. v. Doran, 1 Esp. 127; R. v. Gilson, R. & R. 138; R. v. Ellicombe, 1 Mo. & R. 260; S. C., 5 C. & P. 522.

(5) Molton q. t. v. Harris, 2 Esp. 548. It would be admissible as secondary evidence against the party by whom the deed was registered, and those claiming under him. Wollaston v. Hakewill, 3 M. & G. 297; Doe d. Loscombe v. Clifford, 2 C. & K. 448. See also Doe d. Ubele v. Kilner, 2 C. & P. 289; Collins v. Maule, 8 C. & P. 502; Jenkins v. Biddulph, Ry. & M. 239.

(6) By Bayley, J., and Abbott, J., in R. v. Watson, 2 Stark. R. 129, 130, 131; S. C., 32 How. St. Tr. 82, 86.

(7) Ibid.

is contained in a particular newspaper, if it is proved that he had a copy of the paper, the contents may be shown by producing another paper.(1)

In one case,(2) Lord Ellenborough, C. J., ruled, that a duplicate taken from an autograph, at one impression, by means of a copying machine, was not an original, but only a copy, though it was more likely to be accurate than one taken by successive imitations.(3) In such a case a *fac simile* is produced, but it is still only a copy; but there are some machines by which two or more impressions are taken off at the same time, and of which not any one can be said to be more an original than another; in these cases it would seem that all the impressions are as much duplicate originals as the impressions from a printing press.

Entries in judicial proceedings.

Where the law requires an entry or memorandum of particular transactions to be made in a court of justice, the official entry or memorandum excludes all independent evidence of the transaction. Thus, parol evidence was held not admissible to prove the taking of oaths required by the Toleration Act, as the fact would be recorded in the court where the oaths were taken.(4) In like manner, parol evidence is not admissible of the day on which a cause came on to be tried, because it is matter of record, and ought to be proved as such.(5) The original appointment of a surveyor of highways, under the hands and seals of justices,(6) is the best evidence of such appointment; and a minute-book kept by the justices' clerk is only secondary evidence.(7) Upon a question whether a particular abbey was an inferior one or not, *Dugdale's Monasticon* was refused, because the original record was to be found in the Augmentation Office.(8)

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(1) By Lord Ellenborough, C. J., R. v. Watson, *supra.*

(2) Nodin v. Murray, 3 Camp. 228.

(3) A copy taken in this manner, worked by the witness, who produces it, is admissible as secondary evidence, without showing that it has been compared with the original. Simpson v. Thoreton, 2 Mo. & R. 433.

(4) R. v. Hube, Peake, 134. See Underhill v. Witts, as to the production of the wardmote book in order to prove the election of a person as constable.

(5) B. N. P. 243; Thomas v. Ansley, 6 Esp. 80; R. v. Page, Id. 83; R. v. Iles, Hardr. 118; R. v. Browne, M. & M. 319; S. C., 3 C. & P. 572. As to the necessity of producing the warrant, under which a party has been apprehended, in order to show the fact of the apprehension, see R. v. Phillips, R. & R. 369.

In like manner, a record of a judgment of a competent court *naturalizing* an alien, reciting the necessary facts, cannot be impeached by parol evidence. McCarty v. Marsh and others, 1 Selden, 263. So a certificate of conviction made by a court of special sessions, and filed in the clerk's office, as prescribed by statute, is evidence of the facts stated in it. The People v. Powers, 2 Selden, 50; S. C., 7 Barb. 462. And a judgment upon an issue once litigated is conclusive upon the parties litigating it. White v. Coatsworth, 2 Selden, 137; Embury v. Conner, 3 Comst. 522; Doty v. Brown, 4 Id. 71; Douglass v. Wickwire, 19 Conn. 489.

(6) Pursuant to 13 Geo. II, c. 78.

(7) R. v. Pembridge, Car. & M. 157.

(8) Salk. 281.

The document delivered out by the registrar of the Court of Chancery as the order of the court, is the original order, and it is not necessary to show that it has been compared with any book of the orders of the court.(1)

It has been seen that the discharge of a defendant, by a court of quarter sessions, under an insolvent debtors' act, cannot be proved by parol evidence, nor by proof of an acknowledgment of the discharge by the plaintiff himself; for the discharge may have been irregular and void, or may have been mistaken by the plaintiff; a judicial act of this kind should be proved by calling the clerk of the peace, and giving in evidence the judgment or adjudication of the court for the debtor's discharge.(2)

The rule under consideration may be further illustrated by cases relating to examinations of prisoners under charges of felony or misdemeanor, in which cases the magistrate is expressly enjoined to take the examination in writing. Parol evidence cannot be received of a prisoner's confession before the committing magistrate, unless it be first proved that the confession was not taken in writing; as it must be presumed until the contrary is shown, that it was so taken, in conformity with the statute, 11 & 12

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(1) Ludlow (Mayor, &c.) v. Charlton, 9 C. & P. 242.

(2) Scott v. Clare, 3 Camp. 236.

NOTE 168.—Summerset v. Adamson, 1 Bing. 73, S. P. See *post*, of the text, and a note relating to proof of an insolvent's discharge.

The admission of a party out of court will not supply the place of a record. Thus, in trover, an admission by the plaintiff that the property in question was taken by virtue of an attachment, does not make out a justification for the defendant who justifies under the attachment, but he must produce the record. Jenner v. Joliffe, 6 John. Rep. 9; Salters v. Tobias, 3 Paige, 338. So in an action against a person for non-attendance as a witness, the subpœna must be produced, and his confession that he had been served with the subpœna, does not dispense with the necessity of its production. Hasbrouck v. Baker, 10 John. Rep. 249. And in Vermont, where, in an action upon a note, the defence was that the estate which the defendant represented, had been declared insolvent and the claim barred, as not having been presented to the commissioners; held, that the defendant's confession, that the claim had been exhibited to the commissioners, could not be received, as the commissioners' report to the judge of probate was the best evidence. Franklin v. Brownson, 2 Tayl. 103. The case of the Welland Canal Company v. Hathaway (8 Wend. 480), furnishes a strong illustration of the doctrine on this subject. There, the defendant had entered into a contract with the company, and given a receipt to them, in the name by which they were known; yet held, that when such company sued as a corporation, the admissions implied by these acts of the defendant, did not relieve them from proving that they were a corporation by the highest evidence. And Nelson, J., delivering the opinion of the court (Id. 486), says: "It may be laid down, I think, as an undeniable proposition, that the admissions of a party are competent evidence against himself, only in cases where parol evidence would be admissible to establish the same facts, or, in other words, where there is not in the judgment of the law, higher and better evidence in existence to be produced. It would be a dangerous innovation upon the rules of evidence, to give any greater effect to confessions or admissions of a party, unless in open court, and the tendency would be to dispense with the production of the most solemn documentary evidence." See The Dutchess Cotton Manufactory v. Davis, 14 John. Rep. 238. But where the defendant has accepted an office under the supposed corporation, and obtained money in that capacity, he is estopped from denying its existence as such, and cannot require proof of their charter. All Saints Church v. Lovett, 1 Hall's Rep. N. Y. S. C. 191.

Vict. c. 42. But if it were clearly shown that the prisoner's statement was not taken in writing, parol proof of what he said will be admissible.(1) If the written examination of a prisoner is given in evidence against him, it will not preclude the prosecutor from giving evidence of other statements made by him when not under examination;(2) but whether it will be competent for the prosecutor to give evidence of other statements made by the prisoner during his examination, and relating to the same matter on which he was examined, but which statement has been omitted by the committing magistrate, seems very doubtful; this question will be more fully considered in a subsequent part of this work.(3) It has been held, that a witness, on cross-examination, may admit not having mentioned a fact in an examination before commissioners of bankrupt, but if he chooses he may ask for the written examination, before he makes any admission.(4)

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(1) Decided by all the judges except one, in R. v. Hall, cited in R. v. Lambe, 1 Lea. 559; R. v. Fearnshire, Id. 202; R. v. Jacobs, Id. 309. And see R. v. Huet, 2 Lea. 821. The proper evidence, that the prisoner's statement was not taken down in writing, is by calling the magistrate's clerk, or the magistrate himself. R. v. Harris, Ry. & M. 338; R. v. Parker, 2 Russ., C. & M., by Greaves, 876, n. *p*; R. v. Phillips, Id.; Phillips v. Wimburn, 4 C. & P. 273. See also R. v. Shillcock, 2 Russ., C. & M., *ut supra*, n. *s*.

(2) R. v. M'Carty, Macn. 45; R. v. Reason, 16 How. St. Tr. 35.

(3) See on this subject, Vol. II, Chap. 1, Sect. 7, *Of Depositions and Examinations*.

(4) Ridley v. Gyde, 1 Mo. & R. 197. As to dying declarations taken down in writing, see R. v. Gray, 7 C. & P. 231.

NOTE 169.—And so of an examination of a prisoner taken before a magistrate, who is required by law to reduce the same to writing; the minutes of the magistrate must, in such cases, be produced as the best evidence. See *ante*, note 151. If, in point of fact, however, any particular declaration of the prisoner was not reduced to writing, parol evidence may be given of it. The presumption is, that it was taken down, and the onus to show it was not, is upon the party seeking to introduce the parol evidence. Note 151. And in Rowland v. Ashley (1 Ry. & Mood. 231), the same principle was applied to the examination of a party before commissioners of bankrupt. It must appear, however, that what is sought to be added to the written examination, was material to the inquiry before the commissioners; and very strong proof ought to be adduced, that the party said what the commissioners so omitted. Id. It has been held, however, that parol evidence of what a bankrupt said, on his last examination, cannot be received, though it should appear that no part was taken down in writing. Rex v. Walters, 5 Carr. & Payne, 138.

In Massachusetts, where it was proved that a justice of the peace, before whom a clerk of a militia company was alleged to have been sworn, made no record of administering the oath, the testimony of witnesses present when the oath was administered, was held competent evidence. Bassett v. Marshall, 9 Mass. Rep. 312. The justice was first called, however, in this case, and testified that no record of the oath was made, and though he could not positively affirm that he ever administered the oath, he had some faint recollection of having done so. Id. Where an oath of office has been administered by a justice of the peace, his certificate in that state seems to be the "regular and legal evidence." Colburn v. Ellis, 5 Mass. Rep. 427. See Willes v. Battelle, 11 Id. 477.

In New York, where a record of conviction was destroyed, parol evidence of it was held nevertheless to be inadmissible, inasmuch as a transcript of the certificate, required by 1 R. L. 462, § 2 (K. & R.), to be sent to the Court of Exchequer, was the next best evidence. Hilts v. Colvin, 14 John. Rep. 182.

The non-attendance of a witness, duly subpœnaed, may be proved by parol; there is not necessarily any record or memorandum made by any officer of the court of such fact, nor is it the

A written examination of a prisoner is not admissible, as has been seen, if taken on oath, or even if purporting to be so taken ;(1) nor can secondary evidence be admitted; the objection in each case is, that as the prisoner was subjected to an oath, the statement is to be presumed not to have been voluntary.(2)

Where the confession of a prisoner before a magistrate has been taken down in writing, but the written examination is informal—in not being signed, or from being signed before the evidence was concluded, or from some other informality, so that it cannot be received—there is no longer any ground for excluding parol evidence; for the parol evidence is in such cases adduced, not in substitution of the official document, but according to its effect at common law; the prisoner's statement may, therefore, be proved by a witness who heard it made. And the informal examination may, like any other cotemporaneous document not of an official character, be used, if necessary, by the witness who wrote it, to refresh his memory

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duty of the clerk to enter in his minutes the names of the witnesses called by the crier, at the request of the party whose cause is about to be brought on, and therefore there is no presumption of higher evidence. Cogswell v. Meech, 12 Wend. 147. In replevin against an officer for goods attached by him under a writ that had never been returned, on account of the suit having been settled by the parties; held, that as the officer's omission to make a return, was excused by the act of the parties in suppressing the suit, he might produce the writ, and then prove by parol that the goods were taken by virtue of it. Frost v. Shepleigh, 7 Greenl. 236. And if process issues without the intervention of the court, and no record is made of it, the fact of its having issued may be proved by parol. Beers v. Botsford, 3 Day's Rep. 159. Where an officer was authorized to issue a distress against the collector, and on return thereof unsatisfied, to issue another against the selectmen, and on like return of the latter, to issue one against the town; held, that proof of a distress having issued against the town, was *prima facie* evidence that the others had been previously issued against the collector and the selectmen. Beers v. Botsford, *supra*.

Evidence of what was proved on a former trial, for the purpose of showing the ground of recovery, cannot be received without producing the record of such trial. Cooper v. Watson, 10 Wend. 202. And in New York, where it is sought to connect a suit before a justice, dismissed by reason of a plea of title, with a suit subsequently prosecuted for the same cause in the Common Pleas, the written proceedings before the justice must be produced; the facts cannot be established by parol. Webb v. Alexander, 7 Wend. 281.

In some cases, where a record exists of the fact, it does not exclude parol evidence. Thus, parol evidence has been held admissible to prove the defendant an inn-keeper in an action against him as such, although his license is on record. Owings v. Wyant, 3 Harr. & M'Hen. 393. In Massachusetts, parol evidence of marriage is received, although officiating clergymen and magistrates are by statute required to keep a record of all marriages solemnized before them, and to return annually, to the clerk of the town where they reside, a certificate of the names of all persons by them joined in marriage. Commonwealth v. Norcross, 9 Mass. Rep. 492. And the certificate of a clergyman, in such case, is inferior to his oath, and cannot be received. Ellis v. Ellis, 11 Mass. Rep. 92. See *post*, of the text, and the notes. And so, parol proof of the age of persons and the time of their death, is constantly received there, though a statute requires that births and deaths shall be recorded by the town clerks; and parents, householders, &c., are liable to a penalty for neglecting to give notice of births in their families. 4 Starkie's Ev. 1044, note 1.

(1) *Supra*, Chap. 7, Sect. 11, *Of Confessions.*

(2) See R. v. Wheeley, 8 C. & P. 250; R. v. Rivers, 7 C. & P. 177.

in giving the evidence. This subject will be more particularly considered in the second part of this work, which treats of the admissibility and effect of examinations.(1)

If upon the preliminary hearing of a charge, the magistrate's clerk takes a note of what the witnesses say, but the note is not signed either by the witness or the magistrate, and the substance of it is not returned with the depositions subsequently taken, parol evidence is admissible of what was said on the first occasion, as the clerk's note is not a deposition taken under the statutes.(2) In like manner, parol evidence is admissible of what is said by the witnesses, upon a charge before a magistrate in a matter of summary jurisdiction, though the clerk may have taken notes of the evidence, as in such a case the magistrate is not required to take down the depositions in writing.(3)

Hearsay and secondary evidence.

The substitution of the hearsay of a person, in the place of his testimony, falls obviously within the principle of the rule under consideration. It has been before mentioned that where hearsay evidence is admissible, it will be necessary, in compliance with the rule which excludes secondary evidence, to show that the person whose hearsay is offered, is deceased. So depositions are not receivable, whilst the parties who made them are alive, or capable of being produced as witnesses.(4)

The rule applies not only to the evidence produced in a cause, but also to writings which a witness may use to refresh his memory; and, therefore, where a cotemporaneous entry has been made, it seems that a copy of such entry, made at a subsequent period, is not admissible for the purpose of refreshing a witness's memory.(5)

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(1) See Vol. II, Chap. 1, Sect. 7, *Of Depositions and Examinations.*

(2) Jeans v. Wheedon, 2 Mo. & R. 486.

(3) Robinson v. Vaughton, 8 C. & P. 252.

(4) See Vol. II, Chap. 1, Sect. 7, *Of Depositions and Examinations.*

(5) By Patteson, J., in Burton v. Plummer, 2 A. & E. 344; Jones v. Stroud, 2 C. & P. 196; Doe v. Perkins, 3 T. R. 749; Horne v. Mackenzie, 6 Cl. & F. 628. And see *post*, Vol. II, Chap. 9, Sect. 1, *Of the Examination of Witnesses.*

NOTE 170.—The English rule, though not explicitly stated in the text, is, that the witness may refresh his memory by any book or paper, if he can afterward swear to the fact from recollection; but if he cannot so swear, any farther than as finding it in the book or paper, it must then be produced. See *post*, of the text. Maugham v. Hubbard, 2 Mann. & Ryl. 5.

The American cases are not uniform. They seem agreed, however, that a mere memorandum, or entry, is in no case evidence, *per se*, of the facts stated in it, but may in all cases be used by the person making it, when called on as a witness, to refresh his recollection. Thus, where an entry on a bank teller's book was offered; held, not evidence, *per se*, but proper in connection with the testimony of the teller. Courtney v. The Commonwealth, 5 Rand. Rep. 666. And a memorandum by a notary's clerk (*e. g.* of a notice of non-payment) is of no further use, than to guide the recollection of the clerk as a witness. The Farmers' Bank of Lancaster v. Whitehall, 16 Serg. & Rawle, 90. In an action on a note by the indorsee against the indorser, the plaintiff offered a memorandum of the notary's clerk to prove search for the maker, and notice to the

It is an established rule, that where there are duplicate originals, all the originals must be accounted for, before secondary evidence can be given of any one of them.(1)

Where a writing is not the fact itself to be proved, and not made an appropriate instrument of evidence by private compact, nor required by law, there is no reason why it should exclude oral or other evidence. It often happens that an oral communication or an act is accompanied by a statement in writing to the same effect, yet parol proof of the communication or act may be received, provided it be adduced, not to prove the contents of the writing and in substitution of it, but as independent evidence. Thus, the payment of money, or an admission to that effect, may be proved by oral evidence, though a written receipt was given.(2) Where

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indorser; the clerk having left for a foreign port some few days before the trial; this was held inadmissible, the memorandum being no evidence. The protest of the note, showing due diligence, was also holden to be a mere memorandum, and therefore inadmissible. Cummings v. Fisher, Anth. N. P. 1. See also note *a* to this case.

In New York, it is provided by statute that the certificate of a notary, under his hand and seal of office, of presentment and protest of a bill or note, and of the service of notice thereof on any or all the parties to the bill or note, specifying the mode of giving the notice, and the reputed residence of the party and the post-office nearest thereto, shall be presumptive evidence of the facts contained in such certificate, unless the defendant shall annex to his plea an affidavit denying the fact of having received notice. Laws of N. Y. Sess. 56, p. 395, § 8. So also, it seems, in Kentucky. Bank of Kentucky v. Pursley, 3 Monroe, 238, 240.

Where an action was brought for goods sold, and the plaintiff offered proof that the entries in his books, charging the defendant with the goods, were made by his clerk, who had gone to the West Indies; held, that such evidence was not competent to establish the claim. Kenedy v. Fairman, 1 Hayw. Rep. 458; S. P., Whitefield v. Walk, 2 Id. 24. So where the age of a defendant had been written in a Bible; held, that this memorandum was not the best evidence, and the age might be proved by parol. ——— v. ———, 1 M'Cord's Rep. 164; Butler v. Young, 3 Bibb, 520; Berry v. Waring, 2 Harr. & Gill, 103. See *post*, notes. And a memorandum by a district attorney, of the confession of a prisoner, need not be produced; but he may give oral evidence of such confession. Patton v. Freeman, Coxe's Rep. 113. And see *ante*, note 134.

In South Carolina, the testimony of a witness who swears positively from written memoranda, though they do not call to his memory the facts, is held not only admissible, but better evidence than unaided recollection. Pearson v. Wightman, 1 Rep. Const. Ct. 344; Haig v. Newton, Id. 423; Sharp v. Bingley, Id. 373. See Brown v. Anderson, 1 Monroe, 198.

The general principle, however, deducible from a majority of the cases in this country, will be found, we apprehend, to be this, that the witness may inspect notes or memoranda to refresh his recollection; and then, if he can, with a safe conscience, swear to the facts independent of the notes or memoranda, he is competent to testify; but he will not be permitted to read his notes or memoranda to the jury; nor can they be admitted as evidence to the court or jury in any sense. Juniata Bank v. Brown, 5 Serg. & Rawle, 87; Robertson v. Lynch, 18 John. Rep. 451; Feeter v. Heath, 11 Wend. Rep. 477; Smith v. Lane, 12 Serg. & Rawle, 87. (The witness refreshes his memory by looking at the memorandum, and then swears from recollection. To refresh his memory he may use extracts from his own books, without producing them. Howland v. Sheriff of Queens Co., 5 Sand. 219. To give the entries any force as evidence, the books must be produced, and it must be shown that the entries were truly made. Wood v. Ambler, 4 Selden R. 170, and cases there cited.)

(1) By Parke, B., in Alivon v. Furnival, 1 C., M. & R. 292. See also B. N. P. 254; R. v. Castleton, 6 T. R. 236.

(2) Rambert v. Cohen, 4 Esp. 213; Jacob v. Lindsay, 1 East, 460.

there is both a verbal and written notice to deliver up property, and the one has no reference to the other, it is not necessary that the written notice should be produced.(1)

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(1) Smith v. Young, 1 Camp. 439.

NOTE 171.—It is in general true, that where written evidence of a fact exists, all parol evidence is excluded; but the rule is not universal. Per Thompson, J., Keene v. Meade, 3 Peters' Rep. 1, 7. And see *post* of the text, and the notes; 4 Starkie's Ev. 1054. If a note, for instance, has been given as evidence of a loan, the action may be brought for the money lent, and this proved by parol: the note must indeed be produced on the trial; not, however, as the only competent evidence of the loan, but to be canceled, so as to prevent its being put into circulation. Keene v. Meade, *supra*, per Thompson, J. So, where the defendant has made an entry in the plaintiff's book, of a sum of money paid by him to the defendant; the plaintiff need not produce such book for the purpose of establishing the payment, but may prove it by a person who knows the fact. Id. And if the defendant has written a letter to the plaintiff, acknowledging such payment, the same principle obtains. Id. per Thompson, J.

This doctrine prevails as to all written acknowledgments and receipts; the transaction which they are designed to evince, may be proved by the parol testimony of witnesses, without producing the receipts or accounting for the absence of them; but if the question be upon the receipts themselves, by whom signed, what are their contents, or the like, they then become the highest evidence, and must be produced. Southwick v. Hayden, 7 Cowen's Rep. 334; Heckert v. Haines, 6 Binn. Rep. 16; Wishart v. Downey, 15 Serg. & Rawle, 77; Romayne v. Duane, 3 Wash. C. C. Rep. 246; Townsend v. Atwater, 5 Day's Rep. 298. And whether the receipt be of money or specific articles, makes no difference; the delivery of the latter may be proved by parol, as well as the payment of the former, though there be a written acknowledgment of the fact in existence. Southwick v. Hayden, *supra*.

In Wishart v. Downey (*supra*), Huston, J., intimates a doubt as to the reasonableness and propriety of this exception to the general rule, but he considers the question as settled in Pennsylvania, by the previous authority of Heckert v. Haines (*supra*). At the same time, however, he says that "if notice to produce the receipts is given, and they are not produced, and no reason is given why they are not, it would be matter which ought to affect the defendant's case more or less, according to circumstances." And in Virginia, the Court of Appeals, without deciding whether, if a witness speaks positively as to the date and amount of moneys paid, his testimony would be equivalent to the receipts themselves, held, that where a witness could not so speak, his testimony ought not to be received, unless it was previously shown that the receipts were lost, or out of the power of the party seeking to prove payment. Hamlin's Adm'r v. Atkinson, 6 Rand. Rep. 574.

If it become necessary to prove the receipt itself, and it be attested, the subscribing witness must be called. Heckert v. Haines, 6 Binn. Rep. 16, per Tilghman, C. J. So, to prove the contents of a lost receipt, attested, the subscribing witness must be called. M'Mahan v. M'Grady, 5 Serg. & Rawle, 314.

In Louisiana, it seems, if there be a written receipt, it must be produced as the highest evidence, and parol testimony is not admissible of the fact of payment. Beard v. Bijeaux, 8 Martin's Lou. Rep. (N. S.) 459. And in Massachusetts, where an administrator, to support his charges in an administration account for payment of taxes, offered witnesses to prove the fact of such payment, held, that the receipts of the collector were better evidence, and should be produced. Hall v. Hall, 1 Mass. Rep. 101. But see as to the receipts and written admissions of third persons, the text and the notes on admissions.

A doctrine similar to that established with respect to receipts, &c., has been applied to bills of parcels; and to prove a purchase of goods, the bill of parcels, delivered by the vendor to the vendee, need not be produced. Blood v. Harrington, 8 Pick. 553. See Davis v. Reynolds, 1 Starkie's Rep. 115. And a bill of sale of personal property (not being necessary to pass the title) need not be produced by persons claiming under the grantee, in a controversy between them and the grantor, and those claiming under him; but the former may prove by any other legal evi-

dence, a title in the person under whom they claim, unless it be alleged that such bill contains other matter than the mere transfer of the property, of which the grantor or those claiming under him could avail themselves, and notice has been given that its production would be required. Givens v. Reynolds, 6 Munf. 191, 200. So, in trover for goods, where a witness was called on the part of the plaintiff, and testified that as deputy sheriff, he took and sold goods corresponding with those claimed by the plaintiff, on an execution against S. N., and produced a paper specifying the goods; and further that he made a copy from the paper, which contained an account of the articles purchased by the plaintiff at such sale, and a receipt which was delivered to the plaintiff; and he was then asked by the plaintiff what were the contents of that paper; on objection taken, which was overruled, and writ of error brought, the Supreme Court held, that it was sufficient for the plaintiff to show that he had purchased the goods at auction, and he need not have produced the paper. Waring v. Warren, 1 John. Rep. 340. But in an action of assumpsit to recover the value of articles withheld, and to recover back money paid for such as were defective in a purchase, made by the plaintiff of the defendant, of a ship and many articles contained in her, it was held that the plaintiff ought to have produced the bill of sale, as the highest evidence of the property conveyed, and the covenants contained in it. Allen v. Potter, 2 M'Cord's Rep. 323.

Parol evidence may be given in Massachusetts, of the fact that an executor has posted up notices of his appointment, although there is a provision in the statute for admitting an affidavit made by the executor within a given time; and the original advertisements or a copy need not be produced. Green v. Gill, 8 Mass. Rep. 111.

An arbitrator testified that when the parties were before him, a bill was presented specifying the accounts submitted, a copy of which he transmitted to the plaintiff, accompanied by the award; but the plaintiff denied that the account was received by him; held, that the plaintiff was not thereby precluded from introducing parol evidence as to the items of his claim, unless the defendant could show that the account came into his possession or under his control. Birkbeck v. Burrows, 2 Hall's Rep. N. Y. S. C. 51. And the sale of a note, given by a third person, may be proved without producing the note. This, however, is only true where no inquiry is made respecting its contents. Lamb v. Moberly, 3 Monroe, 179.

In an action for bribery at an election, it was held that parol evidence was admissible to prove the delivery of the precept to the returning officer, though it appeared that he had made an indorsement upon the precept, with a view to prove the time of his having received it, and that the indorsement was attested by two witnesses. Grey v. Smithyes, 4 Burr. 2273.

But wherever the contents of any written instrument, as such, are sought to be proved, it must be produced. Thus, where the plaintiff in an action for libel, in order to connect the defendant with the publication, introduced a reporter to a public newspaper, who testified that he had given a written statement to the editor of such paper, the contents of which had been communicated by the defendant for the purpose of publication; and that the newspaper then produced, was exactly the same save one or two trifling alterations not affecting the sense; held, that what the reporter published in consequence of what passed with the defendant, might be deemed published by the latter, but that the paper could not be read, without producing the written account delivered by the witness to the editor. Adams v. Kelly, Ry. & Mood. 149. And if it become necessary to prove statements made by a deaf and dumb witness, in writing, the written statement itself must be produced, or its absence accounted for. State v. De Wolf, 9 Conn. Rep. 93. But where a statement has been made orally, and taken down in writing by a third person, as a mere memorandum, the statement may be proved independent of the memorandum. See Patton v. Freeman, Coxe's Rep. 113, stated, note 170. Whether a certain book in a public office contains deeds and surveys, must be shown by the production of the book itself, and cannot be shown by parol. Denn v. Pond, 1 Coxe, 379. In assumpsit for goods sold, copies from the invoice-book of the plaintiff's agent residing abroad, and through whom it was alleged the goods were delivered, were offered in evidence to prove the sale and delivery; but were rejected. Cooper v. Morrell, 4 Yeates, 341. The day-book, say the court, containing the original transactions as they occurred, proved on oath or admitted, must be produced, or parol evidence given of the delivery. Id. The defence being that H. was a joint owner and creditor with the plaintiff, and sold the goods, charging them to the defendant; it was offered to prove H.'s books by his clerk, without their production; on objection, it was held they must be produced, as the best evidence.

Although a parish register is required by law to be made of all marriages, the fact of a marriage may be proved by the testimony of persons who were present at it; or, where the marriage is not essential to the question in issue, by general reputation.(1) Witnesses are required to subscribe their names to a marriage entry in the register, in order to facilitate the investigation of proofs of marriages. The mere production of a register, without proof of the identity of the parties married, is insufficient.(2)

Where a written statement cannot be received on the ground of its being in the nature of hearsay evidence, or for want of a stamp, there is no reason for prohibiting the substance of it from being proved by independent testimony. It has been shown that an informal examination,

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Keely v. Ord, 1 Dall. 310. Proof that the defendant was an infant, from a family Bible, into which the defendant's age had been copied by his brother from another Bible, where it was entered in the handwriting of the father, by direction of the father, who was dead, was held inadmissible, as not being the best evidence, till the original was shown to have been lost or destroyed. Curtis v. Patton, 6 Serg. & Rawle, 135. But abstracts from the books of the plaintiffs, resident out of the jurisdiction of the court, duly verified by the testimony of clerks, have been received as evidence of the reshipment of goods to the defendant. Bell v. Keely, 2 Yeates, 255.

If it be proposed to establish the contents of a bill of sale, bill of lading, or receipt, it must be produced. Mather v. Goddard, 7 Conn. Rep. 304; Givens v. Reynolds, 6 Munf. 191, 200. And see the cases before cited in this note, respecting receipts.

(But a mere bill of parcels, receipted, of the sale of articles, need not be produced to prove the sale; it is in the nature of a receipt. Blood v. Harrington, 8 Pick. 552. Not so, where a party claims title under a bill of sale. Dunn v. Hewitt, 2 Denio, 637.)

(1) See B. N. P. 247; Evans v. Morgan, 2 C. & J. 453; R. v. Allison, R. & R. 109; Birt v. Barlow, Doug. 171; St. Devereux v. Much Dew Church, 1 W. Bl. 367; Morris v. Miller, Id. 632; S. C., 4 Burr. 2067; Read v. Passer, Peake, 305. See, also, R. v. Durnell, cit. 2 C. & K. 459, n. Nor is the evidence of the attesting witness required to prove the handwriting of the parties in the register. Doug. 174. An entry of a marriage in a day-book is not admissible in evidence, if the entry has been afterwards made in the register. May v. May, Stra. 1073. And see Doe d. Warren v. Bray, 8 B. & C. 813.

The proof of marriage may be made by circumstances, by evidence sufficient to satisfy the jury. Martin v. Martin, 22 Ala. 86; Taylor v. Robinson, 29 Maine, 323. Marriage is a civil contract (Keyes v. Keyes, 2 Foster (N. H.) 553), and must be made according to law. The State v. Bray, 13 Ired. 289. Mutual promises to marry at some future time, though followed by sexual intercourse and the birth of a child, do not constitute a valid marriage. Cheney v. Arnold, 1 Smith (15 N. Y. Rep.), 345. In civil actions, cohabitation raises a presumption of marriage that may be rebutted by showing that the parties afterwards lived separately. Weatherford v. Weatherford, 20 Ala. 629; The State v. Winkley, 14 N. H. 480; Knower v. Wesson, 13 Met. 143. But cohabitation is not essential to complete the marriage (Potier v. Barclay, 15 Ala. 439; Clayton v. Wardell, 4 Comst. 230); except in the case of an infant, after coming to the age of consent. Shafher v. The State, 20 Ohio, 1. In New York, a certificate of marriage, executed in due form, is made evidence of the fact. 2 R. S. 200, 201 (3d ed.). As to proof by certificate, see Gaines v. Relf, 12 How. U. S. 472.

(2) In Woodgate v. Potts (2 C. & K. 457), where, in an action for goods sold, the defendant, a female, pleaded her coverture with George Potts. A copy of a register of marriage between George Potts and a female of the same name as the defendant was put in evidence, and it was proved that the defendant had cohabited, for several years, with a man whose surname was Potts, but whose Christian name was unknown to the witness. This was held sufficient evidence to go to the jury in support of the plea.

taken before a magistrate, will not exclude oral evidence of what a prisoner has stated. For although the witness is allowed to refresh his memory by reading the examination, he is supposed, in notion of law at least, to speak from his memory independently of the written paper. Where a witness read over to the defendant an account in writing, which was signed by the defendant, but which could not be used in evidence for want of a receipt stamp, the witness was allowed to refresh his memory by the inspection of the account, and to prove that he called over the items to the defendant, and that the defendant admitted them to be correct.(1) In the same manner a verbal admission of a debt is evidence, notwithstanding there may be a written promise to pay.(2)

Where an agent for the plaintiff made a verbal agreement with the defendant, and afterwards put it down in writing (which was not signed by the parties), as a memorandum to assist his recollection, such writing is not the best evidence, nor indeed any evidence of the agreement, though it may be used by the agent for the purpose of refreshing his memory.(3)

In the prosecution of Hunt for a conspiracy,(4) the Court of King's Bench determined that a paper, which had been delivered by the defendant to a person present at a meeting, as a copy of certain resolutions about to be proposed and read, and which was proved to correspond with the resolutions afterwards proposed, was properly received at the trial as evidence of those resolutions; without proof of any previous notice to the defendant to produce the paper from which the resolutions were supposed to be read. This paper was considered, as against the party himself to whom it applied, to be fully as good evidence as any that could be produced.

In the same case,(5) it was held, that the inscriptions on flags and banners, which had been exhibited to public view, might be proved by eye witnesses, speaking to what they had seen on the occasion; and though it appeared that the flags had been seized and taken away by police officers (so that they might have been produced), the evidence was not considered on this account to be less competent; such inscriptions are, as Abbott, C. J., observed, the public expressions of the sentiments of those who bear them, and have rather the character of speeches than of writings. It may be observed, however, that the oral testimony was in this case adduced for the express purpose of representing accurately the contents of the writing,

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(1) Jacob v. Lindsay, 1 East, 460. And see Dalisen v. Stark, 4 Esp. 163. In Maugham v. Hubbard (8 B. & C. 14), a witness, called to prove the payment of money, was allowed to refresh his memory by an unstamped receipt signed by himself.

(2) Singleton v. Barrett, 2 C. & J. 369.

(3) Trewhitt v. Lambert, 10 A. & E. 470. See further, on this subject, Vol. II, Chap. 6, *Of Private Writings.*

(4) R. v. Hunt, 3 B. & A. 566, 568, 572. See, also, Watson's Case, 32 How. St. Tr. 68, 83, 256, 257.

(5) 3 B. & A. 566.

and therefore might seem to fall directly within the principle which excludes secondary evidence.

Whether resolutions, which have been proposed at public meetings, may be primarily proved by the parol evidence of witnesses, when the person proposing the resolutions appeared to read them from a written paper, was a point much discussed in the prosecution of Sheridan and Kirwan, in Ireland,(1) who were tried for an offence against the Irish Convention Act. The indictment began with averring that divers persons had assembled together, and intending to procure the appointment of a committee of persons (of a particular description, and for a specific object), entered into certain resolutions respecting such committee, the purport and effect of which resolutions were set out at length; the indictment then proceeded to charge Sheridan with certain acts done by him for the purpose of assisting in forming such committee, and for carrying into effect the resolutions before mentioned. To prove the first averment, the counsel for the prosecution called a witness, who stated that at a general meeting (at which it was admitted the defendants were not present), the secretary of the meeting proposed a resolution, and read it from a paper. The proposition was seconded; the secretary then handed the paper to the chairman, and the chairman read it. The witness was then asked, "What was the resolution?" This question was objected to on the ground that the absence of the writing itself should be accounted for, before any parol evidence of its contents could be received. After a very full argument a majority of the court were of opinion, that this was not a case to which the distinction between primary and secondary evidence was strictly applicable: that the proposed evidence was intended to show, not what the paper contained, but what one person proposed, and what the meeting adopted; in short, to prove the transactions and the general conduct of the assembly; and that such evidence could not be rejected, because some person present took notes of what passed. The form in which the argument was presented by the solicitor-general was more striking: "A number of persons," he said, "assemble and confer together—they agree to a certain resolution. If it be necessary to prove such a transaction in a criminal trial, would the prosecutor be bound to produce the resolution in writing? Would the prosecutor be bound by the manner in which it was taken down by one of the confederates? If the paper, supposed to contain the resolution, were produced, would that preclude the prosecutor from giving evidence of other matters which took place? Or suppose, further, that the matter were reduced to writing in such a way as to avoid a criminal imputation, although every sentence of the debate or conversation were criminal, would the prosecutor be bound by the former, and precluded from giving evidence of the latter?"

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(1) A. D. 1811; 31 How. St. Tr. 673. And see R. v. Moors, 6 East, 421, n.; R. v. O'Connell, Arm. & Trev. 235, 237.

Cases may here be mentioned, which appear at first sight to be exceptions to the general rule now under consideration. But in none of these cases, it may be observed, could there be any ground for presuming that the party offering the proof withheld some better evidence, which, if produced, would make against him. The reason, therefore, upon which the general rule is founded, does not apply to such cases.

Proof of records.

1. Where it is necessary to prove the contents of any record, or of proceedings of a court of justice, or of entries in court rolls, or in public books or registers, it is sufficient to produce an examined copy.(1) This is on a principle of general convenience, and because it is apparent, that if the contents were misrepresented, there would be obvious means of exposing the fraud or error.

Appointment to public office.

2. It is not, in general, necessary to prove the written appointments of public officers; for this would be attended with general inconvenience; and a strong presumption arises from the exercise of a public office, that the appointment to it is valid. The cases upon this subject sometimes appear to be governed by the doctrine of admissions, but it will be seen, by the examples, that the exception is of a more extensive nature. In the case of justices of the peace, constables, &c., it is sufficient to prove that they acted in these characters without producing their appointments.(2) And in the case of officers of any branch of the revenue, where the question is whether they are such, proof of being reputed to be so, or of having exercised the office, is good evidence of the fact, in any legal proceeding.(3) On an indictment for perjury, committed by the defendant before a surrogate in an Ecclesiastical Court, proof that the person who administered the oath, acted as surrogate, has been held to be sufficient *prima facie* evidence of his appointment and authority.(4) On a like indictment, an affidavit, purporting to be sworn before a public commissioner, was held admissible, without proof of the commission, on the ground that a commissioner for taking affidavits was a person acting as a public officer.(5) And proof of

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(1) See Vol. II, Chap. 3, Sect. 1, *Of Records and Judicial Proceedings.*

(2) By Buller, J., in Berryman v. Wise, 4 T. R. 366; by all the judges in R. v. Gordon, 1 Lea. C. C. 515.

NOTE 172.—S. P., Snow v. Peacock, 2 Carr. & Payne, 215, per Best, C. J. In an action by an attorney for fees, an allegation that he is an attorney of the Court of King's Bench is evidenced by showing that he has acted as such. Berryman v. Wise, 4 T. R. 366; Pearce v. Whale, 5 Barn. & Cress. 38; per Johnson, J., Brown v. Mims, 2 Rep. Const. Ct. 235, 328; 4 Starkie's Ev. 373. See note 173.

(3) This is expressly provided for by stat. 7 & 8 Geo. IV, c. 53, § 17; 8 & 9 Vict., c. 87, § 131. And see 8 & 9 Vict., c. 85, § 7, and c. 93, § 75.

(4) R. v. Verelst, 3 Camp. 432; S. P., R. v. Creswell, Lond. Sitt. after Mich. 1816.

(5) R. v. Howard, 1 Mo. & R. 187; R. v. Newton, 1 C. & K. 480.

a person's acting as sheriff,(1), or under-sheriff, is sufficient proof of his authority to do any act necessary in the course of the office; as, in the latter case, for instance, to make an assignment of a lease, under an execution, in the name of the sheriff.(2) The like proof was held sufficient

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(1) Bunbury v. Matthews, 1 C. & K. 382.

(2) Doe d. James v. Brawn, 5 B. & A. 243. See Plumer v. Brisco, 11 Q. B. 46, as to replevin clerk.

NOTE 173.—In Porter v. Luther (3 John. Rep. 431), the defendant justified the taking of property as deputy sheriff under an execution, and, on the trial, offered to prove himself a general deputy of the sheriff by reputation; the justice rejected the evidence, requiring him to produce his appointment; and, upon *certiorari* brought, the Supreme Court reversed the judgment on the authority of Berryman v. Wise (4 T. R. 366), cited in the text.

The same principle has been applied to the case of magistrates by the Supreme Court of the United States. Turner v. Fendall, 1 Cranch, 117. In Vernon v. East Hartford (3 Conn. Rep. 475), it appeared that W. had been appointed justice of the peace, and to prove him duly qualified to act, one P. was offered to show that W., since his appointment, had issued a writ and received the duty on it; and the Court of Errors held the evidence admissible as primary proof, though the writ was not produced. And where a deed was produced, purporting to have been acknowledged before a person styling himself a justice of the Common Pleas, this was held sufficient, *prima facie*, that he was such till the contrary should appear. Lessee of Willink v. Miles, 1 Peters' C. C. Rep. 429.

In assumpsit by the officers of a revenue cutter, to recover their proportion of a forfeiture, incurred by a breach of the non-intercourse law, against the collector; it was held, that the officers need not produce their commissions, for proof that they acted as such was sufficient. Sawyer et al. v. Steele, 3 Wash. C. C. Rep. 464.

It has been held in Connecticut that a clergyman, in the administration of marriage, is a public officer; and his acts, as such, in the celebration of marriage, are admitted as *prima facie* proof of his qualification, without higher evidence. Goshen v. Stonington, 4 Conn. Rep. 209.

Proof that an individual had executed and returned a writ directed to him as coroner, has been held sufficient evidence of his being commissioned as such, without proof of his commission. Young v. The Commonwealth, 6 Binn. Rep. 88.

The collector and trustees of a school district may be proved such by their acts and reputation. M'Coy v. Curtice, 9 Wend. 17. And persons acting publicly as officers of a corporation are presumed rightfully in office. See United States Bank v. Dandridge, 12 Wheat. 70; also All Saints Church v. Lovett, 1 Hall's Rep. N. Y. S. C. 191.

The foregoing will suffice to show the extent to which the doctrine of the text has been carried; and it is proper to be observed here, with regard to the effect of this species of evidence, that where the rights of third persons are concerned, it is, in general, enough for them to show that the officer through whom or by whose acts they claim, is such *de facto;* his not being so *de jure* also, is not an objection that can be made available to defeat, or in any way affect, their interests. Doty v. Gorham et al., 5 Pick. Rep. 487; Nason v. Dillingham, 5 Mass. Rep. 170; Fowler v. Beebe et al., 9 Id. 231; Gilbreth v. Brown et al., 15 Id. 180; The People v. Collins, 7 John. Rep. 549; M'Instry v. Tanner, 9 Id. 125; Reed v. Gillett, 12 Id. 296; Wilcox v. Smith, 5 Wend. 231.

As to what evidence shall be sufficient to make out that a person is an officer *de facto*, and thus preclude an inquiry into the validity of his appointment or election, no precise rule of a general nature can be drawn from the authorities; for each case must necessarily depend, in some degree, upon its own peculiar circumstances. In Wilcox v. Smith (5 Wend. 231, 234), Sutherland, J., delivering the opinion of the court, says: "The mere claim to be a public officer, and the performance of a single, or even a number of acts, in that character, would not perhaps constitute an individual an officer *de facto*. There must be some color of an election or appointment, or an acquiescence on the part of the public for a length of time which would afford a strong presumption of at least a colorable election or appointment."

on the part of a plaintiff of his being vestry clerk; and the rule was said to extend to all public officers.(1)

The rule obtains, though the action be brought by a public officer, as for a libel;(2) or in a criminal prosecution for an injury to him, as for the murder of a constable in the execution of his duty;(3) or even in a criminal prosecution against a public officer for misconduct in his office,—as, upon an indictment against a person employed by the post-office, for stealing or embezzling a letter.(4)

The rule does not, however, apply with regard to persons acting under a private authority, such as a tithe collector,(5) or assignees of a bankrupt,(6) or the like. In such cases the appointment must be strictly proved.(7)

Inquiry as to general mode of dealing, &c.

3. Inquiry has been allowed in some cases, as to a general mode of dealing, or as to the general result of an examination of accounts, and other such matters, where the evidence is the result of voluminous facts, or of the inspection of many books or papers, the examination of which could not conveniently take place in court. Thus a witness may be asked

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But where the person assuming to be an officer is himself a party to the suit, and the only individual to be injuriously affected by any inquiry into the validity of his official title, proof of acts, &c., is, in his favor, mere *prima facie* evidence of his being such. Fowler v. Beebe, 9 Mass. Rep. 231; Commonwealth v. Fowler, 10 Id. 290. As against him, his having acted in a public office will estop him from denying that he is such officer. Hughes v. James, 3 J. J. Marsh. 700.

So, also, where the officer is not a party, but his act is made the foundation of an affirmative criminal proceeding, instead of being used as a defence or protection, it may well be that his strict legal title to his office may be inquired into under such circumstances. Wilcox v. Smith, 5 Wend. 231, 235, per Sutherland, J., remarking upon Rex v. Verelst, cited in the text; and he refers te 1 Hawk. P. C., c. 69, § 4.

(1) M'Gahey v. Alston, 2 M. & W. 211. See R. v. Jones, 3 Camp. 131, as to lords of the treasury; Marshall v. Lamb, 5 Q. B. 115, as to masters in chancery; Butler v, Ford, 1 C. & M. 662, as to commissioners under a local public act; Pritchard v. Walker, 3 C. & P. 212, as to trustees under a turnpike act; R. v. Murphy, 8 C. & P. 310, as to commissioners to raise church rates under a local act; Doe d. Bowley v. Barnes, 8 Q. B. 1037, as to churchwardens and overseers, even in an action of ejectment brought by them for parish property. And see Ganvill v. Utting, 9 Jur. 1081, Exch., as to parish officers generally.

(2) By Parke, B., in M'Gahey v. Alston, 2 M. & W. 211; by Tindal, C. J., in Connell v. Curtis, 2 N. C. 228, 234.

(3) R. v. Gordon, 1 Lea. C. C. 515.

(4) Clay's Case, 2 East P. C. 580; R. v. Rees, 6 C. & P. 606; R. v. Borrett, Id. 124; R. v. Townsend, Car. & M. 178; R. v. Goodwin, 1 Low C. C. 100. But see R. v. Trenwyth, Ir. Cir. R. 172. As to the cases where the acting in a particular capacity is proof against a party by way of admission, see *supra*, Chap. 7, Sect. 10.

(5) Short v. Lee, 2 J. & W. 468.

(6) Pasmore v. Bousfield, 1 Stark. R. 296.

(7) The re-appointment of a town clerk by a corporation, under 5 & 6 Wm. IV, c. 76, being required to be under seal, an entry of such re-appointment in the minutes of the town council is not primary evidence thereof. R. v. Stamford (Mayor, &c.), 6 Q. B. 433. As to army and navy surgeons, see Steavenson v. Oliver, 8 M. & W. 234; Milbanke v. Grant, 3 Q. B. 690.

as to a practice of accepting bills drawn in a particular manner, without producing the bills.(1) In this case, Lord Ellenborough, C. J., observed, that parol evidence might be received of one unvaried mode of dealing between parties by means of bills of exchange; but that if the mode of dealing varied, the bills must be produced. And this rule, it seems, applies only to cases where bills or notes are negotiated by parties in their ordinary course of business; thus, where A. and B. were in partnership, but not in a commercial business, and it was necessary to show that A. had an authority to indorse negotiable securities in the name of the firm, it was held, that parol evidence could not be given of other securities, indorsed in a similar manner, and paid by the firm, as showing a course of dealing; but that such securities must be produced or accounted for.(2) A witness may give evidence of a general balance of accounts.(3) Where the question is as to the solvency of a party at a particular time, a witness may speak to the general result of his inquiries, as derived by the accounts rendered by a bankrupt of his affairs.(4)

But a witness who states that he had at one time received a number of letters from one of the parties in the cause, containing statements as to a particular fact, but which letters he had since destroyed, cannot be examined as to the general contents of such letters for the purpose of ascertaining the impression thereby produced in his mind with reference to such fact.(5)

A witness may be interrogated as to his examination of old records, and may state that they correspond in substance with a particular record which has been read, without going through the whole in detail, subject, however, to a full cross-examination.(6)

Where original evidence not attainable.

4. Where the production of evidence indicates the existence of other evidence of a more original character, still if it can be shown that the better evidence is not attainable, the principle of the rule will not apply. Inscriptions on walls and fixed tablets do not admit of being proved, otherwise than by secondary evidence.(7) But where a notice is merely

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(1) Spencer v. Billing, 3 Camp. 310.

(2) Levy v. Pyne, Car. & M. 453.

(3) Roberts v. Doxen, Peake, 83. In Furness v. Cope (5 Bing. 114), a bankrupt's ledger was received, to prove that a person had no funds in the bank, without calling the clerks who made the entries.

(4) Meyer v. Sefton, 2 Stark. R. 274.

(5) Topham v. M'Gregor, 1 C. & K. 320.

(6) Rowe v. Brenton, 3 M. & R. 212.

(7) R. v. Fursey, 6 C. & P. 81; Doe d. Coyle v. Cole, Id. 360; Bartholomew v. Stephens, 8 C. & P. 728; Mortimer v. M'Callan, 6 M. & W. 58, where Lord Abinger, C. B., mentioned the case of a man who had been convicted of a libel written on the wall of a jail.

hung up in an office, not fastened to the wall, it must be produced like any other accessible document.(1)

Notices.

5. Notices of the dishonor of bills, notices to quit, and attorneys' bills of charges delivered under the statute, may be proved by duplicate originals, or by examined copies, without giving a notice to produce or showing the loss of the original evidence.(2)

Examination on the *voir dire.*

6. It has been already noticed, that the rule is not in general enforced upon examinations on the *voir dire*, owing to the peculiar circumstances under which those examinations take place.(3)

Where documents lost, &c.

With respect to the proof of documents, it is, in general, permitted to give secondary evidence of them, where they are destroyed or lost, or where they are in the possession of an adversary who refuses to produce them, or are not available in consequence of some reason of public policy, or of consideration for the interests of witnesses. This subject involves several subordinate questions of great practical importance, as, for example, the necessary search after documents, and the due notice to produce them; which will be more particularly considered in treating of written evidence.(4)

In some cases, however, the mere loss of a document will not be sufficient to enable a party to give secondary evidence of its contents; as, in the instance of a negotiable security, such as a bill of exchange or promissory note, payable to bearer, or indorsed in blank. In such a case if the holder of the bill or note has lost it, he cannot recover against the acceptor or maker; for the instrument may be in the hands of an innocent and *bona fide* holder, who would have the right of action against the defendant.(5) If, indeed, the instrument was not in a negotiable state at the time of the loss, its production will not be necessary, and secondary evidence of its contents may be given.(6) So, if it is proved that the instrument is

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(1) Jones v. Tarleton, 9 M. & W. 675.

(2) See Vol. II, Chap. 6, *Of Private Writings.*

(3) *Supra*, Chap. 5, Sect. 7, *Of the Mode of objecting to Competency.*

(4) *Post*, Vol. II.

(5) Davis v. Dodd, 4 Taunt. 602; Champion v. Terry, 3 B. & B. 295; Hansard v. Robinson, 7 B. & C. 90; Pierson v. Hutchinson, 2 Camp. 211; S. C., 6 Esp. 126; Mayor v. Johnson, 3 Camp. 324; Bevan v. Hill, 2 Id. 381; Woodford v. Whiteley, M. & M. 517. Under such circumstances the payee should offer an indemnity to the acceptor or maker, and apply for a new bill or note; and if this is refused, he must apply for relief to a court of equity, under the 9 & 10 Wm. III, c. 17, § 3, and 3 & 4 Anne, c. 9. See Rolt v. Watson, 4 Bing 274. As to the course of proceeding in equity, see Warmsley v. Child, 1 Ves. sen. 341; Toulmin v. Price, 5 Ves. 238; Ex parte Greenway, 6 Ves. 812; Macartney v. Graham, 2 Sim. 285.

(6) Wain v. Bailey, 10 A. & E. 616; Long v. Bailie, 2 Camp. 214.

destroyed, secondary evidence of its contents is admissible;(1) though this appears formerly to have been doubted.(2)

With respect to the cases where the more original evidence is to be supplied by the testimony of an individual, questions frequently occur in regard to the absence of attesting witnesses, or of persons who have made depositions. Where there is not sufficient proof that the parties are dead, some difficulty often arises as to whether any, and what, causes of absence shall be sufficient to allow of the admission of secondary evidence. The search after absent witnesses is another point of considerable practical importance. These matters will be more particularly considered in treating of written evidence, in which part of the work it will also be more convenient to examine the cases where the proof of documents by attesting witnesses may be dispensed with, from various other causes besides the inability to procure their attendance. It may be proper, however, to observe in this place, that where it is proposed to discredit a witness—in which case it is proper to give him an opportunity of explaining his own acts and declarations previously to the proving of them by other witnesses (such inquiry not being irrelevant to the issue), it will be necessary to examine the witness as to these matters in the first instance, notwithstanding his answers would tend to criminate himself.(3)

Where original evidence is not available, many questions have arisen as to what shall be deemed sufficient secondary evidence. These questions usually occur in the proof of documents, and will, therefore, be more conveniently treated of in the second part of this work. And to the same part belong the questions, whether particular documents are the best, or secondary evidence.

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(1) Blackie v. Pidding, 6 C. B. 196. And see Pierson v. Hutchinson, and Woodford v. Whiteley, *ut supra.*

(2) See Hansard v. Robinson, *ut supra.*

(In this country, it is not in general necessary for the owner of a lost negotiable instrument to file a bill in equity; he may have a recovery on it in a court of law, on giving an adequate indemnity against any future claim to be founded on the bill or note. Edwards on Bills and Notes, 295, 310.)

(3) The Queen's Case, 2 B. & B. 313. See Edmonstone v. Webb, 3 Esp. 264. See Vol. II, Chap. 9, *Of the Examination of Witnesses.*

CHAPTER X.

OF PRESUMPTIVE EVIDENCE, AND OF PRESUMPTIONS.

IN the preceding chapters we have considered the various general rules which have been adopted in our courts of law relative to the exclusion of evidence. In the present chapter it is proposed to treat of the nature or quality of evidence; more especially with regard to *presumptive* or *circumstantial* proof, as contradistinguished from *direct* proof.

Presumptive evidence defined.

Where the facts proved are not the precise facts in issue, and the jury are to come to a conclusion upon the facts in issue, by an act of reasoning from those other proved facts, the evidence in such case is said to be presumptive.(1)

A presumption of fact is, properly, an inference of that fact from other facts that are known; it is an act of reasoning.(2) In drawing an infer-

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(1) NOTE 174.—The rules of presumptive evidence apply to corporations as well as individuals. Persons acting publicly as officers of the corporation, are presumed rightfully in office; the previous necessary steps are presumed, in order to make a corporate act legally operative; grants and proceedings beneficial to the corporation are presumed to have been accepted by it, especially when the presumption is fortified even by slight acts indicating an intention to accept; a general agent of the corporation may prove his authority by corporate acts contemplating or recognizing it; a charter may be presumed from the long exercise of corporate rights; or the acceptance of a new charter, from the acts of the corporate officers; or a demise from year to year to or from the corporation. So of the extent of their possession, drawn in question by an ejectment. So a surrender of their corporate rights, or a contract or promise by the corporation, or a regular vote of the corporate body. These general positions are advanced and illustrated from various reported cases, English and American, by the Supreme Court of the United States in United States Bank v. Dandridge (12 Wheat. 70 to 76).

(2) NOTE 175.—"A necessary and invariable connection of facts is not required; it is enough if one fact is ordinarily and usually connected with another." Per Parke, J., in Doe ex dem. Patteshall v. Turford, 3 Barnw. & Adolph. 890. "That the fact to be inferred *often* accompanies the fact proven, is not sufficient; it should *most usually* accompany it; and I would say, in the absence of all circumstances, that it should *rarely* otherwise happen." Per Henderson, J., delivering the opinion of the court in Hart v. Newland, 3 Hawks, 122, 123. "The circumstances should be strong in themselves, should each of them tend to throw light upon and to prove each other; and the result of the whole should be to leave no doubt upon the mind that the offence has been committed, and that the accused and no other could be the person who committed it." Per Washington, J., United States v. Johns, 1 Wash. C. C. Rep. 372. In the last case (p. 372 to 374), the learned judge examines a train of circumstances, pro and con, upon the question of intent to destroy the prisoner's vessel and cargo to defraud the underwriters. It is more usually put to the jury that the circumstances should overcome *reasonable* doubt, as being consistent with guilt only, and inconsistent with innocence. Atwood's Case, before Colden, Mayor, N. Y. Gen. Sess., June, 1819, 4 C. H. Rec. 91. And see Plunket's Case, before the same, N. Y. Gen. Sess., Sept.

ence from facts proved, regard must always be had to the facility that appears to be afforded for explanation or contradiction. No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable conclusion against him in the absence of explanation or contradiction; but when such sufficient proof has been given, and the nature of the case is such as to admit of explanation or contradiction, human reason cannot do otherwise than adopt the conclusion to which the proof tends, if no explanation or contradiction is offered.(1)

A presumption, then, is a probable inference, which our common sense draws from circumstances usually occurring in such cases.(2) The slight-

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1818, 3 C. H. Rec. 137, 138. See the charge in The People v. Gardner, 1 Wheel. Cr. Cas. 25, and Rowley's Case, 1 C. H. Rec. 47, 49.

In deceit for the sale of a consumptive negro, the defence was that the plaintiff's wife knew of the disease, whence it was sought to infer that the plaintiff had knowledge of it also. But this evidence was denied by the court, who accompanied the denial with the remarks of Henderson, J., in Hart v. Newland, *ut supra*. See note 177.

(1) By Abbott, C. J., in R. v. Burdett, 4 B. & Ad. 162.

NOTE 176.—*Stabitur presumptioni donec probetur in contrarium.* 2 Ev. Poth. 329, No. 16, § 14; Helm's Lessee v. Howard, 2 Har. & M'Henry, 77; Miller v. The Resolution, 2 Dall. 22, 23; Livingston's Ex'rs v. Livingston, 4 John. Ch. Rep. 287, 293.

So that that there are some assertions which should always be holden true till the contrary be proved, and others that are always holden contrary to truth, until they are proved. 1 Dom. b. 3, tit. 6, § 4, art. 7. For illustration of this, see the following note.

(2) NOTE 177.—See note 175. The ground of all presumptions is the necessary or usual connection between facts and circumstances; the knowledge of which connection results from experience and reflection. A presumption is, therefore, "an inference as to the existence of a fact not actually known, arising from its necessary or usual connection with others which are known. It is upon this principle that all our knowledge of those relations and existences, which are not perceptible to the human senses, must depend." The force of presumptions is almost intuitively perceived by mankind; and that principle of the mind which prepares it to expect the future association of circumstances, because it has been accustomed to find them associated, cannot be accounted for, except by setting it down as imposed upon us by the law of nature. It is the same principle which leads us to reason upon cause and effect in all the regions of inductive philosophy; of which the doctrines of presumptive evidence rank as an important branch. The triors are to be satisfied that one circumstance has always, or at least usually been found in consecutive connection with another, the like conduct with the like motive, the fact to be presumed with the fact established by direct proof. See 1 Stark. Ev. 23 to 29, 37 to 39, and 3 Id. 493, 494; 1 Dom., b. 3, tit. 6, § 4, art. 3. *Post*, of the text.

It was proposed to infer that a surveyor had laid off the land in question twice by *actual survey*, because two *paper surveys* were made by him. The Court of Appeals of Kentucky, by Robertson, J., assumed the fact as common, that large surveys were often made by surveyors on the ground, and subdivided upon paper in their offices. And they denied the result contended for, as being a violation of the principles of circumstantial and presumptive evidence, "which respect the order and laws of moral and physical nature in regard to cause and effect." Wallace v. Maxwell, 1 J. J. Marsh. 447, 451, 452. See also Newland v. White, stated *ante*, note 175.

On the other hand, among the various cases where presumptions have been allowed, and which are hereafter noticed both in the text and notes of these volumes, the greater variety of illustration will be found in prosecutions for a divorce or for damages, on the ground of criminal conversation; cases where both the offending parties always seek concealment; and are usually

successful in placing themselves beyond the reach of direct testimony; and where you are thrown, as the only resource, upon such circumstances "as would lead the guarded discretion of a reasonable and just man to the conclusion." Accordingly, cohabiting together for months or years (Loveden v. Loveden, 2 Hagg. Consist. Rep. 1; Cadogan v. Cadogan, Id. 4, n.); or the man living at a neighboring inn, and frequently resorting to the woman's house, who lives separately from her husband, the man's clothes being at the woman's house; he taking his meals there; his horse being there, though he be absent for a few hours of the night (Cadogan v. Cadogan, *supra*); sleeping in the house, though apparently in a separate room; the man being admitted to her bed chamber under the plea of illness (Rutton v. Rutton, cited in Cadogan v. Cadogan, *supra*); are among the strong circumstances upon which courts and juries proceed. In another case (Loveden v. Loveden, 2 Hagg. Const. Rep. 1 to 53), the offender was long received on a footing of hospitality at the husband's house; and a fondness was observed between the former and the wife, being indicated by their early return from hunting parties, and their solitary rambles, arm and arm, through the garden and plantations. Finally suspicion was excited by their indelicate familiarities; walking in the garden with arms around each other's waist, and once kissing each other; often retiring to separate rooms without the husband's observation; the wife's particular attention to the offender's accommodation when he came to the house; the preparation and ornaments of his room; her assisting to make the fire there; addressing him particularly at dinner and meals; his visits being usually when the husband was absent; and, while there, she ordering all others to be denied to her; and on the husband's return, they separating, and appearing to have met for the first time; their meeting upon signals to ride together in the park; he laying his hand on her hip, and on being observed, withdrawing it in confusion; laying his hand familiarly on her shoulder; her admitting him into her dressing-room, where other gentlemen were scarcely ever admitted; and on a friend remonstrating with her she taking it ill, and refusing to alter her behavior; and their still seeking opportunities, and apparently meeting upon assignation. On this evidence, Sir William Scott observes, "When an improper attachment is admitted to have existed between the parties; when it is admitted that indelicate acts have passed between the parties when they were within the reach of observation, shall it not be concluded that those acts were carried much farther when they were out of reach of observation?" The case was then followed by proof of written correspondence between the wife and the alleged adulterer, which the judge said would be a circumstance, though its nature might be unknown, but especially where he saw that it avowed an amatory attachment. After this, while the husband was absent, the paramour visits his house, and is alone with his wife three-quarters of an hour. He again comes, when she hurries to meet him, shakes him by the hand, presses him into the green dining-room, after which they are seen in one of their solitary rambles. She was much in the habit of going about with her open carriage in the streets; but having on one occasion taken up her paramour, she rode with it closed, though on a very warm day; and on another day, after a meeting in the green-house, he was seen skulking away in disguise, on the return of the husband's carriage. Other instances are then given of their occasionally being together in the rooms of the house; and the particular care she took of her dress when her paramour was expected, the perfuming of the rooms, oiling the doors to preserve silence, &c., &c. More direct disclosures were finally made; but it is evident the case would have been sustained much short of that. Indeed, the opinion of the judge, ranging through fifty pages in the original report, presents a numerous and diversified group of circumstances, and the manner of using and adapting them to the ends of justice; and the whole will be found an able commentary on the general principles of circumstantial evidence. In Cadogan v. Cadogan (*supra*), the judge remarks, that finding persons in such a situation as generally leads to a presumption of guilt, courts must presume it in all cases attended with the like circumstances. They cannot adopt the extravagant professions of platonism for the principles of their decisions. It is physically possible that persons may be in the same bed together without criminal intercourse. Courts of justice, however, cannot proceed on such grounds.

The latter circumstance alone was held sufficient to warrant a jury in finding the defendant guilty. State v. Green, Kirb. 87.

It may be useful to follow out the general principles with which we started this note, by some of their subdivisions and cases, though we must stand principally indebted for them to other heads of these volumes.

1. The law presumes that a man intended the result which naturally followed the means voluntarily used by him. On this principle, a libel injurious in its tendency was declared actionable *per se*. Haire v. Wilson, 9 Barnw. & Cres. 643; Rex v. Shipley, 4 Doug. 177, per Willes, J., S. P. And several persons having caused a plate to be struck calculated for the alteration of bank bills from a lower to a higher denomination, were held to intend the usual consequence, and were convicted of a conspiracy to defraud, though not a bill was altered. Malone's Case, before Radcliff, Mayor, N. Y. Gen. Sess. Jan. 1817, 2 C. H. Rec. 22. And see The People v. Bradford, 1 Wheel. Cr. Cas. 219, 221.

2. The seeking of opportunities and means to commit a criminal act; the flight of the accused; concealing or showing anxiety to conceal, evidence of guilt; are circumstances for the prosecution. The fabrication of false or contradictory accounts is a familiar instance; as of the prisoner's residence, or occupation, or acquaintances. Coe's Case, before Radcliff, Mayor, N. Y. Gen. Sess. Sept. 1816; 1 C. H. Rec. 141, 143. So making arrangements to escape. Id. Using or signing a feigned name. Id. So concealing instruments of violence or counterfeit money. See 1 Stark. Ev. 29 to 33, and 2 Ev. Poth. 337, No. 16, § 14. Fraudulently passing, or possessing with intent to pass, counterfeit bills, is a crime where guilty knowledge and intent must generally be derived from circumstances. Among these are entries of the purchase of counterfeit bills in cabalistic language used among counterfeiters; coincidence between false bills found in the prisoner's pocket-book and those found in the recesses of his house or residence; that the prisoner had failed to show a good character; the possession of large quantities of spurious notes (The People v. Gardner, Sept. 1822, N. Y. Gen. Sess., before Riker, Recorder, 1 Wheel. Cr. Cas. 23, 25); paying away the bill without calling for change due on the purchase (Rhodes' Case, before Radcliff, Mayor, N. Y. Gen. Sess. Jan. 1816, 1 Cit. H. Rec. 1, 2); passing a comparatively large bill for a small quantity of liquor not drank, and immediately leaving the store; a short time after returning with a similar bill, attempting the same practice; and on being charged, fleeing into the woods, and not accounting for the possession of the bills. Helm's Case, before Riker, Rec., N. Y. Gen. Sess. March, 1816, 1 C. H. Rec. 46, 47. So an attempt to conceal or destroy a counterfeit bill, the prisoner refusing to give an account of himself or to tell his name, a large amount of counterfeits being found in his portmanteau (Galbrant's Case, before Radcliff, Mayor, N. Y. Gen. Sess. July, 1816, 1 C. H. Rec. 109, 110); denying that he passed the forged check, and refusing to disclose from whom he obtained it; held sufficient to convict, no satisfactory account being given. Vosburgh's Case, before Radcliff, Mayor, Aug. 1816, N. Y. Gen. Sess. 1 C. H. Rec. 130. So two persons being engaged in passing the bill, and contradicting each other and giving unsatisfactory accounts on their separate examination. Reynolds' Case, before Radcliff, Mayor, N. Y. Gen. Sess. March, 1817, 2 C. H. Rec. 47. Concealment or attempt to conceal false money (called a strong circumstance in Stewart's Case, before Radcliff, Mayor, N. Y. Gen. Sess. June, 1817, 2 C. H. Rec. 87). In this case one bill was found in the cuff of the prisoner's coat, and, on search at his boarding room, another was found in his pantaloons pocket. So, pretending that the bill was received from S., in the market, without farther account, averring that the note was good, catching up the change in a hurried and confused manner, without counting it; offering a sum of money to the officer to release him; and on this being declined, attempting to escape by knocking the officer down, and giving a confused and unsatisfactory account of the transaction. The People v. Quackenboss, before Riker, Recorder, N. Y. Gen. Sess. Dec. 1822, 1 Wheel. Cr. Cas. 91, 93.

On a charge of receiving stolen goods with knowledge; finding them secreted in the prisoner's store, in a place convenient for concealment; considerable stolen property being found up stairs; the prisoner, on being questioned, giving no satisfactory account of them; a great quantity of stolen goods being found in his house; with bad character of the accused; were allowed as proof of knowledge. People v. Teal, before Riker, Recorder, N. Y. Gen Sess., March, 1823, 1 Wheeler's Cr. Cas. 199, 201. So, buying the goods at a reduced price, they being of a large amount, receiving them of a stranger; throwing them into a trunk in a confused and crowded manner; the trunk being found in a room up stairs in the prisoner's house, though he kept a store. People v. Cochrane, before Riker, Recorder, N. Y. Gen. Sess., Nov. 1822, 1 Wheel. Cr. Cas. 81, 84.

The falsity of pretences on which goods are obtained, may also be inferred from circumstances. Lazarus' Case, before Radcliff, Mayor, N. Y. Gen. Sess., June, 1816, 1 C. H. Rec. 89.

On the other hand, in cases of counterfeit bills, circumstances considered favorable to the

prisoner are, his receiving the counterfeit bills as good in the regular course of business (People v. Bryan, before Riker, Recorder, N. Y. Gen. Sess., Sept., 1822, 1 Wheel. Cr. Cas. 21, 22); passing the note to an acquaintance, and giving a true statement of the prisoner's business. So, having been in the state prisson before, he might have offered money to procure his escape, though innocent, he knowing the impression to be against him. So, no other spurious bill being found upon him; and since he was discharged from the state prison, so conducting as to be thought trustworthy by his employers. The People v. Quackenboss, *supra.*

In charges for knowingly receiving stolen goods, the following circumstances have been recognized as favorable to the prisoner: Going out to sell the goods in the daytime, stating that he had other goods of the like kind; and offering to be present at an auction sale of them; leaving the original marks on most of the goods; and after being arrested, aiding in the arrest of the thief, who refuses to answer on examination. People v. Cochrane, *supra.* So, part of the goods being found in the prisoner's store, open to the view of those who called in; the original letters on a stolen dressing box being allowed to remain, by which the owner could identify it; with good character as to honesty. People v. Teal, *supra.*

Again: *Omnia presumuntur contra spoliatorem;* as if a devisee in the first will destroy a second, it is ground for presuming that the latter contained a revocation of his devise in the first. Admitted in Harwood v. Goodright, Cowp. 92. And an obligor, obtaining and destroying his bond, affords a presumption that it was given for a valuable consideration. Carneal's Heirs v. Day, Litt. Sel. Cas. 492, 493. So, the mere non-production of written evidence, which is in the power of the party, generally operates as a strong presumption against him (2 Ev. Poth. 336, 337, No. 16, § 14); not that, even a refusal, on notice to produce, shall be taken to establish the writing as claimed by the party giving notice; but every doubt as to its contents, everything equivocal in the secondary evidence to which the party is driven, or imperfect, vague, or uncertain; as in dates, sums, and whatever is material, shall be presumed against the party who might remove every doubt by producing the higher evidence. Some general evidence of its material parts must be given before the presumption attaches. Life & Fire Ins. Comp. v. The Mech. Fire Ins. Comp. of New York, 7 Wend. 31. And it may be remarked generally, that on a trial either in civil or criminal cases, the omitting to produce evidence in elucidation, which is in the power of the party or within his peculiar knowledge, shall be holden to turn every doubt against him. 1 Stark. Ev. 34.

3. So in civil cases, the law looks for evidence to long delay or acquiescence in the exercise of an adverse right; as in the uninterrupted enjoyment of property or privileges. This we shall presently see at large in the subsequent pages, as to the presumption of payment, grants, agreements, licenses, &c., founded upon time.

4. The law looks favorably on the good character of one accused of an infamous crime, where the proof against him leaves the case otherwise doubtful. 1 Stark. Ev. 35; People v. Mead, before Riker, Recorder, N. Y. Gen. Sess., Sept. 1822, 1 Wheel. Cr. Cas. 36, 37, 38. This head will also be hereafter more fully considered.

5. Presumptions may also arise from artificial habits; as the course of trade; the course of the post; the customs of a particular trade, or of a particular class of people. In this way, the time of credit, the time when a letter was received, &c., &c., may be proved, and stand so till rebutted. 1 Stark. Ev. 356. And see 2 Ev. Poth. 334, No. 16, § 14. The reliance on the course of the post is most conspicuous in suits to charge drawers and indorsers of commercial paper, which will be considered in the second volume, and see De Forest v. Hunt, 8 Conn. Rep. 179. The course and custom of trades and classes run through every department of society, giving a construction to their words and conduct, and charging them with notice and knowledge. It was lately held that the officers of an insurance company should be presumed cognizant of the marine intelligence contained in a newspaper taken at the office, especially that which related to their own port. Green v. Merch. Ins. Co. of New Bedford, 10 Pick. 402. So, that a client, resident abroad, has left all material papers with his attorney, who defends his cause in England; but not if he reside in England; and in no case, if the paper be not obviously material. Vice v. Anson, 3 Carr. & Payne, 19. So, that all the partners may have access to and know the contents of partnership books, though this may be repelled by circumstances. United States Bank v. Binney, 5 Mason 176. So, that a bank stockholder is entitled to a certificate of ownership, as it is the habit of nearly all banks to give this. Hussey v. The Man. & Mech. Bank of Nantucket, 10 Pick. 415.

Presumptions also arise from the state of society. In a slaveholding state, a person bearing a black complexion was presumed to be a slave; though otherwise of a yellow or mulatto. Scott v. Williams, 1 Dev. 336. While in New York, where slavery yet barely lingered; and a majority of blacks were free, the same presumption was denied, even from a plain African color and features. Rogers' Ex'rs v. Berry, Wash. Circ. June, 1812, *Cor.* Yates, J., MS.; S. C. but not S. P., 10 John. Rep. 132. The wife, in the husband's absence, was presumed to have been left an agent for the hiring out of his horses. Church v. Landers, 10 Wend. 79, 80. A servant by the year having left her service a considerable time, the presumption (in England) is that her wages were paid. Sellen v. Norman, 4 Carr. & Payne, 80. A *fortiori* when the service is in a factory, where the custom is to pay weekly. Note *a* to Sellen v. Norman, *supra*.

The latter case comes rather to the practice of individuals, concerning which there are various cases. Only some few of the modern ones will be given. A man allowing his friend repeatedly to forge his name upon commercial paper, by submitting to have the paper enforced, was held incapable of defending against subsequent forgeries. Weed v. Carpenter, 4 Wend. 219. The habit of the retailer to charge interest after ninety days was held to bind the customer, who shall be presumed to know the habit. M'Allister v. Reab, 4 Wend. 483, 490; S. C., on error, 8 Wend. 109. So, the practice of a porter to a bank as to the time of presenting checks. Merchants' Bank v. Spicer, 6 Wend. 443. The practice of clerks in a counting-house as to mailing letters. Toosey v. Williams, 1 Mood. & Malk. 129. And the habit of an attorney's office, as to the preparation and service of notices to quit. Doe ex dem. Patteshall v. Turford, 3 Barnw. & Adolph. 890.

From the custom of parents to furnish their daughters, on marriage, with outfits, the delivery of property, *e. g.* a slave, by a parent to a daughter, on such an occasion, without explanation, will be presumed to be a gift. Smith v. Montgomery's Adm'rs, 5 Monroe, 502, 504; Bell v. Strother, 3 M'Cord, 207, 210; Johnson v. Dilliard, 1 Bay, 232; Teague v. Griffin, 2 Nott & M'Cord, 93; De Graffenried v. Mitchell, 3 M'Cord, 506; Byrd v. Ward, 4 M'Cord, 228. So, if some time after marriage. M'Cluney v. Lockhart, 4 M'Cord, 251.

See 1 Dom. b. 13, tit. 6, § 4, art. 7, that persons shall be presumed to act according to their principles and customs.

6. So things are held to be legally and properly in their existing state, until the contrary be shown; as if a person be in possession of property, the presumption is that he is the rightful owner. *Post*, of the text and notes; 2 Ev. Poth. 333, No. 16, § 14; 1 Dom. b. 3, tit. 6, § 4, art. 1; per Savage, C. J., in Livingston v. The Peru Iron Co., 9 Wend. 520, 521; Bell v. The Commonwealth, 1 J. J. Marsh. 550, 553, 554; per Lord Ch. of Ireland, 3 Ridgw. P. C., 291, note; per Mills, J., in Fowke v. Darnell, 5 Litt. Rep. 319, 320; *Per Cur.* in Cook v. Wilson's Adm'rs, Litt. Sel. Cas. 439; Schermerhorn v. Van Volkenburgh, 11 John. Rep. 529; Jackson ex dem. Glover v. Winslow, 9 Cowen's Rep. 13; Jackson ex dem. Klock v. Rightmyre, 10 John. Rep. 314; Smith v. Lorillard, 10 John. Rep. 338; Ricard v. Williams, 7 Wheat. 59; Jackson ex dem. Williams v. Miller, 6 Cowen's Rep. 751; Campbell v. Roberts, 3 Marsh. Rep. 623; Doe ex dem. Riley v. Million, 4 J. J. Marsh. 395, 396.

7. So the law presumes that a fact continuous in its character, still continues to exist, until a change be shown; as a partnership (1 Stark. Ev. 36), or, within certain limits, that a life continues. Id.; Innes v. Campbell, 1 Rawle, 373. And see 2 Ev. Poth. 333, No. 16, § 14. So, that a legal or actual possession continues. Bayard's Lessee v. Colefax, 4 Wash. C. C. Rep. 38. That a corporation continues to exist. People v. Manhattan Co., 9 Wend. 351. That an entry and ouster by a landlord upon his tenants continues, till a restoration be shown. Lewis v. Paine, 4 Wend. 423, 429. And see Jackson ex dem. Miller v. Porter, 4 Wend. 672.

Yet a written admission that the defendant was editor on one day, was held at Nisi Prius no evidence that he was editor on a subsequent day. Macleod v. Wakely, 3 Carr & Payne, 311. And admitting insolvency at one time was denied as evidence that it existed considerable time after. Hume v. Long's Representatives, 6 Monroe, 116, 119. *Quere.*

8. So, everything which happens naturally and commonly is taken as true; as that a father loves his children. 1 Dom. b. 3, tit. 6, § 4, art. 7. So of fraternal affection, for where a younger brother entered on the land which descended to the elder brother, in his absence, this was holden not to be adverse, because of the relation between them. Gilb. Ten. 28, and said in Magow's Case, Latch, 68, and see the cases *supra*, pl. 5, of marriage gifts to children. Farther, of things hap-

pening naturally; a collateral relation claiming by descent from a decedent advanced in life, must prove that he died *without issue*, which shall not be presumed. Dudley v. Grayson, 6 Monroe, 259, 263. So, sanity shall be presumed. 2 Ev. Poth. No. 16, § 14; Lee's Heirs v. Lee's Ex'rs, 4 M'Cord, 183; Jackson ex dem. Cadwell v. King, 4 Cowen's Rep. 207; Den ex dem. Stevens v. Van Cleve, 4 Wash. C. C. Rep. 262, 269; Attorney-General v. Parnther, 3 Bro. C. C. 441, 443; White v. Wilson, 13 Ves. 87, 88, 89; Jackson ex dem. Van Dusen v. Van Dusen, 5 John. Rep. 144, 158; Hoge's Lessee v. Fisher, 1 Pet. C. C. Rep. 163; Kinloch v. Palmer, 1 Rep. Const. Ct. 225. And on the other hand, so amply have medical science and general observation borne testimony to the obstinacy of a settled or habitual derangement of the intellect, that *semel furandibus semper furandibus, præsumitur*. Den ex dem. Stevens v. Van Cleve, 4 Wash. C. C. Rep. 262, 269; Jackson ex dem. Van Dusen v. Van Dusen, 5 John. Rep. 144, 158, 159; Jackson ex dem. Cadwell v. King, 4 Cowen's Rep. 207, 216; Attorney-General v. Parnther, 3 Bro. C. C. 441, 443; White v. Wilson, 13 Ves. 87, 88; Hoge's Lessee v. Fisher, 1 Peters' C. C. Rep. 163; Vance v. The Commonwealth, 2 Virg. Cas. 132; Lee's Heirs v. Lee's Ex'rs, 4 M'Cord, 189; Kinloch v. Palmer, 1 Rep. Const. Ct. 225.

Upon the same principle, the law presumes that a child within the age of discretion did not act with guilty knowledge. Rex v. Owen, 4 Carr. & Payne, 236; People v. Davis, 1 Wheel. Cr. Cas. 230, 231. And see Walker's Case, 5 C. H. Rec. 137.

Innocence, as being the more natural and usual state, is always presumed, till rebutted. 2 Ev. Poth. No. 16, § 14. And so that a wife accompanying her husband in the commission of crime, acts under his coercion, and consequently without a guilty intent. Rex v. Knight, 4 Carr. & Payne, 116. So a minor is presumed to be under the control and protection of the parent, even though such minor be out at hired service. Millar v. Thompson, 1 Wend. 447.

9. So every one is presumed to take care of his own concerns. 1 Dom. b. 3, tit. 6, § 4, art. 7. Hence the owner and vendor shall be presumed to know of obvious defects in the things sold; *e. g.* the adverse possession of his land by another. Lane v. Shears, 1 Wend. 433. It is also a presumption that he who pays is indebted. 1 Dom. b. 3, tit. 6, § 4, art. 7, 10; James v. Biou, 2 Sim. & Stu. 606. Thus a person accepting and paying a check has, *prima facie*, funds of the drawer to that amount. State Bank of North Carolina v. Clark, 1 Hawks, 36. A gift is not to be presumed. Thus, though payment may be presumed after twenty years, yet that being repelled, the law will not presume the debt forgiven. Potter v. Titcomb, 7 Greenl. 302. The law presumes, that a prebendary *de facto* had performed the requisites to make him so. Dr. Sherard's Case, cited 2 Bl. Rep. 853.

10. Another fruitful subdivision of presumption from what is natural and usual, sanctioned both in the civil and common law, is the rule that every one governs himself by the rules of right reason, and consequently acquits himself of his engagements and his duty. 1 Dom. b. 3, tit. 6, § 4, art. 7. This rule extends to every man, both in his official and private character. Bank of the U. States v. Dandridge, 12 Wheat. 69, 70. And see Jackson ex dem. Ballou v. Campbell, 5 Wend. 572; per Collet, J., in Colvin v. Carter, 4 Ham. 354; Fridge v. The State, 3 Gill & John. 103; Whittlesey v. Starr, 8 Conn. Rep. 134; Truwhit v. Dupree, 2 Car. & Payne, 557.

As to official acts: "The legal presumption is, that the surveyor, register, governor and secretary of state have done their duty in regard to the several acts necessary to be done by them in granting lands; and therefore surveys and patents should always be received as *prima facie* evidence of correctness. Per Underwood, J., in Wallace v. Maxwell, 1 J. J. Marsh. 447, 450, 451. An agreement of counsel made in the course of a cause shall be presumed on proper authority from the client. Ellworthy v. Bird, 1 Tam. 33. So, that a sheriff selling horses on execution had levied on them. Hartwell v. Root, 19 John. Rep. 345; Marsh v. Lawrence, 4 Cowen's Rep. 461. So, that overseers of the poor have taken the proper steps for the relief of a pauper (Minklaer v. Rockfeller, 6 Cowen's Rep. 276); that officers of government would not twice survey and patent the same lands (Woodson v. Buford, 7 Monroe, 418); that an assessed tax on certain land was imposed upon the possessor at the time, or other person bound legally to pay (Rex v. Inhabitants of St. Lawrence, 4 Doug. 190; Rex v. Inhabitants of St. James, 4 Doug. 200); that a district attorney has filed the transcript of a conviction in the Court of Exchequer as required by statute (Hilts v. Colvin, 14 John. Rep. 182); that a register's sale was duly advertised (Hickman v. Skinner, 3 Monroe, 211); that a sheriff's sale was according to his duty (Terry v. Bleight, 3 Monroe, 271); that he returned the execution in due time (Maury v.

Cooper, 3 J. J. Marsh. 226); that he gave due notice of sale (Hanson v. Barnes' Lessee, 3 Gill & John. 359); that he held a *ca. sa.* the proper length of time to charge bail. Wheelock v. Hall, 3 N. H. Rep. 310. That a rector in possession had read the thirty-nine articles, will be presumed. Monk v. Butler, 1 Roll. Rep. 83. And see 2 Anst. 372. So, that a man acting in a public office has been rightfully appointed (12 Wheat. 70); *e. g.*, one acting as a surrogate. Rex v. Verelst, 3 Camp. 432. And see Bishop v. Cone, 3 N. H. Rep. 513, and People v. Gilbert, Anth. N. P. Rep. 191. So, that entries made in public books were made by the proper officers (12 Wheat. 70); that officers issuing a land patent, had the requisite warrant, plat and certificate (Hickman v. Boffman, Hardin's Rep. 362); that a government surveyor did his legal duty by surveying on the ground. Philips' Lessee v. Robertson, 2 Tenn. Rep. 421. A record stated a tax to have been reported as assessed; this shall be intended to be the report of the man who was sheriff at the time it was assessed, as the duty belonged to him. Said in Bush's Heirs v. Williams, 1 Cooke's Rep. 360, 363. It shall be intended of a parson *de facto* that he had subscribed the thirty-nine articles before the bishop, had publicly read and assented to them, and had a license to preach. Powel v. Milbank, 2 Bl. Rep. 851; S. C., 3 Wils. 355, by the title of Powell v. Milburn; Anon., Clayt. 48. So, that the auditor of the exchequer, on his removal, had delivered up the rolls. Lord Halifax's Case, Bull. N. P. 298. So, that a constable delivering an execution for renewal, held it long enough to levy and collect according to law (Wilson v. Gale, 4 Wend. 623, 626); that a tax collector sold no more land than was necessary to pay the tax (Ives v. Lynn, 7 Conn. Rep. 505); that the certificate of appraisal was in the hands of the sheriff before he set off the land under the *fi. fa.* (Booth v. Booth, 7 Conn. Rep. 350); and that an officer commissioned by the governor was duly nominated. Commonwealth v. Frazier, 4 Monroe, 513, 516.

In one case, where a sheriff received money on a *fi. fa.* after the return day, having received one installment before, the court were asked to presume that he levied on the debtor's property before the return day, which act alone could give him power officially to receive money afterwards. But they would not presume that; saying, where a fact is necessary to confer authority, it is not to be presumed, though every proper official step will be presumed after authority is shown. Rudd v. Johnson, 5 Litt. Rep. 19.

Transactions of a private or unofficial character are interpreted by the same lenient rules of presumption. *Odiosa et inhonesta non sunt præsumenda* (10 Rep. 56, a), *Injuria non præsumuntur* (Co. Litt. 232 b), *Omnia præsumuntur legitime facta, donec probetur in cantrarium* (Co. Litt. 232 b), *Fraus est odiosa, et non præsumenda* (Cro. Car. 550), are maxims of daily application in our courts, both of civil and criminal jurisdiction, to every diversity of human action which is not itself of such a character as to pronounce its own condemnation. A party having a legal right, enters upon land; the law presumes that he enters with a view to that right, and not with a wrongful intention. Benson v. Bolles, 8 Wend. 175, 181. So, that a deed of a trustee having power to convey upon a certain contingency, was not given till after the condition happened (Morrison v. M'Millan, 4 Litt. Rep. 210); and generally, that a trustee has faithfully executed his trust. Shilknecht v. Eastburn's Heirs, 2 Gill & John. 114. And so against every act of immorality. Cusack v. White, 1 Rep. Const. Ct. 282. Equally so against acts of negligence; for where it was sought to charge the defendant with having placed a dangerous commodity on board a ship, without due notice to the captain, it was held, that the want of notice should not be presumed; but the contrary. Williams v. The East India Co., 3 East, 192. And there cannot be a doubt that negligence in most of the different descriptions of bailees, should never be presumed. Story on Bailm. 152, 153, 190, 230, 231, 270, 271, 296, and the cases and authorities cited at these respective pages. Schmidt v. Blood, 9 Wend. 268, 271. So, when a vessel is in her usual business, it will be presumed that the master is on board; that being his duty. Cutter v. Moore, 3 Halst. 219. And see Co. Litt. 78 b. A *fortiori* as against any one charged with actual fraud. Kinloch v. Palmer, 1 Rep. Const. Ct. 224; Levingsworth v. Fox, 2 Bay, 520; Marshall v. Lewis, 4 Litt. Rep. 140; Hardin v. Baird's Heirs, Litt. Sel. Cas. 346; Fisk v. Gerard, 2 M'Cord, 11. The presumption is, that a deed bears its true date. Breckenridges v. Todd, 3 Monroe, 54, 55; Seymour v. Van Slyck, 8 Wend. 403.

And after every effort to establish fraud, if it remain doubtful upon the proof, innocence is to be presumed. 3 Cas. Ch. 85, 114; Lee v. Cook, 1 Wash. 306, 308; Munroe v. Gardner, 1 Rep. Const. Ct. 308, 309. *Et in facto quod se habet ad bonum et malum, magis de bono quam de malo præsumendum est.* Co. Litt. 75 b.

So the presumption is against the breach of a positive law. By an English statute, letters not sent with, and respecting packages, must be mailed, and cannot be sent by private post: it appearing that a letter was with the package in the parcel sent, the court presumed that it had respect to the parcel, inasmuch as the contrary would be to violate the act of Parliament. Bennett v. Clough, 1 Barnw. & Ald. 461. Upon the authority of the last case, it was lately held that an importer shall be presumed to have caused his goods to be entered at the custom-house, according to 46 Geo. III, c. 87, § 1. Sissons v. Dixon, 8 Dowl. & Ryl. 526, 529; S. C., 5 Barnw. & Cress. 758. So strong is this presumption, that where a woman married within twelve months after her first husband was last heard of, his death was presumed. Rex v. Inhabitants of Twyning, 2 Barnw. & Alders. 386. So, evidence that a theatre has gone on to perform without interruption authorizes the presumption that it is licensed pursuant to the statute. Rodwell v. Redge, 1 Carr. & Payne, 220. A candidate for a corporate office shall be presumed to have taken the sacrament within the time required by statute (Rex v. Hawkins, 10 East, 211); and a corporation, in receiving a contract for debt, shall be presumed to have acted within its powers. New York Firemen's Ins. Co. v. Sturges, 2 Cowen's Rep. 664. And see 12 Wheat. 69. So if it buy land at sheriff's sale. Ex parte The Peru Iron Company, 7 Cowen's Rep. 540.

Upon the same ground, we are to presume that an unexplained interlineation, erasure, obliteration, or other alteration of a written instrument, was made before its execution. Such would, of course, be the presumption on a criminal prosecution for forgery; and the range of decision in civil cases, with a few exceptions, follows the same rule. In Fitzgerald v. Ld. Fauconberge (Fitz-G. 207), the interlineation was in a deed of conveyance or settlement of F.'s estate, and tended to enlarge the power of revocation over his estate, which he had received to himself; and Lord Chief Baron Reynolds (with whom the master of the Rolls and Lord Chancellor seem to have concurred) said, he must look upon it as if it had been originally incorporated in the body of the deed, "for there was no proof when these words were interlined." Fitz-G. 214. The Lord Chancellor speaks of it at page 223. In Trowel v. Castle (1 Keb. 22), it was given in charge to the jury, that "an interlineation, without anything appearing against it, will be presumed to be at the time of the making of the deed, and not after." So, in Wickes v. Caulk (5 Har. & John. 41), on objection that the subscribing witnesses' names were erased; the court declared that "it is incumbent on a party who wishes to avoid a deed by its erasure to prove that the alteration was made after its execution and delivery."

Exceptions to this doctrine would seem to be found in the case of bills of exchange, promissory notes and the like commercial paper. Thus, on a question arising whether the date of an acceptance was altered (the alteration appearing on its face) before or after the bill was indorsed, the indorsement being unavailable if made before the alteration, Abbott, Ch. J., refused to presume in favor of an alteration at the proper time; observing that the plaintiff must prove the alteration to have preceded the acceptance, otherwise it would be void for want of a new stamp. Johnson v. Duke of Marlborough, 2 Stark. 313. Here, it will be perceived, was a complete departure from the usual presumption in favor of innocence; for the judge intends a forgery. If the case went on a general inclination observed among men to evade the burden imposed by the stamp laws, it is obvious that the onus would be changed in respect to various other species of paper, as well as the commercial kind. So, in a subsequent case, where the action was by the indorsee against the acceptor of a bill of exchange, an alteration appearing to have been made in the sum, it was held at bar to lie with the plaintiff to prove that it was properly made. Henman v. Dickinson, 5 Bing. 183; S. C., 2 Mo. & Payne, 289.

How far these decisions will be followed by the American courts is quite doubtful. The direct contrary has been holden in New Jersey. Cumberland Bank v. Hall, 1 Halst. 215. And see Sayre v. Reynolds, 2 South. 737. So *semb.* in New York. Rankin v. Blackwell, 2 John. Cas. 198, 200. But see Jackson ex dem. Gibbs v. Osborn, *infra*.

Another exception has been made in case of an appeal bond, though the court do not deny the general presumption in favor of an alteration before execution. They say the presumption may be rebutted; and they will not put the appellee to that hazard. Sutphen v. Hardenbergh, 5 Halst. 288, 289; Shinn v. White, 6 Halst. 187, S. P. In the latter case, it is said, a note of the alteration by the attesting witness would have obviated the objection; and that this might have been subjoined by the witnesses on the motion to dismiss the appeal.

And it is agreed by all the cases, that where the alteration appears to be suspicious on its face,

and is not duly noted, as if the paper have been cut close, or a mutilated figure be left, or the ink differ, or the handwriting be that of a holder interested in the alteration, &c., the onus lies with the party who claims that the alteration was genuine. Bishop v. Chambre, 3 Carr. & Payne, 55; S. C., 1 Mood. & Malk. 166; Nunnery v. Cotton, 1 Hawks, 222; Jackson ex dem. Gibbs v. Osborn, 2 Wend. 555; Jackson ex dem. Collier v. Jacoby, 9 Cowen's Rep. 125, 126; M'Micken v. Beauchamp, 2 Miller's Lou. Rep. 290.

Upon what internal appearances suspicion may arise, we have a very full enumeration in 1 Shep. Touch. 69. See, also, 2 Jac. Law Dict. 224, Deed, iii; 5 Id. 384, 385, Rasure.

So if the suspicion arise from extraneous circumstances. Doe ex dem. Campbell v. Roe, 2 Hawks, 93. And the instrument may, in turn, be sustained by internal evidence of fairness, or external evidence applicable to the transaction. Glanville v. Paine, Barnardist. Ch. Rep. 18, 19, 20. And see Cumberland Bank v. Hall, 1 Halst. 215; Rankin v. Blackwell, 2 John. Cas. 198.

Nor is it to be disguised that an unpleasant appearance of contrariety exists among the cases as to the general rule, where no suspicion arises independent of the alteration itself. While various high authorities follow the ancient rule of presumption in favor of an alteration *before* execution (12 Vin. Abr. 57, Evidence Q, a. 2, pl. 5; 13 Id. 41, Faits u, pl. 11; 2 Wood's Inst. (10th ed.) 286, ch. 3; 1 Swift's Syst. 310; 4 Cruis. Dig. 496, tit. 32, ch. 26, § 10; Rankin v. Blackwell, 2 John. Cas. 198; Cumberland Bank v. Hall, 1 Halst. 215; Wickes v. Caulk, *supra;* Stark. Ev. pt. 4, p. 476, note *h*; Prevost v. Gratz, 6 Wheat. 481, 502); other cases, or at least other dicta of very able judges, are diametrically opposed. In Jackson ex dem. Gibbs v. Osborn, (2 Wend. 555, 559), although that case be sustainable on the ground of a strong suspicion, independent of the mere erasure, yet the reasoning of the court, who speak by Sutherland, J., is general, and would seem to change the onus in all cases. The authorities cited by him apparently relate to one case only, viz: that of an altered deed, the execution of which is claimed to be proved by its age and possession under it. In such a case, age and possession are not sufficient, but the ordinary proof must be resorted to. Mr. Phillipps (Vol. I, 405, ed. of 1823), cited by the learned judge, also adds that the blemish must be satisfactorily explained; the principle of which expression would seem applicable to cases of alteration generally. The dictum of Washington, J., in the case of Prevost v. Gratz, in note *b* to the above page of Phillipps, reported in 1 Pet. C. C. Rep. 364, 369, is to the same effect with the doctrine of Sutherland, J.; and both are sustained by the Nisi Prius decision, and charge to the jury of M'Kean, C. J. Morris' Lessee v. Vanderen, 1 Dall. 64, 67.

The force of Mr. Justice Washington's decision and dictum, in Prevost v. Gratz, was taken away by a review and reversal of his decree, in the Supreme Court of the United States (S. C., 6 Wheat. 481, 502,); by which the authority of that high tribunal is turned in favor of the ancient rule. Duncan, J., speaking of that case, in Heffelfinger v. Shutz (16 Serg. & Rawle, 47), calls it a presumption made in favor of innocence, "even where the alteration was in favor of the person in whose handwriting it was." Still, however, if we superadd the late decisions of the English courts upon commercial paper, which, although we have set them down as making an exception, are not directly so treated by the judges, the discrepancy may be quite embarrassing. We called those cases exceptions, because they do not profess to overrule or question the ancient cases. It is certainly a point of no little interest, how the rule shall finally stand, which must exercise almost a daily influence on important rights. The dictum of a learned court, proceeding mainly according to the civil law, also sustains the above departures from what was clearly the ancient rule of the common law. We allude to the late case of M'Micken v. Beauchamp (2 Miller's Lou. Rep. 290). There a contract appeared to be altered in a material part, *by different ink.* The court disregard the difference of the ink (which we have seen would have changed the onus under the old common-law rule); and, on quotations from the civil law, as construed by Spanish commentators, take the broad ground, "that writings erased or interlined, are presumed to be false." They add that "the rules in relation to this subject, cited from the Spanish and civil law, are in conformity with the law of merchants, and all systems of jurisprudence with which we have any acquaintance." Id. 292.

But although it be said that fraud, &c., are not to be presumed, the student should be careful to remember that this is predicable of those acts only which stand alone. Not that fraud, like crime, may not be made out and presumed from circumstantial testimony. Per Lord Hardwicke, in Aston v. Aston, 1 Ves. 268; Watkins v. Stockett's Adm'rs, 6 Harr. & John. 435; Brogden v.

Walker's Ex'r, 2 Id. 292. True, this ought not to be slight. Caldwell v. Benedict, 8 Mart. Lou. Rep. (N. S.) 454. Yet strong presumptive circumstances indicating fraud, will outweigh positive proof against it. The Short Staple, 1 Gallis. 104. Indeed, so common and obvious are these circumstances in some cases, as where property is transferred in fraud of creditors, that the professional reader can find ample illustration in his own recollection. The Court of Chancery constantly presumes fraud from certain confidential relations, as that of trustee and *cestui que trust*, principal and agent, &c., existing between the parties in respect to the subject matter of the contract (Gallatian v. Cunningham, 8 Cowen's Rep. 361); a principle which constitutes an important distinction between the jurisdiction of chancery and the courts of common law. Jackson ex dem. Cadwell v. King, 4 Cowen's Rep. 207.

So a conspiracy may be proved by circumstances, among which are the acts of the parties in doing the injury which is the alleged object of the conspiracy. Jones v. Becker, 7 Cowen's Rep. 445.

11. Again: men are presumed to act according to their own interest. Finch's Law, 37. A tenant in tail pays off an incumbrance on the estate. Why? In order to exonerate it; for he can at any time obtain the fee simple in another form, and therefore has no interest in keeping it on foot to protect the estate, or enlarge it, or to reimburse himself. Otherwise of a tenant for life, who has but a temporary interest. He cannot save himself without the incumbrancer's place, which chancery will give to him, with all the incumbrancer's rights and remedies, upon the presumption that the tenant intended the apparent payment as an act of purchase. And so of the like cases. Per Lord Thurlow, C., in Countess of Shrewsbury v. Earl of Shrewsbury, 1 Ves. jun. 227, 233, and the case at large; S. C., 3 Bro. C. C. 120, 125, 126; Kirkham v. Smith, 1 Ves. sen. 258, 260; Amesbury v. Brown, 1 Ves. sen. 477, 480, 481; Jones v. Morgan, 1 Bro. C. C. 206, 218; Ware v. Polhill, 11 Ves. 257, 274, &c.; St. Paul v. Lord Dudley, 15 Vesey, 167, 173; Redington v. Redington, 1 Ball & Beat. 131, 141; Earl of Buckinghamshire v. Hobart, 3 Swanst. 186, 199, 200.

This presumption, like any other, may in various ways be repelled. Per Lord Eldon, C., in St. Paul v. Viscount Dudley, 15 Ves. 173; Jones v. Morgan, 1 Bro. C. C. 206; Lady Shrewsbury v. Lord Shrewsbury, 3 Bro. C. C. 126; Redington v. Redington, 1 Ball & Beat. 143; Windham v. Lord Egremont, Ambl. 753; Kirkham v. Smith, 1 Ves. sen. 258, 260; Amesbury v. Brown, 1 Vesey, sen. 480; Earl of Buckinghamshire v. Hobart, 3 Swanst. 186, 199, 200; Forbes v. Moffat, 18 Vesey, sen. 384. And see Gardner v. Astor, 3 John. Ch. Rep. 53, 55.

The modern cases have arisen mainly upon mortgage transactions. Thus, where the equity of redemption was devised to the mortgagee, it was held that this union of estates should extinguish the mortgage, if that result would be indifferent to the devisee; otherwise if he had an interest to keep it on foot; and so of other like cases. Forbes v. Moffat, 18 Ves. 384; Gibson v. Crehore, 5 Pick. 146; Freeman v. Paul, 3 Greenl. 260; Starr v. Ellis, 6 John. Ch. Rep. 393; Mills v. Comstock, 5 Id. 214; Lockwood v. Sturdevant, 6 Conn. Rep. 372. *Prima facie*, it is an extinguishment; and the one who pays must show that his interest was to have the mortgage kept on foot. Gardner v. Astor, 3 John. Ch. Rep. 53, 55; Burnet v. Denniston, 5 Id. 35; Starr v. Ellis, 6 Id. 393. Thus, where one owning the equity of redemption in fee, pays off a mortgage in which the mortgagor's wife joined, and which payment, if allowed to operate as an extinguishment, would let in her dower against the owner, discharged from the mortgage, the latter shall be taken as still subsisting. Gibson v. Crehore, 3 Pick. 475; S. C. per Wilde, J., 5 Pick. 146. And this would be so, though the owner not only pay, but take a release from the mortgagee. Caril v. Butman, 7 Greenl. 102; Thompson v. Chandler, Id. 377. So where the mortgagee took a deed with warranty from the mortgagor, the former was still allowed the benefit of his mortgage, as against a previous attaching creditor of the mortgagor. Myers v. Brownell, D. Chip. Rep. 448. So of the covenants of title in the mortgage. Lockwood v. Sturdevant, 6 Conn. Rep. 373, 388. And though he take a release of the equity of redemption on his prior mortgage, and discharge the debt, this shall not let in a subsequent mortgage. Baldwin v. Norton, 2 Conn. Rep. 161. But in such a case, the proof of an interest or intent at the time to keep the mortgage on foot, should be clear and precise. Burnet v. Denniston 5 John. Ch. Rep. 35. Where the intention is declared by the deed, to consider the mortgage paid, this shall conclude. Wade v. Howard, 6 Pick. 492. Whether considerations of interest prevail or not, all the cases agree that the intent may be declared at the time, or deduced from various circumstances. James v. Johnson, 6 John.

Ch. Rep. 417. And this doctrine will be found to have been very fully examined in the last cited case, when it came to be reviewed in the Court of Errors, where it appears by the title of James v. Morey, 2 Cowen's Rep. 246. See the remarks and quotations of the learned judges, at pp. 285 to 287, 303, 304, 313, and 318.

Upon the same principle, long acquiescence by one in the adverse enjoyment of a right by another, leads to an inference that the former has parted with it in a legal form; and, in time, may lead to the presumption of the necessary instruments of assurance, or of the requisites to make existing assurances valid against him. So of the extinction and satisfaction of demands, and the sanctioning of secondary evidence. See per Robertson, J., in Fitzhugh v. Croghan, 2 J. J. Marsh. 435 to 437, and Bigger's Adm'r v. Alderson, 1 Munf. 54, 60. But this principle will be illustrated by our subsequent notes on presumptive evidence of grants, payments, extinction, &c.

Upon the same principle, it is presumed that a man has adopted or accepted an advantageous act, offer, gift, bequest, devise or conveyance, &c., until his positive disclaimer or refusal is shown. Per Bayley and Littledale, J's, in Bailey v. Culverwell, 8 Barnw. & Cressw. 448; Doe ex dem. Marston v. Butler, 3 Wend. 149; Camp v. Camp, 5 Conn. Rep. 291; Townsend v. Tickell, 3 Barnw. & Ald. 31, and the cases there cited, particularly Thompson v. Leach, 2 Salkeld, 618. See also Nicolson v. Wordsworth, 2 Swanst. 365, 372; Adams v. Taunton, 5 Madd. Rep. 435; and 2 Prest. on Abstracts, 226, *et seq.* This rule has, of late, mainly been applied to the presumed acceptance by creditors of their debtor's assignment, in trust for their payment, where the assignment requires no release or other disadvantageous terms (Nicoll v. Mumford, 4 John. Ch. Rep. 522, 529; Halsey v. Fairbanks, 4 Mason, 206. And see Brooks v. Marbury, 11 Wheat. 78; and M'Allister v. Marshall, 6 Binn. 338); or to the assent of the assignees or trustees. Wilt v. Franklin, 1 Binn. 502. And see Lippincott v. Barker, 2 Binney, 174; Shepherd v. M'Evers, 4 John. Ch. Rep. 136; Nelson v. Blight, 1 John. Cas. 205; Weston v. Barker, 12 John. Rep. 276; and Cumberland v. Codrington, 3 John. Ch. Rep. 229, 261. But the doctrine of presumed assent in these particular cases is received, if at all, with great caution in Massachusetts, where, to warrant it, the benefit must appear to be decided and unequivocal. Russell v. Woodward, 10 Pick. 408, and the cases there cited. The Supreme Court of that state, however, applied the principle very strongly in another case, where they presumed the assent of a widow to a testamentary provision in lieu of dower, it appearing decidedly advantageous. Merril v. Emery, 10 Pick. 507, 510. In England, it has lately been held that one shall be presumed to have adopted an advantageous act done by another as his assumed agent. Per Bayley and Littledale, J's, in Bailey v. Culverwell, 8 Barnw. & Cressw. 448.

12. Other presumptions arise from the nature and general incidents of property. To the ownership of lands, certain rights and privileges are annexed *de communi jure;* though not so inseparably but that they may be disannexed, and vested in another. Thus the lord of the manor owns the soil of common right; and on his being proved lord of the manor, his ownership of the soil is intended; and it lies with the opposite side to show that any part belongs to another. Co. Litt. 261 a, note 1, in Harg. & Butl. ed. So the different land holders of a manor have, *prima facie*, a right of common on the lord's waste; and the owner of the surface of the land, to the minerals or inferior strata; the possessor of a several fishery to the ground covered with water (Co. Litt. 122 a, note 7, Harg. & Butl. ed.; Lofft, 364, title Separate Fishery; Partheriche v. Mason, 2 Chitt. Rep. 658); and of various other incidental rights, which see enumerated in 3 Ridgw. Irish P. C. 323, *et seq.;* the lord to the soil of the highway running over the waste of his manor (Lofft, 358; 1 Roll. Abr. 392, 1, 5; *post*, Vol. II, and the cases there cited); and the owner of inclosed land, to the waste intervening between that and the highway. Pring v. Pearcy, 7 Barn. & Cress. 304. So, where a road passes between the land of A. and B., *prima facie*, each owns the soil thereof, *usque ad filem viæ*. Lofft, 359; per Gibbs, Ch. J., in Grose v. West, 7 Taunt. 41; Watrous v. Southworth, 5 Conn. Rep. 305; Cook v. Green, 11 Price, 736; *Post*, Vol. II. And see per Bayley, J., in Noye v. Reed, 1 Mann. & Ryl. 65; 3 Kent's Comm. 432, 433, and cases there cited. So two proprietors on opposite sides of a river not navigable, that is to say, above the ebb and flow of the tide, own *usque filum aquæ;* and the proprietor of both sides owns the whole. Ex parte Jennings, 6 Cowen's Rep. 518, 536, *et seq.* note *a*, and the authorities there cited; 3 Kent's Comm. 427, *et seq.* (2d ed.), and the authorities there cited; to which add 2 Dane's Abr. 692, § 13; Waters v. Lilly, 4 Pick. 145; Commonwealth v. Chapin,

5 Pick. 199; per Lord Tenterden, Ch. J., in Mason v. Hill, 3 Barnw. & Adolph. 76; Fleming v. Kenney, 4 J. J. Marsh. 158; and Scott v. Wilson, 3 N. H. Rep. 321, 325.

As before remarked, these incidental or presumptive rights are not inseparable. The presumption may, therefore, be rebutted. 1 Rol. Abr. 401; 16 Ves. 390; Co. Litt. 122 a, note of Hargr. & Butl.; Lade v. Shepherd, 2 Str. 1004; Grose v. West, 7 Taunt. 39. Thus the presumption that the right of minerals accompanies the fee, may be rebutted by showing a user by others. Rowe v. Grenfel, Ry. & Mood. N. P. Cas. 396.

13. Other presumptions are founded on the dictates of prudence and discretion; as that regular and ordinary means are adopted for a given end. Hence, where the means calculated to attain a certain end appear to have been adopted, or the end itself appears to have been attained, a technical and particular completion in the one case, or all the ordinary previous steps in the other, need not be proved, but will be presumed; especially if the absence of particular proof be accounted for. Thus proof of sealing and delivery without the signing of a deed, the usual place on the deed for this being mutilated, would doubtless warrant the presumption that the deed was signed. So if the deed be lost. So where the attestation says only "sealed and delivered," in a case where you are put to proof of the subscribing witness's handwriting; or where there is no attesting witness; but you prove the parties' hand to a paper sealed, with the usual attestation, "sealed and delivered," the paper being in your hands and for your benefit; or in the ordinary case of establishing a contract by simply proving the signature to be in the handwriting of the party to be charged. In all these cases something is wanting in the direct proof; the handwriting in one case, the sealing in another, the delivery in another, yet the facts which are proved lead irresistibly to the presumption that the other acts requisite to give validity to the instrument were, in truth, done, and the law applies the maxim, *omnia præsumuntur recte solleniter esse acta, donec probetur in contrarium.* See 12 Wheat. 70. This is a maxim of extensive application in the law of presumptive evidence; and where direct proof is beyond the party's reach, or in cases where it is not reasonably to be expected, comes in aid of numerous defects. M'Queen v. Farquhar, 11 Ves. 467, 477, 478; Burrowes v. Lock, 10 Ves. 470, 473; Pigot v. Holloway, 1 Binn. 436; Rex v. Catesby, 2 Barnw. & Cressw. 814; Den ex dem. Gaston v. Mason, Coxe's Rep. 10; Curtis v. Hall, 1 South. Rep. 148; Newbold v. Lamb, 2 South. Rep. 449; Churchill v. Speight's Ex'rs, 2 Hayw. 338; Rex v. Inh. of Whitchurch, 7 Barnw. & Cressw. 573. Where the bargain and sale for a year, and the release bear date the same day, the former will be presumed to have been first executed, this course having been necessary to give them validity as a conveyance. And so of any other and like modes of conveyance. See per Lord Keeper North, in Barker v. Keate, 1 Freem. 251; and per Lord Mansfield, in Taylor ex dem. Atkyns v. Horde, 1 Burr. 106, 107. So where a witness attested only the last sheet of a will, all the sheets were presumed to have been in the room. Bond v. Seawell, 3 Burr. 1773; S. C., 1 Bl. Rep. 407. Or if all the witnesses be dead, a regular execution is intended from proof of their handwriting. Hands v. James, 4 Conn. Rep. 531; Brice v. Smith, Willes, 1; Croft v. Pawlet, 2 Str. 1109. So a deed shall be presumed to have been delivered on the day of its date. Breckenridges v. Todd, 3 Monroe, 54, 55; Shep. Touch. 72. And having a seal at the trial, will be presumed to have had one when delivered, though the subscribing witness remember no seal. Ball v. Taylor, 1 Carr. & Payne, 417. A patent from the state will be presumed to have borne the great seal, though the exemplification be marked "L. S." only. Williams v. Sheldon, 10 Wend 654. And after a few years' possession and exercise of corporate rights by an ecclesiastical corporation, formed under the New York statute, it will be presumed that the proper officer (*e. g.* the rector), was present at the formation, though the certificate of the proceedings omit to mention that circumstance. All Saints Church v. Lovett, 1 Hall's Rep. N. Y. S. C. 191. So a judicial confirmation of a sale made under a decree, by a trustee, was presumed. Shilknecht v. Eastburn's Heirs, 2 Gill & John. 114. A contract by A. to work for B.; and another bearing the same date, and having the same subscribing witness, by which B. promised to pay A. a certain sum in a certain way, were intended the one to form the consideration of the other. Aldridge v. Birney, 7 Monroe, 344, 347.

It has been a matter of much litigation, how far this maxim *omnia præsumuntur rite esse acta*, shall prevail in establishing the jurisdiction of a court or magistrate. In England it is not admissible as to the *facts* which constitute a special and limited jurisdiction. Per Holroyd, J., in Rex v. All Saints, 1 Mann. & Ryl. 668, and the cases there cited. Though it is otherwise of courts

having general jurisdiction. Id. In the former case, in order that the party may avail himself of the proceeding, he must not only plead, but prove the facts which go to the question of jurisdiction. Id. And see Rudd v. Johnson, 5 Litt. Rep. 19; also stated *supra*, pl. 9 of this note. But in Massachusetts, there appearing on the files of the Probate Court a record of assignment of dower regular on its face, the Supreme Court intended that a regular application by the widow was made, or her assent given for that purpose. Tilson v. Thompson, 10 Pick. 359, 363. And in Pennsylvania the maxim was expressly applied to support the summary proof of a will in the County Court of Virginia; the court saying, "To the act of the County Court in holding jurisdiction of the subject of probate, the maxim *omnia*, &c., is as applicable as to the judicial proceedings of our own state." Ripple v. Ripple, 1 Rawle, 386, 389. In New York, as to these foreign proceedings, which are unknown to the common law, the two latest and prominent cases appear to conflict. The first was the case of a New Jersey attachment of a vessel by a material man; which was sustained on the presumption that the law of that state warranted the proceeding. The Stamford Steamboat Co. v. Gibbons, 9 Wend. 327, 331. The other respected a specific delivery of real estate under an execution, in satisfaction of a judgment of Vermont; a very common proceeding in New England, which was placed by the Supreme Court upon the ground of a strictly foreign proceeding unknown to the common law, jurisdiction of which must be shown by pleading the local statute, and proving it. Holmes v. Broughton, 10 Wend. 75. But by this and several other cases, it agreed that upon a common-law question, that law shall be presumed to prevail in a neighboring state until the contrary be shown. Walker v. Maxwell, 1 Mass. Rep. 103; Legg v. Legg, 8 Mass. Rep. 99. This subject, however, belongs more properly to the future head which treats of the mode of proving domestic and foreign judgments and other judicial proceedings.

15. Other presumptions are referable to the policy of the law. An instance under this head is the presumption in favor of cross remainders when the land is devised between two persons as tenants in common in tail, and the contrary when between more than two. 2 Bl. Com. 381. This rule is of course confined to devisees, and is subject to various modifications and exceptions arising from the particular language of the will. See Pery v. White, Cowp. 777; Phipard v. Mansfield, Cowp. 797, 800; Doe ex dem. Burden v. Burville, 2 East, 47, 48, note; Holmes v. Meynel, T. Jones, 172; S. C., T. Raym. 452, 455; 2 Roll. Rep. 281; 1 Wms. Saund. 185, a, note 6; Atherton v. Pye, 4 T. R. 710, 713; Cooper v. Jones, 3 Barn. & Ald. 425, 429; Staunton v. Peck, 2 Cox's C. C. 8; Watson v. Foxon, 2 East, 36, 40; Roe v. Clayton, 6 East, 628; Doe ex dem. Gorges v. Webb, 1 Taunt. 234; Green v. Stephens, 17 Ves. 64; Comber v. Hill, 2 Str. 969; Davenport v. Oldis, 1 Atk. 579; Dyer v. Dyer, 19 Ves. 612; S. C., 1 Meriv. 214; and Jones v. Randall, 1 Jac. & Walk. 100.

Again: the presumption is, that money borrowed by the husband, on the security of the wife's real estate, is appropriated solely by him, the money being under his absolute control, in virtue of the power conferred by the marital right. Earl of Kinnoul v. Money, 3 Swanst. 208, note. Hence, she and her personal representative have a right, in equity, to demand of him and his representatives, that his estate shall be first applied in discharge of the incumbrance, so as to relieve her estate. Neimcewicz v. Gahn, 3 Paige, 614; S. C., 11 Wendell, 312; Tate v. Austin, 1 P. Wms. 264; Lord Huntingdon's Case, 2 Vern. 437; per Lord Hardwicke, in Astley v. Earl Tankerville, 3 Bro. C. C. 545; Earl of Kinnoul v. Money, 3 Swanst. 208, note *a*. And see Pococke v. Lee, 2 Vern. 604; and Clinton v. Hooper, 1 Ves. jun. 173. This, however, being but an equity, may be rebutted by another equity, which may be set up by parol proof. Per Lord Hardwicke, in Earl of Kinnoul v. Money, 3 Swanst. 202, 208, note *a*. As if the money were raised to pay off her debts due *dum sola* (Lewis v. Nangle, Ambl. 150; S. C., 2 P. Wms. 664, note; Earl of Kinnoul v. Money, 3 Swanst. 202, note; Bagot v. Oughton, 1 P. Wms. 347); or for her private use (see per Lord Thurlow, in Clinton v. Hooper, 1 Ves. jun. 188); even though she should afterwards make a present of the money to him. *Semb.* per Lord Thurlow, in Clinton v. Hooper, 1 Ves. jun. 188. And so, in general, where the money is raised partly for the use of each. Lewis v. Nangle, Ambl. 150.

16. In some cases, the mere want of presumption on the one side is a sufficient presumption in favor of the other; for wherever the nature of a subject leaves it perfectly indifferent whether a given fact does or does not exist, the party who founds his claim or his defence upon the existence of it, must remove that indifference; and the opposite party may rely upon the single argument

est presumption is of the nature of probability; and there are almost infinite shades, from the lightest probability to the highest moral certainty.(1) If the circumstantial evidence be such as to afford a fair and reasonable presumption of the fact to be tried, it is to be received and left to the consideration of the jury, to whom alone it belongs to determine upon the precise force and effect of the circumstances proved, and whether they are

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that nothing appears in opposition to him; and that *de non apparentibus et non existentibus eadem est ratio.* 2 Ev. Poth. 329, No. 16, § 14.

17. Where the existence of one fact so necessarily and absolutely induces the supposition of another, that if the one is true the other cannot be false, as where *connection* is inferred from *pregnancy*, the term presumption cannot be legitimately applied; for the nature of presumption is, that it does not require to be substantiated, but that it may be defeated by positive contradiction, according to the maxim *stabitur presumptioni donec probetur in contrarium. Vid.* Lofft's Gilb. 303. The distinction between presumption and proof is, that the one may be false, but until shown to be so, must be regarded as true; that the other (the facts upon which it is founded being admitted) cannot be otherwise than true. 2 Ev. Poth. 329, No. 16, § 14.

(1) NOTE 178.—The civil law speaks of *strong presumptions* and *conjectures;* and again of *signs, conjectures* and *presumptions* (1 Dom. b. 3, tit. 6, § 4, art. 2 and 3); and some writers have attempted a still more certain division as to the force and effect of presumptive proof. Thus, in Co. Litt. 6 b, and Lofft's Gilbert, 303, we find a division into, 1. *violent*, 2. *merely probable*, and 3. *weak and inconclusive presumptions.* The latter, it is there said, are light and rash, and weigh nothing in judicial consideration. An instance of the first is put of a man suddenly dead in a room, and another running out in haste with a bloody sword, no other person being in the room. This is a violent presumption that he is the murderer, for the blood, the weapon, the hasty flight, are all necessary concomitants to such a horrid fact. Lofft's Gilb. 310, and the authorities there cited. So, continual and quiet possession to prove a deed. Co. Litt. 6 b. Probable presumption, it is said, weighs but little. Co. Litt. 6 b. And the third class not at all. Lofft's Gilb. 303; Co. Litt. 6 b. It is evident that all those numerous presumptions which stand for proof till overturned, are of the first class. Of the second class, the books give us very few instances. But it would seem to embrace all those circumstantial proofs, the effect of which is not reducible to rules, and must, therefore, go to a jury in order to be weighed upon the force of the circumstances. And this seems to be more properly denominated circumstantial evidence, of which a late writer has made a head distinct from presumptive evidence. 3 Stark. Ev. 478. Instead, however, of *moving but little* in the language of Lord Coke, it is now allowed, in many instances, to be the most satisfactory species of proof, whether in criminal or civil cases. Per Washington, J., in United States v. Johns, 1 Wash. C. C. Rep. 372; 3 Stark. Ev. 479. It is in its own nature capable of producing the highest degree of moral certainty. 3 Stark. Ev. 479, 480. And see the next note. The third class seems to be the mere *conjecture* of the civil law. As if one has threatened another with death, who is shortly after found dead by violence. Without other proof, a conviction cannot follow. 1 Dom. b. 3, tit. 6, § 4, art. 4. So of a tutor (guardian) who begins his office without any estate of his own; but in the course of his administration becomes rich. The ward cannot infer from this that the tutor has enriched himself by despoiling the trust estate, if the account be otherwise true. For the tutor may have acquired his goods in many other ways. 1 Dom. b. 3, tit. 6, § 4, art. 12; 2 Ev. Poth. 345, No. 16, § 14; Id. 338; Goodtitle v. Duke of Chandos, 2 Burr. 1065. Yet, "the degrees of probability are very extensive; and a considerable latitude must be allowed to the judgment, applied to the circumstances of each particular question, which, as it cannot be previously defined, is from its very nature, subject to be affected by the variety of individual setiments." 2 Ev. Poth. 339, No. 16, § 14. See Hart v. Newland, 3 Hawks, 122, 123. That a man had conspired to commit a murder afterwards perpetrated, was holden not enough upon which to presume his participation. Otherwise, where he, after so conspiring, was present. In such case, he shall be presumed a participant, unless he show that he was present for an innocent purpose. Commonwealth v. Knapp, 9 Pick. 496.

sufficiently satisfactory and convincing to warrant them in finding the fact in issue.(1)

Presumptive evidence must obviously be as admissible in criminal prosecutions as in civil cases; for whether the proceeding be of a civil or criminal nature, the modes of reasoning, and of drawing conclusions from facts, must necessarily be the same. When direct evidence of facts cannot be supplied, as must continually happen in some of the worst species of crimes, reasonable minds will necessarily form their judgment on circumstances, and act on the probabilities of the case. "As mathematical or absolute certainty,"(2) to use the words of Lord Mansfield in the Douglas

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(1) 2 H. Bl. 297.

NOTE 179.—This is what the civil law means by the discretion of the judge. "Thus when one thing is signified by another, we presume the truth of that which is signified, by the certainty of that which signifies it. And it is out of these different principles that signs, conjectures and presumptions are formed; concerning which there can be no certain rules laid down; but in every case it must depend on the prudence of the judge, to discern whether the presumption be well or ill grounded, and what effect it may have to serve as a proof." 1 Dom. b. 3, tit. 6, § 4, art. 3.

Yet this is a discretion governed, in respect to many things, by rules, as will appear throughout the doctrine of presumptive evidence. "And it is on the prudence of the judge that the use and application of these rules depend, according to the quality of the facts and the circumstances." 1 Dom. b. 3, tit. 6, § 4, art. 3.

"What circumstances will amount to proof, can never be matter of general definition. The legal test is the sufficiency of the evidence to satisfy the understanding and conscience of the jury. On the one hand, absolute, metaphysical and demonstrative certainty, is not essential to proof by circumstances. It is sufficient if they produce moral certainty, to the exclusion of every reasonable doubt. Even direct and positive testimony does not afford grounds of belief of a higher and superior nature." 3 Stark. Ev. 514, and see *post.*

A juror ought not to condemn till reasonable doubt of guilt is excluded from his mind; that is to say, unless he be so convinced by the evidence that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest. And in no case, as it seems, ought the force of circumstantial evidence where it is adequate to conviction, to be inferior to that which is derived from the testimony of a single witness, the lowest degree of direct evidence. 3 Stark. Ev. 514, and see *post.*

"The rule, even in a capital case is, that should the circumstances be sufficient to convince the mind and remove every rational doubt, the jury is bound to place as much reliance on such circumstances as on direct and positive proof; for facts and circumstances cannot lie." Per Livingston, J., U. S. C. C., New York, Sept. 1817, in Jacobson's Case, 2 C. H. Record, 143. And see Judge Washington's observations to the like effect in United States v. Johns, 1 Wash. C. C. Rep. 372.

No court has a right to direct a jury to disregard presumptive proof, or to view it under a different aspect from that in which it is actually presented. They are to decide on its proper influence, and on the order and manner in which they weigh it; and any interference with this right would be an invasion of their privilege. Crane v. Astor, 6 Pet. 598.

But presumptive or circumstantial proof of which the jury are the exclusive judges, should be carefully distinguished from what the law calls *prima facie* evidence. The latter is, *in judgment of law*, sufficient to establish the fact; and if not rebutted, remains sufficient. And, therefore, if the jury disregard it, their verdict may be set aside. Kelly v. Jackson ex dem. Morris, 6 Pet. 622, 631, 632.

(2) Cited in Andrew Stuart's Third Letter to Lord Mansfield. And see 16 Parl. Hist. 518—532.

Cause, "is seldom to be attained in human affairs, reason and public utility require that judges, and all mankind, in forming their opinion of the truth of facts, should be regulated by the superior number of probabilities on the one side or the other, whether the amount of these probabilities be expressed in words and arguments, or by figures and numbers." The principal difference to be remarked between civil and criminal cases with reference to the modes of proof by direct or circumstantial evidence, is, that in the former, where civil rights are ascertained, a less degree of probability may be safely adopted as a ground of judgment, than in the latter case, which affects life and liberty. In criminal prosecutions, it has been observed, the circumstantial evidence should be such as to produce nearly the same degree of certainty as that which arises from direct testimony, and to exclude a rational probability of innocence.(1) Doubtless the circumstances ought to be of such a nature as not to be reasonably accounted for on the supposition of the prisoner's innocence, but perfectly reconcilable with the supposition of the prisoner's guilt.(2)

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(1) Burnet on the Criminal Law of Scotland, p. 523. See also the masterly summing up of the lord chief justice in the Court of King's Bench in Ireland, on the trial of Graham, Forbes, and others, for a conspiracy. Printed report, p. 350.

(2) NOTE 180.—Various other rules for determining the weight and effect of this kind of testimony, occur in the books.

Each of the circumstances essential to the conclusion should be fully established, in the same manner and to the same extent as if the whole issue rested upon it. The proof is more cogent where the circumstances are numerous, and derived from many different and independent sources, than where they are few and depend on the credit of one or two. Where they all rest on a single witness, the question is both whether he be faith-worthy, and if so, whether the inference be correct; thus frequently reducing the evidence below the lowest degree of direct proof. The number of circumstances stated by the witness does not add to the force of his testimony, unless they admit of contradiction if false. But the number of circumstances, coming from different sources, repel the suspicion of fraud; and a hypothesis which consists with and reconciles many circumstances, is more likely to be true than one which depends on but few. The simulation or fabrication of facts intended by a party to break the chain of circumstantial proof, are exposed to great danger of detection. 3 Starkie's Ev. 502 to 506.

"The force and tendency of circumstantial evidence to produce conviction and belief, depend also on a consideration of the coincidence of circumstances with the fact inferred, that is, with the *hypothesis;* and the adequacy of such coincidences to exclude every other hypothesis." Plunket's Case, 3 C. H. Rec. 137; 3 Stark. Ev. 481; Atwood's Case, 4 C. H. Rec. 91. The facts must not only be consistent with the hypothesis—for this leaves it indifferent whether the hypothesis be true or false; neither is a preponderance of probability enough to make a presumption—but a presumption can only be applied when the circumstances are such as to render the opposite hypothesis improbable. 3 Stark. Ev. 506 to 510; 2 Ev. Poth. 339, No. 16, § 14. If the latter be rendered exceedingly remote and improbable, and morally, though not absolutely impossible, the hypothesis is established as morally true. 3 Stark. Ev. 483, 509. That A. entered a room whence a watch was found gone on his departure, no agent but A. in the interval having access, would demonstratively exclude the supposition of the removal by another, and be conclusive against A. 3 Stark. Ev. 483. And see the instance of death and the bloody sword, *ante*, note 178. So the nature and degree of coincidence may often exclude reasonable doubt, and generate full moral conviction and belief, though it be not of an absolute and demonstrative nature. The probability of the hypothesis is proportioned to the nature, extent and number of the coincidences. 3 Stark. Ev. 483. In the case of A. being found in possession of stolen goods

recently after the larceny of them; and refusing to render any account of them, although the coincidences with the hypothesis of his being the thief be but two, viz: his *possession* and *omission* to account for it, yet the latter excludes the supposition of an honest intention. 3 Stark. Ev. 483, note *y*.

These connections or coincidences are of a natural or mechanical character, being objects of sense; or of a moral nature. An instance of the first class are proximity in point of time and space; and other circumstances showing means and opportunity. So the possession of the stolen goods in case of a robbery, burglary or larceny; or, in cases of homicide, stains of blood upon the person, possession of deadly weapons recently used, and marks of conflict and violence. So, in burglary, the broken blade of a penknife by which the window was opened being left in the wood, and found to correspond with a broken knife in the prisoner's pocket. So, again, of homicide, by a pistol shot, the wadding being part of a letter belonging to the prisoner, and found upon his person. So, of a correspondence between a patch on the prisoner's knee with impressions on the soil near where the murdered body lay. So, where the prisoner was struck on the face by the party robbed, with a key, the wards of which corresponded with an impression on his face, and the like. 3 Stark. Ev. 485 to 487 and 501, note. So, in a case of larceny, of the perfect coincidence of severed threads, between cloth found in possession of a prisoner, and cloth in a loom from which it had been cut. 3 Stark. Ev. 497, note *o*. In a recent case of arson, where a fire was discovered and extinguished in a grocer's cellar window, beneath another building, the crime being charged on the grocer, it was found that one of the pine splinters used to kindle the fire, fitted exactly to a larger pine stick lying in another room of the prisoner's cellar, and to which stick another splinter lying by his stove fitted in the same way. People v. Gilchrist, Montgomery Oyer and Terminer, November, 1831, before Cowen, Circ. Judge, MS.

Again: certain laws of moral conduct are said to operate almost as uniformly as the mechanical laws of the material world, thus affording us certain axioms in the theory of evidence. 3 Stark. Ev. 487.

One is, that a man will do that which is for his obvious advantage. Thus, if a party be pressed by circumstantial proof, having it obviously in his power to destroy its apparent force, if unfounded by testimony on his own side, but he omit to do so, the very omission supplies a presumption against him (3 Stark. Ev. 487, 488); or, as it is expressed by another writer, "Imperfect proofs of which the accused, if innocent, might clear himself, become perfect." Beccaria, ch. 14. And see 2 Ev. Poth. No. 16, § 14, p. 340; per Livingston, J., in Jacobson's Case, U. S. C. C., Sept. 1817, 2 Cit. H. Rec. 143. This is the main foundation for calling on the possessor of property recently stolen, to account for the manner in which he came by it. In case of a very recent larceny, this is always supposed to be easy. So of marks of blood and violence on the dress and person of the accused, the possession of concealed weapons and the like; if he omit to explain the cause, he subjects himself to the worst construction. 3 Stark. Ev. 487, 488. And yet, if it appear that the only explanatory testimony is of a suspicious character, as that the witness whose absence is insisted on be interested in the question against him, this takes away the force of the presumption. Blatch v. Archer, Cowp. 65, per Ld. Mansfield.

So, if a party having conclusive evidence in his power, resort to weaker proof, as where the lessors of the plaintiff said they had a deed in court to one of them, but gave oral evidence of it and would not produce it; Lord Mansfield said he would intend that if they had produced the deed, it would have shown that neither of them had any title. Roe v. Harvey, 4 Burr. 2484, 2487. Again: *omnia presumuntur contra spoliatorem. Vid. ante*, note 177. So of the fabrication or corruption of evidence, as the forgery of letters, subornation of perjury, &c. 2 Ev. Poth. 337, and note *a* there, No. 16, § 14; 3 Stark. Ev. 490, 491; 1 Macnally, 580; Lofft's Gilb. 898.

From the moral connection between conduct and motive, jurors are often enabled to infer motives from acts, and *e converso*. Although, in criminal cases, mere motive is very inconclusive in establishing the *corpus delicti*, yet, that being established *aliunde*, the motive becomes fair matter of consideration. 2 C. H. Rec. 143, per Livingston, J. So, the total absence of apparent motive must always operate strongly as a circumstance in favor of the accused; *a fortiori* where he had motives adverse to the commission of the imputed crime. In a case of conflicting motives, as of infanticide, where natural feeling opposes the desire to avoid detection and shame, the former are entitled to high consideration. 3 Starkie's Ev. 491, 492, and note *n*. So, presumptions of great importance may arise out of a connection between the acts of a party and his intentions

consciousness and knowledge. He must be taken to intend the natural and immediate consequences of his own acts. This rule is mainly applied in detecting intention and malice. 3 Stark. Ev. 492; 4 Id. 739, 740; 3 M. & S. 15, per Lord Ellenborough; 1 Hale's P. C. 298; East's P. C. 513, 514; 4 Starkie's Ev. 739, 906; Kelying, 126; Holt's Rep. 484; Cro. Car. 131; W. John. 198; 1 Hale's P. C. 454; Palm. 485; *Ante*, note 177.

So, we connect the conduct of the criminal with the supposition of his guilt; as his providing poison or instruments of violence in a secret manner, the subsequent concealment of them, attempts to divert the course of inquiry or prevent investigation, and other singular measures for security dictated by the restless anxiety of a mind conscious of guilt. 3 Stark. Ev. 492, 493.

A singular combination of both the above classes of circumstances was exhibited in How's Case, convicted of murder (before Rochester, Circ. Judge, Allegany Oyer and Terminer, February, 1824, 2 Wheel. Cr. Cas. 412); a summary of which circumstances are given Id. pages 411 and 412.

If any of the established circumstances be wholly repugnant to the hypothesis, it cannot be true, notwithstanding the degree and extent of coincidence in other respects. 3 Stark. Ev. 483, 505; 2 Ev. Poth. 340, No. 16, § 14. Yet, when a series of facts distinctly and unequivocally proved, manifestly tends to one conclusion, and another fact is proposed in contradiction to that conclusion, the mere inability to account for such opposite fact is not sufficient to destroy the inference deduced from the others; but the positive inconsistency should be fully shown. So, where the facts to found a conclusion are fully proved, the opposite facts may not destroy the conclusion, where such facts are left to probability or inference, unless, indeed, they account for the facts in support of the conclusion, for a conclusion from certain facts is not sufficiently encountered by another from uncertain facts. 2 Ev. Poth. 341, 342, No. 16, § 14. And where facts, tending to a conclusion, agree in their leading features, a slight incidental inconsistency ought not to affect the case. Thus, where A., in company with B., had his pocket picked of *three* guineas, and B. boasted that he had picked A.'s pocket of *four*, the substance is that he picked A.'s pocket, and an accidental inaccuracy of A. or B. as to the number, would not weaken the case. 2 Ev. Poth. 342, No. 16, § 14, and note *a*. Sometimes circumstances may be so strong as to discredit positive proof to the contrary; *e. g.* proof of an *alibi*, which is rendered very suspicious by a powerful chain of circumstances going to establish the guilt of the accused. 2 Ev. Poth. 342, No. 16, § 14.

The force of concurring circumstances often depends upon the compound probabilities, both that the concurrence is not casual and that another hypothesis, unsupported by circumstances, is not true. Thus, where the concurring circumstances clearly point out the offender, this proof is strengthened by the total absence of any trace or vestige leading to another agent. 3 Stark. Ev. 494, 495.

We have before remarked, in this note, that circumstantial proof is not of a conclusive nature in respect to the hypothesis proposed, unless it also exclude every other inconsistent hypothesis. Thus, a man is robbed in the market of a purse containing one penny, two sixpences, three shillings, four half crowns, five crowns, six half sovereigns and seven sovereigns; and a person soon after apprehended in the same market is found in possession of the same remarkable combination of coin, and no other; yet this coincidence is *per se* of a definite and inconclusive nature (3 Stark. Ev. 497, note *o*), though there be a high probability of identity; and other slight circumstances might warrant conviction. Id. 501. So of the threat followed by death, and the estate acquired by the tutor, which are mentioned, *ante*, note 178. Now, although it seems to have been supposed by Beccaria (ch. 14), that such imperfect proofs may, by being multiplied, become perfect and conclusive; yet Mr. Starkie thinks it is generally otherwise in criminal cases. But he admits that the force of circumstances of a conclusive nature may be greatly confirmed by a combination with other independent circumstances, though the latter be, in themselves, of an imperfect and inconclusive nature. And he seems also to concede that cases may be put even in criminal cases, coming up to the combination of imperfect proofs mentioned by Beccaria. 1 Stark. Ev. 497 to 501, and note *o*.

The nature of the crime ought not at all to influence the measure of the proof, after the *corpus delicti* is established, that is, the commission of the crime, by some one. Till that is done, or where any doubt exists as to the *corpus delicti*, the proof should be the stronger in proportion to the enormity of the crime imputed; for the more repugnant it is to the feelings of human nature,

In some instances, undoubtedly, circumstantial evidence has been found to produce a much stronger assurance of the prisoner's guilt than could have been produced by the most direct and positive testimony. As a general principle, however, it is certainly true, that positive evidence of a fact from credible eye-witnesses is the most satisfactory that can be produced, and the universal feeling of mankind leans to this species of evidence in preference to that which is merely circumstantial. Chief Baron Gilbert, therefore, considers the former a higher species of proof. He says, "when the fact itself cannot be proved, that which comes nearest to the proof of the fact is the proof of the circumstances which necessarily or usually attend such facts, and which are called presumptions and not proofs, for they stand instead of the proofs of the fact until the contrary be proved."(1)

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the more improbable it is that it has been perpetrated at all. The perpetration being established, then the atrocity of the crime, *in the abstract*, raises no probability either for or against the accused, although under particular circumstances it may. 3 Stark. Ev. 480, note *s*, and see *post*. Thus, if the accused appear to be of fair character, and correct general deportment, the probability of great moral depravity is more slight in this case than in one of a different character and conduct. Other circumstances are continually occurring in our criminal courts, where the like argument is admitted. "In cases of wanton cruelty, the presumption is always against the accuser; for no man is cruel without some interest—without some motive of fear or hate. Beccaria, ch. 13.

The European continental writers on penal law adopt a different principle. "Behold their inhuman maxim dictated by the most cruel imbecility: *In atrocissimis, leviores conjecturæ sufficiunt, et licet judici jura transgredi.* Let us translate this sentence, that mankind may see one of the many unreasonable principles to which they are ignorantly subject. *In the most atrocious crimes, the slightest conjectures are sufficient; and the judge is allowed to exceed the limits of the law.*" Beccaria, ch. 13. Evans says considerable attention ought to be paid to the consequences of the decision, and to the effect of error as it may be committed on one side or the other; but this caution ought not to be suffered to degenerate into excessive timidity. 2 Ev. Poth. 339, No. 16, § 14.

(1) Gilb. Ev. 142.

NOTE 181.—And the probability that the inference rests upon sure grounds, is in general weakened by the number of circumstances *essential* to the proof; for the greater the number of such essential circumstances, the greater latitude for mistake or deception. 3 Stark. Ev. 496. And where an inference was to be drawn upon an inference, the Supreme Court of North Carolina said that the main fact was, therefore, inadmissible for irrelevancy. The case was deceit for selling a consumptive negro. The defence was, that he was a runaway; and while lurking in the plaintiff's neighborhood previous to the sale, the plaintiff's wife had relieved him with food, whence it was sought to infer, first, that she knew of the disease; and secondly, that the husband knew it, and so could not be deceived. The court denied the latter inference, even if her knowledge were established directly (see *ante*, note, 175), but mainly because an inference was sought to be raised upon an inference. Hart v. Newland, 3 Hawks, 122, 123, 124. The distinction is somewhat novel; and perhaps will hardly admit of anything like universal application.

If the facts, A. B. C. D. be so essential to the particular inference that the failure of any one would destroy the inference altogether, they are dependent facts. But if, notwithstanding the failure of one or more, the rest would still afford the same inference, they are independent. And where each of a number of independent circumstances, or combinations of circumstances, tends to the same conclusion, the probability of the truth of the fact is greatly increased in proportion to the number of those circumstances. 3 Stark. Ev. 495, 496; 2 Ev. Poth. 342, No. 16, § 14.

There are presumptions of law as well as presumptions of fact. Some presumptions of law are considered so strong and conclusive, as not to admit of contrary proof; but there are fewer instances of this strictness in the present day than formerly. That innocence is to be presumed, till the contrary is proved, may be called a presumption of law, founded on the universal principles of justice. That a child born during marriage shall be presumed to be legitimate, is another presumption of the same description. That grants and deeds are to be presumed in support of long undisturbed possession, is also a presumption in law, founded on principles of public policy and convenience.

Closely connected with the doctrine of presumptive evidence, or, perhaps, rather as introductory to it, may be considered those subjects of which the courts of law take what is termed judicial notice, and which are not required to be proved.

The consideration of these last-mentioned subjects will form the substance of the first section of the present chapter; the presumptions of ordinary occurrence, made by courts and juries, will be considered in the second section; in the third, the relevancy of this kind of evidence will be discussed with reference to the points in issue to which it ought to be directed; and the fourth section will be devoted to the question, how far the production of evidence is affected by the admissions of parties made in the course of the pleadings in a cause.

SECTION I.

Of Matters Judicially Noticed.

The principle upon which certain matters are judicially noticed, without any proof being required in respect to them, appears to be partly, that they are of such general and public notoriety that every subject of the realm may fairly be presumed to be acquainted with them; and partly, that the matters so noticed are generally quite collateral to, and unconnected with the point in issue, and are of such a kind that there is no risk in dispensing with the strict formal proof, whereas, in requiring it there might be great inconvenience, by reason of the expense, or the difficulties in procuring it.

Matters of government.

All public matters which affect the government of the country will

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If some facts tend to the conclusion, and others are ambiguous, the former may be used not only to maintain the conclusion, but give a corresponding exposition to the latter. And sometimes, if all the facts be equivocal, when taken separately, their union may lead to a clear and distinct conclusion, especially where this conclusion is unopposed by other facts. 2 Ev. Poth 343, No. 16, § 14.

be judicially recognized;(1) such as the time of the accession or demise of the sovereign, the correspondence of the year of any particular reign with the year of our Lord,(2) the prerogatives of the crown, and the privileges of the royal palaces.(3) In like manner, the courts will take judicial notice of the great and privy seals,(4) and also, as it appears, of the sign manual.(5)

The courts will also notice the *London Gazette*, without proof that it was bought at the queen's printers, or other proof of the place whence it came.(6)

It seems that judicial notice will be taken of royal proclamations as being acts of state;(7) but not of orders of council.(8)

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(1) See Taylor v. Barclay, 2 Sim. 221.

(2) Holman v. Burrow, 2 Ld. Raym. 791, 794; S. C., Salk. 658; Henry v. Cole, 2 Ld. Raym. 811; S. C., 7 Mod. 103; R. v. Pringle, 2 Mo. & R 276.

(3) Elderton's Case, 2 Ld. Raym. 978, 980; S. C., 3 Salk. 294. See also Winter v. Miles, 1 Camp. 475, n.; S. C., 10 East, 578; Attorney-General v. Donaldson, 10 M. & W. 117.

(4) See Lord Melville's Case, 29 How. St. Tr. 707; Y. B. 24, Ed. 3, 23, cit. 2 Sid. 146.

(5) R. v. Miller, 2 W. Bl. 797; S. C., 1 Lea. C. C. 74; R. v. Gully, 1 Lea. C. C. 98. See also Lord Melville's Case, 29 How. St. Tr. 706.

(6) R. v. Forsyth, R. & R. 274. *Vide post*, Vol. II, *Of public writings, not judicial.*

(7) Per Treby, C. J., in Wells v. Williams, 1 Ld. Raym. 283; S. C., 1 Salk. 46; Lutw. 35. See also per Holt, C. J., in Dupuys v. Shepherd, 12 Mod. 216; R. v. Oulton, 4 M. & S. 532.

It would appear from the marginal note to Van Omeron v. Dowick (2 Camp. 44), that a different doctrine had been laid down by Lord Ellenborough, C. J., in that case. The marginal note is as follows: "A judge at Nisi Prius will not take judicial notice of the king's proclamations." And this has been incorporated into most modern treatises. But upon examination it will be seen that this note is not borne out by the case itself. It was an action upon a policy of insurance against the owners of a ship, on a bill of lading, signed by their captain, for two cases of cutlasses to be carried from England to Surinam. One point of the defence set up was, that cutlasses were contraband of war, for the purpose of showing that the contract was illegal, and would not support an action. The report then states, "it turned out, that by 33 Geo. III, c. 2, the king is only authorized to prohibit the exportation of implements of war by proclamation; and the defendant not being prepared with the *Gazette* containing the proclamation for this purpose, the plaintiff had a verdict." The meaning of this seems to be—not that the judge would not take judicial notice of the proclamation—but merely that he required some evidence to satisfy his own mind as to the contents of the alleged proclamation. When it is said that the court will take judicial notice of any fact, the meaning is, that such facts need not be proved in the ordinary manner; in trials at law, for instance, it is not to be laid before the jury; but in all such cases the judge may require something in the nature of evidence to bring the fact under his immediate knowledge; as he may refer to the statute-book, to ascertain the enactments of any particular statute. In the case under consideration, all that Lord Ellenborough seems to have required was the production of the *Gazette*: yet it has just been seen, that of the *Gazette* itself judicial notice is taken. See also R. v. Withers, *infra*.

By the 8 & 9 Vict. c. 113, § 3, all copies of royal proclamations, purporting to be printed by the printers to the crown, shall be admitted as evidence thereof by all courts, &c., without any proof being given that such copies were so printed.

(The United States courts will take notice of the persons who preside over the different offices of government, such as the patent officer, so that their appointment to the office need not be shown in proving their official acts. York & Md. Line R. Co. v. Winans, 17 How. U. S. 30.)

(8) 6 Vin. Abr. 490; Att. Gen. v. Theakstone, 8 Pri. 89.

By the annual Mutiny Acts,(1), the articles of war, in the land and marine service, are required to be judicially noticed.(2) But this does not extend to the book called "Rules and Regulations for the Government of the Army."(3)

Upon the same principle, the courts will take judicial notice of the commencement of the sessions, prorogations, and dissolutions of Parliament, and of the place where any particular Parliament sat.(4) They will also notice the customs, privileges and proceedings of Parliament, and of each branch of the legislature;(5) but not the journals of either house, as not being records of Parliament.(6) Nor will they take judicial notice that a party to the cause is a member of the legislature—as in the Case of an Irish Peer.(7)

With reference also to foreign countries, the courts will take judicial cognizance of the existence of a foreign state, which has been recognized by our own government,(8) but not otherwise.(9)

They will also notice the existence of a war between our own country and another state, where such war has been recognized in acts of Parliament, or royal proclamations.(10) But the existence of a war between foreign states will not be so noticed.(11)

Public statutes.

In matters relating to the administration of the law, the judges are bound to take judicial notice of all public statutes, and of all facts therein

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(1) See 11 Vict. c. 11, § 1, and c. 15, § 1.

(2) But the court will require the production of a copy printed by the king's printer. R. v. Withers, 1 East P. C. 360; S. C., cit. by Buller, J., in R. v. Holt, 5 T. R. 446.

(3) Bradley v. Arthur, 4 B. & C. 292, 304.

(4) R. v. Wilde, 1 Lev. 296; S. C., 2 Keb. 686. See also 1 Doug. 97, n.; Birt v. Rothwell, 1 Lord Raym. 210, 343.

(5) Lake v. King, 1 Saund. 131 *a*; Astley v. Younge, 2 Burr. 811. See also Stockdale v. Hansard, 7 C. & P. 731; S. C., 9 A. & E. 1; Case of the Sheriff of Middlesex, 11 A. & E. 273; Cassidy v. Steuart, 2 M. & G. 437.

(6) R. v. Knollys, Lord Raym. 10, 15. See also Hob. 110, 111.

By the 8 & 9 Vict. c. 113, § 3, all copies of the Journals of either house of Parliament, purporting to be printed by the printers to either house, shall be admitted as evidence thereof by all courts, &c., without any proof being given that such copies were so printed.

(7) Nugent (Lord) v. Harecourt, 2 Dowl. P. C. 578. See also Hunter v. Deloraine (Lord), Lofft, 49.

(8) Taylor v. Barclay, 2 Sim. 221.

(9) Grierson v. Eyre, 9 Ves. 347. "The existence of unacknowledged states must be proved by evidence. The proof necessary to establish the fact of the existence of such states, is that they are associations formed for mutual defence, who acknowledge no other authority but that of their own government, observe the rules of justice to the subjects of other states, live generally under their own laws, and maintain their independence by their own force." Per Best, C. J., in Yrissari v. Clement, 3 Bing. 438; S. C., 2 C. & P. 223, 225. See also Donaldson v. Thompson, 1 Camp. 429; Blackburn v. Thompson, 2 Id. 66.

(10) R. v. De Berenger, 3 M. & S. 67; Dolder v. Huntingfield (Lord), 11 Ves. 292. See also Blackburn v. Thompson, *ut supra.*

(11) Dolder v. Huntingfield (Lord), *ut supra.*

recited.(1) They are also bound to take judicial notice of all common-law rights and duties, and of general customs,(2) such as the custom of merchants, where it has been incorporated with the law of the land;(3) the customs of gavelkind and borough English;(4) but not of any local customs, such as the customs of a particular manor,(5) or the customs of London, except such as have been certified by the recorder to either of the superior courts of record.(6)

They will also take notice that the common law of England extends to Ireland.(7)

The judges of the courts of common law, will officially notice the eccle-

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(1) Anon., Bull. N. P. 222; Burnand v. Nerot, 1 C. & P. 578. See also by Lord Ellenborough, C. J., in R. v. Sutton, 4 M. & S. 542.

Under the new Code of Virginia, her courts are required to take judicial notice of private or local statutes. Somerville v. Wimbish, 7 Gratt. 205. And in Iowa all acts of incorporation are declared public acts, to be judicially noticed (Dunham v. Daniels, 2 Greene, 518); and the courts are to take notice of the time when statutes take effect (Pierson v. Baird, 2 Greene (Iowa), 235); and of public surveys (Wright v. Phillips, 2 Id. 191); of the terms of court. Lindsay v. Williams, 17 Ala. 229. So in New York, courts take judicial notice of the Constitution of the United States, and of the laws enacted by Congress under it (Jack v. Martin, 12 Wend. 311; 14 Id. 507); and of the civil divisions of the state created by the constitution or by statute. People v. Breese, 7 Cowen, 429; Chapman v. Wilber, 6 Hill, 475.

(2) Co. Lit. 89 a.

(3) Soper v. Dible, Lord Raym. 175; Erskine v. Murray, Id. 1542; Carter v. Downish, Carth. 83; Williams v. Williams, Id. 269; Edie v. East India Company, 2 Burr. 1226; Barnett v. Brandao, 6 M. & G. 630; S. C., 3 C. B. 519; 12 Cl. & Fin. 787.

(4) Co. Lit. 175 b; Clements v. Scudamore, Lord Raym. 1024.

(5) 1 Rol. Rep. 106. See also Kingsmill v. Bull, 9 East, 185. It seems that judicial notice will not be taken of the forest laws. See 2 Leon. 209.

(6) Argyle v. Hunt, Stra. 187; S. C., Fort. 347; Blacquiere v. Hawkins, 1 Doug. 378; Bruin v. Knott, 12 Sim. 452; Piper v. Chappel, 14 M. & W. 624.

The following customs have at various times been certified by the recorder of London:—foreign attachments, 22 Edw. IV, 30, b; 1 Rol. Ab. 554, pl. 3, 4. See also Bruce v. Wait, 1 M. & G. 39; Crosby v. Hetherington, 4 M. & G. 933:—that every shop within the city is a market overt, 5 Rep. 83, b; S. C., Moore, 360; Poph. 84. See also Lyons v. De Pass, 9 C. & P. 68; S. C., 11 A. & E. 326:—that married women may be sole traders, Lavie v. Phillips, 3 Burr. 1776; and the custon that regulates the distribution of the property of an intestate freeman, Bruin v. Knott, 12 Sim. 452, 453.

The general custom known in England as the law of the road, viz: that horses and carriages should keep to the left side of the road, though it can hardly be said to have been judicially noticed, has been often recognized at Nisi Prius. See Leame v. Bray, 5 Esp. 18; S. C., 3 East, 593; Turley v. Thomas, 8 C. & P. 104. The contrary practice prevails in most of the continental countries of Europe.

(7) In re Nesbitt, 2 Dowl. & L. 529.

The courts of the United States take judicial notice of treaties with foreign governments, and of the public acts of such foreign governments carrying them into effect (U. States v. Reynes, 9 How. U. S. 127); and of the laws of the several states and territories which they are called upon to administer. U. States v. Turner, 11 How. U. S. 663; The Same v. Philadelphia and New Orleans, Id. 654; Jones v. Hays, 4 McLean, 521.

siastical,(1) civil,(2) and maritime(3) laws, at least so far as they have been acknowledged and acted upon by the proper tribunals of this country; the doctrines and jurisdiction of the courts of equity,(4) and the general practice of conveyancers.(5)

Proceedings of superior courts, &c.

Each court is bound to take notice of its own rules and course of proceeding,(6) the general customs of the superior courts of Westminster,(7) and the extent of their jurisdiction;(8) the privileges of attorneys,(9) and of other officers of the superior courts.(10) Each court will notice who are its own officers,(11) but not who are the officers of the other courts.(12) They are bound, also, by statute,(13) to notice the signature of any of the judges of the superior courts. But they will not judicially notice the time when an order was made by the judges under the 1 Vict. c. 55, allowing a scale of fees.(14) And a court will not notice a consent on a summons, unless followed, in due time, by an order drawn up and served.(15)

The superior courts will notice courts of general jurisdiction, and the course of their proceedings—as, the courts of the Counties Palatine, and of the great sessions in Wales,(16) (now abolished); also the limits

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(1) Bro. Abr. tit. *Quare Impedit*, pl. 12; 1 Roll. Abr. 526; 6 Vin. Ab. 496. See also Atkinson v. Cornish, Lord Raym. 338; S. C., Carth. 446; 5 Mod. 395; Comb. 475; 12 Mod. 194; Holt, 43.

(2) See R. v. Cambridge (University), Lord Raym. 1334.

(3) Chandler v. Grieves, 2 H. Bl. 606, n.

(4) Elliott v. Edwards, 3 B. & P. 181; Maberly v. Robbins, 5 Taunt. 625. See also In re Clarke (2 Q. B. 619), as to the recognition by the common-law courts of the jurisdiction of the master of the Rolls.

(5) By Lord Hardwicke, C. J., in Willoughby v. Willoughby, 1 T. R. 772. See also by Abbott, C. J., in Doe v. Hilder, 2 B. & A. 793; in Doe v. Plowman, 2 B. & Ad. 577; and in Rowe v. Grenfel, Ry. & M. 398; and by Lord Eldon, C., in Howard v. Duncan, 1 Turn. & R. 86.

(6) Dobson v. Bell, 2 Lev. 176; Hugh v. Robinson, 1 T. R. 118.

(7) Lane's Case, 2 Rep. 16, b; Wolrich v. Massey, Cro. Jac. 67; Mounson v. Bourn, Cro. Car. 518, 526. See also 6 Q. B. 780, 784.

(8) See by Alderson, B., in Doe d. Counsell v. Caperton, 9 C. & P. 116.

(9) By Lord Ellenborough, C. J., in Stokes v. Mason, 9 East, 426. See also Chatland v. Thornley, 12 East, 544; Hunter v. Neek, 3 M. & G. 181; Walford v. Fleetwood, 14 M. & W. 449.

(10) Ogle v. Norcliffe, Lord Raym. 869.

(11) Howell v. Wilkins, 7 B. & C. 783. See also Bland v. Drake, 1 Chitt. R. 165. In Molling v. Poland (3 M. & S. 157), Bayley, J., had refused to take judicial notice of the handwriting of any of the masters of the court.

(12) R. v. Hare, 13 East, 189.

(13) 8 & 9 Vict. c. 113, § 2. Even before this statute each court would recognize the signature of one of its own judges. R. v. Hare, *ut supra*.

(14) Pilkington v. Cooke, 17 L. J. (N. S.) Exch. 141.

(15) Wood v. Harding, 3 C. B. 968.

(16) Peacock v. Bell, 1 Saund. 76, a. See also Treganey v. Fletcher, Lord Raym. 154.

of Counties Palatine,(1) and of ecclesiastical jurisdiction with reference to granting administration of the effects of a deceased person.(2)

Proceedings of courts of different jurisdiction.

But it seems that no court is bound to take notice of the peculiar practice of another court which is of a different jurisdiction, and employs a foreign course of procedure; thus the common-law courts will not take judicial notice of the practice of the Court of Chancery,(3) or of the Courts of Review and Bankruptcy,(4) or of the Ecclesiastical Courts;(5) or of any inferior court.(6) But a court of error will take judicial notice of the authority and powers of the court from which error is brought.(7)

The courts will not take judicial notice of the sheriff's book;(8) nor of the rules and orders of the Poor Law Commissioners, made under the authority of the 4 & 5 W. IV, c. 76, § 15.(9)

Foreign laws.

With regard, also, to the laws and customs of a foreign state, they must be proved as facts, as our courts cannot take judicial notice of them.(10) And the same rule applies to the laws of Scotland,(11) and of our colonies.(12) But it has been said that the courts in England will take judicial notice

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(1) 2 Inst. 557.

(2) Adams v. Terre-tenants of Savage, Ld. Raym. 854, 856; S. C., Salk. 40; 6 Mod. 134; Whyte v. Rose, 3 Q. B. 493.

(3) Dicas v. Brougham (Lord), 1 Mo. & R. 309; S. C., 6 C. & P. 249. In this case, an ex-chancellor, Lord Eldon, was examined, among other witnesses, to prove the practice of the Court of Chancery, the case being tried before Lord Lyndhurst, C. B., who had himself been Lord Chancellor. See, also, Tucker v. Inman, 4 M. & G. 1049, 1063.

In Doe d. Williams v. Lloyd (1 M. & G. 671), the Court of Common Pleas, upon the authority of Worsley v. Filisker (2 Rol. Rep. 119), caused inquiry to be made by their own officers as to the practice in the Inrolment Office of the Court of Chancery, relative to the indorsement of the certificate of inrolment upon a deed. 1 M. & G. 685.

(4) Van Sandau v. Turner, 6 Q. B. 773; In re Ramsden, 1 B. C. Rep. 133.

(5) Beaurain v. Scott, 3 Camp. 388; Tucker v. Inman, 4 M. & G. 1063.

(6) See Moravia v. Sloper, Willes, 37; R. v. Cambridge (University), Ld. Raym. 1334; Lane's Case, 2 Rep. 16 b, n. *d;* Peacock v. Bell, 1 Saund. 75; Deane v. Robson, M. & M. 295; Rider v. Edwards, 3 Scott N. R. 456.

(7) Chitty v. Dendy, 3 A. & E. 319, 324.

(8) Russell v. Dickson, 6 Bing. 442.

(9) By Patteson, J., in R. v. Dolgelly Guardians, 8 A. & E. 563.

(10) By Lord Mansfield, C. J., in Mostyn v. Fabrigas, 1 Cowp, 174; by Grose, J., in Collett v. Keith (Lord), 2 East, 273; by Lord Kenyon, C. J., in Ganer v. Lanesborough (Lady), Peake, 17, 18. See, also, Henry v. Adey, 3 East, 221; Dalrymple v. Dalrymple, 2 Hagg. Cons. R. 54; Sussex Peerage Case, 11 Cl. & Fin. 114. As to the proof of foreign laws, *vide post,* Vol. II. See Code of N. Y., § 426.

(11) Male v. Roberts, 3 Esp. 163; Mure v. Kaye, 4 Taunt. 34; Woodham v. Edwards, 5 A. & E. 771. As to the laws of Ireland, see Ferguson v. Mahon, 11 A. & E. 179; by Maule, J., in Reynolds v. Fenton, 3 C. B. 191.

(12) Wey v. Yalley, 6 Mod. 194. See, also, 1 Cowp. 174.

that the law of Ireland is the same as the law of this country, with regard to the commencement of a suit by a process.(1)

Seals.

It has already been seen that the courts will take judicial notice of the great and privy seals;(2) there are also other seals of which they will take notice—some on account of the presumed notoriety of their official character—others, by the express enactments of the legislature.

In the former class may be considered the seals of all the superior courts,(3) of the Counties Palatine,(4) of the High Court of Admiralty,(5) of the Ecclesiastical Courts.(6)

Judicial notice is taken of the seal of the corporation of the city of London;(7) but not of the seals of other corporations,(8) nor of the seals of inferior courts, unless when they are made admissible by statute; nor of the seals of colonial or foreign courts;(9) nor of the stamp affixed upon a judge's order by his clerk;(10) nor of the seal of the sheriff.(11)

As instances falling within the second class, namely of seals which the legislature has required should be recognized, may be specified those of the Court of Bankruptcy,(12) of the Court for the Relief of Insolvent Debtors,(13)

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(1) By Maule, J., in Reynolds v. Fenton, 3 C. B. 191, explaining Ferguson v. Mahon, 11 A. & E. 179.

The courts of a state do not take judicial notice of the statute laws of another state of the Union, at variance with the common law. Jones v. Saney, 2 Texas, 342; Holmes v. Broughton, 10 Wend. 75; Monroe v. Douglass, 1 Selden, 448; Bank of Chillicothe v. Dodge, 8 Barb. 233. The presumption is, that the common law prevails in a neighboring state until the contrary is proved. Averett v. Thompson, 15 Ala. 678. The court will assume the law of the foreign state to be the same as its own. Cox v. Morrow, 14 Ark. 603. The state court does not take notice of the rate of interest established in another state (Clarke v. Pratt, 20 Ala. 470); or of its statute law in any other respect. Holman v. Collins, 1 Carter (Ind.), 24. Such laws are to be proved as facts. Taylor v. Boardman, 25 Vt. 581. But see Herschfeld v. Dexel, 12 Geo. 582; Same v. Harris, 16 Id. 217. The law merchant is to be taken notice of without proof (Jewell v. Centre, 25 Ala. 198); but the particular regulations of another state, such as the allowance of days of grace, may be proved. Bowen v. Newell, 3 Kernan, 290.

(2) *Supra*, p. 619.

(3) Tooker v. Beaufort (Duke), Say. 297; Com. Dig. tit. Evidence, A, 2.

(4) Oliver v. Guin, 2 Sid. 145, 146; S. C., Hardr. 118.

(5) Green v. Waller, Ld. Raym. 891, 893.

(6) Id.; Kempton v. Cross, Rep. temp. Hardw. 108. It may be proved, however, that the seal of the Ordinary has been forged. B. N. P. 247. See, also, Noell v. Wells, 1 Lev. 236.

(7) Doe d. Woodmass v. Mason, 1 Esp. 53.

(8) Moises v. Thornton, 8 T. D. 307; Collins v. Carnegie, 1 A. & E. 695. See, also, Cooch v. Goodman, 2 Q. B. 580.

(9) Henry v. Adey, 3 East, 221. See, also, Buchanan v. Rucker, 1 Camp. 63; S. C., 9 East, 192.

In the same manner the seals of our courts are required to be proved in the colonies. Clark v. Mullich, 3 Moo. P. C. R. 252, 280.

(10) Barrett Navigation Company v. Shower, 8 Dowl. P. C. 173.

(11) Bunbury v. Matthews, 1 Car. & K. 380.

(12) 1 & 2 Wm. IV, c. 56, § 28; 2 & 3 Wm. IV, c. 114, § 9.

(13) 5 & 6 Vict., c. 116, § 11. See Doe d. Duncan v. Edwards, 9 A. & E. 554.

of the courts recently established for the recovery of small debts,(1) and of the court of the vice-warden of the Stannaries.(2)

Judicial notice is likewise required to be taken of the respective seals of the Board of Poor Law Commissioners,(3) of the record office,(4) of the general register office,(5) and of the office of the registrar of designs for articles of manufacture.(6)

Almanac, &c.

With reference to other matters of public notoriety, the courts will take judicial notice of the almanac, the calendar being established by act of Parliament;(7) they will, therefore, notice all feasts and fasts;(8) the beginning and ending of the legal terms;(9) the order of the months, and the number of days in each month;(10) the correspondence of the days of the month with the days of the week,(11) such as, what days fall upon Sundays.(12)

Division of kingdoms into counties.

In like manner the courts will take judicial notice of the general division of the kingdom into counties, because process is directed to the sheriffs of these counties, and because they are mentioned in a great variety of acts of Parliament;(13) but they will not take notice of the extent and boundaries of counties,(14) nor of the local situation of different places in each county, nor of the distances of one county from another;(15) nor of the divisions of a county(16) (unless, probably, where those divisions have been created by statute);(17) nor of the local situation of parishes;(18) or of

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(1) 9 & 10 Vict., c. 95, §§ 3, 57, 111.

(2) 6 & 7 Wm. IV, c. 106, § 19.

(3) 4 & 5 Wm. IV, c. 76, § 3.

(4) 1 & 2 Vict., c. 94, § 13.

(5) 6 & 7 Wm. IV, c. 86, § 38.

(6) 5 & 6 Vict., c. 100, § 16; 6 & 7 Vict., c. 65, §§ 6, 7.

(7) By Holt, C. J., in Brough v. Parkings, Ld. Raym. 993; S. C., 6 Mod. 80. See 2 & 3 Edw. VI, c. 1; 5 & 6 Edw. VI, c. 1. See, also, 24 Geo. II, c. 23, § 3.

(8) Brough v. Parkings, *ut supra;* 6 Vin. Abr. 492, pl. 8—14.

(9) 6 Vin. Abr. 490, pl. 32. See, also, Brasfield v. Lee, Ld. Raym. 329.

(10) Lang v. Gale, 1 M. & S. 111; R. v. Brown, M. & M. 163.

(11) 6 Vin. Abr. 492, pl. 6—8; Page v. Faucet, Cro. Eliz. 227; Hany v. Broad, 2 Salk. 626; Brough v. Parkings, *ut supra.*

(12) Hoyle v. Cornwallis (Lord), 1 Stra. 387; Hanson v. Shackleton, 4 Dowl. P. C. 48.

(13) By Bayley, J., in Deybel's Case, 4 B. & A. 246. See, also, 2 Inst. 347. They will notice that a particular county is in England. R. v. Sharpe, 8 C. & P. 436.

So in New York (People v. Breese, 7 Cowen, 429; Chapman v. Wilber, 6 Hill, 475); and in the other states. Ham v. Ham, 39 Maine R. 263; Ross v. Austill, 2 Cal. 183.

(14) By Coleridge, J., in Brune v. Thompson, 2 Q. B. 791.

(15) By Best, J., in Deybel's Case, 4 B. & A. 248.

(16) R. v. Bourn, Burr. Set. Ca. 42.

(17) See 2 & 3 Wm. IV, c. 64.

(18) Anon., 1 Chitt. 31 a. But the courts will presume that a place in England is parochial,

any particular city, as, for instance, that Dublin is in Ireland ;(1) or that a particular town is within a certain diocese ;(2) or that a particular place is within a certain city, as that the Tower of London is within the city of London ;(3) or that a particular street is in a certain county ;(4) or even that a street is a thoroughfare, although the word "street"—*via strata*—would rather imply a thoroughfare.(5)

But the courts will take judicial notice of the extent of ports and of the river Thames.(6)

In like manner they will take notice of the value of the coin of the realm,(7) and the various legal weights and measures ;(8) and also of the meaning of words in general use in the English language,(9) for which purpose, in a case of doubt, reference may be made to a dictionary.(10)

Finally, the courts will take judicial notice of events which, from the invariable course of nature, could not have happened otherwise ; as, for instance, where a husband had no access to his wife till within a fortnight of her delivery of a child, that he could not be the father of such child.(11)

SECTION II.

Of Presumptions Made by Courts and Juries.

The chief part of the reported cases concerning presumptive evidence relates to presumptions of law. These are of two descriptions: First,

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unless the contrary appears. R. v. St. Margaret, Westminster, 7 Q. B. 569. In Harris v. Cook (8 Taunt. 539), upon a question of variance as to the name of the parish of St. George, Bloomsbury, Burrough, J., observed: "The court cannot know whether there be not more than one St. George."

(1) Kearney v. King, 2 B. & A. 301; S. C., 1 Chitt. 28, 32.

(2) R. v. Simpson, Ld. Raym. 1379.

(3) Brune v. Thompson, 2 Q. B. 789.

(4) Humphreys v. Budd, 9 Dowl. P. C. 1000.

(5) By Tindal, C. J., in Grant v. Moser, 5 M. & G. 129.

(6) Rouse v. Bardin, 1 H. Bl. 351, 357; Anon., 1 Chitt. 31 a. See, also, Fazakerly v. Wiltshire, 1 Stra. 469.

(7) See Kearney v. King, 2 B. & A. 301.

(8) 1 Rol. Abr. 525; Hoskin v. Cooke, 4 T. R. 314.

(9) Storace v. Longman, 11 East, 245, n.; Hime v. Dale, 1 Camp. 27, n.; S. C., 11 East, 244, n.; Clementi v. Golding, 1 Camp. 25; S C., 11 East, 244, as to the word "book;" R. v. Woodward, 1 Moo. C. C. 323, as to the word "pulse" in the stat. 7 & 8 Geo. IV, c. 30, § 17; R. v. Swatkins, 4 C. & P. 548, as to the words "corn or grain" in the same statute. See, also, R. v. Beaney, Ry. & R. 416.

(10) Storace v. Longman, *ut supra.* Where a word has acquired a peculiar meaning in a particular locality, or among a certain class of persons, evidence of that meaning must be given in the usual manner. See Shore v. Wilson, 9 Cl. & Fin. 525, and that class of cases referred to, *post,* Vol. II.

(11) By Lord Ellenborough, C. J., in R. v. Luffe, 8 East, 201, 202.

where the presumption is so conclusive in its nature (as a rule of law) as to be capable of being withdrawn altogether from the consideration of a jury, and which, if successive juries were to disregard it, would be enforced by granting as many new trials, the presumption being as obligatory upon juries as upon the court. Secondly, where the presumption is not so conclusive in its nature, yet having received judicial sanction, ought to be adopted by a jury, and which, if not adopted, might be a ground for a new trial.

Lord Stowell has observed, that when a criminal fact is ascertained, presumptive proof may be taken to show who did it, in order to fix the criminal, there being an actual *corpus delicti;* but that to take presumptions, in order to swell an equivocal and ambiguous fact into a criminal fact, is an entire misapplication of the doctrine of presumptions.(1) However, on proper occasions, the same learned judge was accustomed to resort to presumptive evidence for the purpose of testing the truth of positive testimony, especially to that presumption which arises from the conduct of the parties at the time of a transaction—the *evidentia rei*, as he used to call it—which will generally be found to lead to a conclusion incompatible with direct testimony, where such testimony is invented or exaggerated.(2)

Where it appears that on one side there has been forgery or fraud in some material parts of the evidence, and they are discovered to be the contrivance of a party to the proceeding, it affords a presumption against the whole of the evidence on that side of the question, and has the effect of gaining a more ready admission to the evidence of the other party.(3)

With respect to the comparative weight due to direct and presumptive evidence, it has been said that proof by circumstances is in many cases of greater force and more to be depended on than direct proof; inasmuch as witnesses speaking directly to a fact may be mistaken themselves, or may intend to deceive others, whereas circumstances and presumptions, naturally and necessarily arising out of a given fact, cannot lie.(4) It may be remarked also, that circumstantial evidence is generally composed of a more extensive and comprehensive assemblage of facts under the cognizance of a jury, and requires, therefore, a greater number of witnesses than

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(1) In Evans v. Evans, 1 Hagg. Cons. Rep. 105. And see the observations of Abbott, C. J., in R. v. Burdett, 4 B. & A. 161, as to the proof of the *corpus delicti.*

(2) Evans v. Evans, 1 Hagg. Cons. Rep. 105, 112. See Lord Stowell's observations on the circumstantial evidence leading to the presumption of the fact of adultery, which, he observes, is rarely proved by direct testimony. Loveden v. Loveden, 2 Hagg. Cons. Rep. 2; Cadogan v. Cadogan, Id. 4, n.; Chambers v. Chambers, 1 Id. 444; Williams v. Williams, Id. 294; Elwes v. Elwes, Id. 277; Hammerton v. Hammerton, 2 Hagg. Ec. R. 8.

(3) See Mr. A. Stuart's Letters to Lord Mansfield, upon the Douglas case.

(4) See Annesly v. Anglesea (Lord), 17 How. St. Tr. 1430. It was there said the presumptions in that case, arising from kidnapping and the prosecution for murder, were stronger than the evidence of a thousand witnesses.

where the evidence is direct, whereby it is more capable of being disproved if untrue.(1)

On the other hand, it may be observed, circumstantial evidence ought to be acted on with great caution, especially where an anxiety is naturally felt for the detection of great crimes; this anxiety often leads witnesses to mistake or exaggerate facts, and juries to draw rash inferences. Not unfrequently a presumption is formed from circumstances which would not have been noticed as a ground of crimination, but for the accusation itself: such are, the conduct, demeanor and expressions of a suspected person, when scrutinized by those who suspect him.(2) And again, any circumstantial evidence which comes through the medium of witnesses, may, no less than direct evidence, be discolored, exaggerated, or perverted.

Kinds of presumption.

The first species of presumption may be again divided into two kinds, first, when the presumption admits of no proof to the contrary, and secondly, where it only affords a *prima facie* inference, which is conclusive only in the absence of proof to the contrary.

In the history of the law, several presumptions which were at one time deemed conclusive by the courts, have, by the opinions of later judges acting upon more enlarged principles, become conclusive only in the absence of proof to the contrary, or have been treated as wholly within the discretion of juries. In modern times, many presumptions have been established, which convenience or general experience have dictated, and which are binding upon juries, until they are rebutted. Several presumptions of this nature have been created by the courts; others have been made by act of Parliament, and this principally in cases of revenue and penal statutes.(3)

With respect to those presumptions of law, which are not considered imperative upon juries, the occasions upon which judges have afforded their sanction and authority to them, have been various. In some cases, it has been said, a jury ought to have drawn a particular inference which they have not drawn, and a new trial has consequently been granted. In

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(1) See Bentham's observations on the probative force of circumstantial evidence. Rationale of Judicial Evidence, Vol. 3, p. 251.

(2) Of the suspicious conduct sometimes exhibited by innocent persons under accusation of crime, a remarkable instance is mentioned by Lord Hale, in his Pleas of the Crown, Vol. 2, p. 290. On the dangers of circumstantial proof, see Defence of Donellan, published by his solicitors, A. D. 1781. On the general subject of presumptive evidence, see 7 How. St. Tr. 1529, n.; 14 Id. 1229, 1230, 1246; 17 Id. 1341, 1430; 33 Id. 606; Burnet Crim. Law Scot.; Harris's Crim. Law Scot.; Paley Mor. Phil.; Evans's Appendix to Pothier, 339; Bentham's Rationale of Judicial Evidence, Vol. 5, which contains many valuable suggestions on this subject.

(3) A remarkable example of a statutory presumption was that which was founded on a concealment of birth, by the repealed statute of 21 Jac. I, c. 27. See Ashford v. Thornton, 1 B. & A. 405; where the nature of those presumptions is considered which were deemed sufficient to support a counter plea to the wager of battle.

others, the court has observed, that a jury or inferior court have not improperly acted upon a particular presumption, and that therefore the decision ought not to be interfered with. It has not unfrequently happened, that the same presumption has been spoken of by some judges, as a rule of law; whilst by others it has been treated merely as fit to be recommended to a jury, or as one which a jury might properly make. Though the presumptions under consideration are strictly within the province of a jury, the language of courts expressed in regard to particular presumptions may, in general, be expected to have considerable influence in the determination of future cases, whether by a court or a jury, in which the like presumption may arise.

The presumption of prescriptive rights or of obligations from modern user, is seldom warranted in point of fact, or really entertained by juries. It is, however, unusual for a judge to leave the presumption to a jury, in cases where modern user is uncontradicted, as one which it is *competent* for them to make; the jury is generally instructed, that they *ought* to make the presumption.(1)

In a case respecting the seaworthiness of a ship, the Court of Common Pleas were equally divided upon the question, whether a second new trial should be granted on the ground that the jury had found their verdict in direct opposition to the presumption of unseaworthiness arising from the ship having become distressed recently after sailing, without any adequate cause; a presumption which had been sanctioned by great legal authorities, and been even called a rule of law.(2)

Presumptions arising from age.

It seems to be a presumption not admitting of proof to the contrary, that a person under the age of fourteen is unable to commit the crime of rape;(3) and also, that an infant under the age of seven years cannot be

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(1) See Jenkins v. Harvey, 1 C., M. & R. 894; where Parke, B., and Alderson, B., intimated that it was *improper* for a judge to leave the presumption to a jury in such cases, and that they should be instructed that they ought to make the presumption. The usage had existed for more than seventy years. It was asked by the court, if juries were at liberty to make the presumption or not, at their discretion, what would become of moduses? In R. v. Joliffe (2 B. & C. 54), Lord Tenterden, C. J., speaks of modern user as affording cogent evidence of prescription; and he observes that it is fit to *recommend* a jury to make the presumption. In that case the usage had existed only for twenty years. In Brune v. Thompson (4 Q. B. 543, 552), Lord Denman, C. J., spoke of the doctrine held in Jenkins v. Harvey as being not altogether satisfactory, and said that any person affected by it ought to have an opportunity of tendering a bill of exceptions. See also, Page v. Hatchett, 8 Q. B. 593.

(2) Foster v. Steele, 3 N. C. 892. See Douglass v. Scougal, 4 Dow, 269; Parker v. Potts, 3 Id. 23; Watson v. Clark, 1 Id. 344; Munro v. Vandam, 1 Park Ins. 469.

(3) 1 Hale P. C. 630; 1 Russ., C. & M. 676; R. v. Groombridge, 7 C. & P. 582, where it was held that the presumption was not affected by the statute 9 Geo. IV, c. 31; R. v. Jordan, 9 C. & P. 118. Nor can a boy under that age be convicted of an assault with intent to commit a rape. R. v. Eldershaw, 3 C. & P. 396; R. v. Philips, 8 C. & P. 736. But he may be a principal in the second degree. 1 Hale, *ut supra;* R. v. Brimilow, 9 C. & P. 366; S. C., 2 Moo. C. C. 122.

guilty of felony.(1) It was formerly considered a *prima facie* presumption of law, that a person under the age of fourteen was not guilty of a felonious intention, until evidence was produced to show that he was *doli capax;* for then, it was said, *malitia supplet ætatem*:(2) but this presumption appears, in a great measure, to be inferentially put an end to, by the recent act for the more speedy trial and punishment of juvenile offenders,(3) which gives a summary power to justices to convict persons not exceeding fourteen years of age of certain felonies.

Presumptions as to legitimacy.

If a child be born after the marriage of the mother, and during the husband's life, it is presumed to be legitimate. It was formerly an established doctrine of the courts, that this presumption in favor of legitimacy could not be rebutted, unless the husband was incapable of procreation, as from impotency or old age, or was absent beyond the four seas during the whole period of the wife's pregnancy.(4) This doctrine was not, however, conformable to the more ancient legal authorities.(5) And in later times it came to be established, that the presumption, in favor of the legitimacy of the child of a married woman, might be rebutted, if it were shown that the husband had not opportunity for sexual intercourse within such a period of time before the birth of the child, as would admit of his having been the father: and, in the present day, even where a husband and wife have had opportunities for sexual intercourse, at a time when the husband might have become the father of the child, a court or jury are at liberty to infer, from the circumstances of the case, that no sexual intercourse took place.(6) But where a jury believe that sexual intercourse took place between husband and wife, at a time when it might have led to the conception of the child whose legitimacy is disputed, it would seem that they ought not to find the child a bastard.(7) If, however, there was an

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(1) 1 Hale P. C. 27; 4 Bl. Com. 23.

(2) 1 Hale P. C. 3; 1 Russ., C. & M. 1—5; R. v. Owen, 4 C. & P. 236. And see R. v. Sutton, 3 A. & E. 597, 612, as to misdemeanors.

(3) 10 & 11 Vict. c. 82.

(4) Co. Litt. 244 a; R. v. Alberton, 1 Lord Ray. 395; R. v. Murray, 1 Salk. 121.

(5) See them collected in Le Merchant's Preface to the Gardiner Peerage Case.

(6) Pendrell v. Pendrell, 2 Str. 925; R. v. Reading, Rep. temp. Hard. 82; R. v. Luffe, 8 East, 193; Banbury and Gardiner Peerage Cases, Le Merchant's ed., App., n. E; S. C., 2 Selw. N. P. 759, 760; 1 Sim. & Stu. 153; Cope v. Cope, 1 Moo. & R. 269, 276; S. C., 5 C. & P. 604; Morris v. Davies, 3 C. & P. 215, 427; S. C., 5 Cl. & Fin. 163; Goodright v. Saul, 4 T. R. 356.

NOTE 182.—The American cases and authorities will be found substantially to accord with the English, without furnishing much additional matter for illustration. State v. Pettaway, 3 Hawks, 623; Commonwealth v. Shepherd, 6 Binn. 283; Tate v. Penne, 7 Mart. Lou. Rep. (N. S.) 548; Cross v. Cross, 3 Paige, 139; Commonwealth v. Wentz, 1 Ashm. 269; 1 Beck's Med. Jurispr. ch. 9; Johnson's Legatee v. Johnson's Executor, 1 Dessauss. Eq. Rep. 595; Vaughan v. Rhodes, 2 M'Cord, 227.

(7) Cope v. Cope, *ut supra.* In the report in 5 C. & P. 604, Alderson, B., is stated to have said, "If the husband and wife are living separate, and the wife is notoriously living in open

opportunity of access, though the wife was notoriously living in adultery, it does not necessarily follow that the child is not legitimate.(1) Children born during a divorce *a mensa et thoro*, are presumed to be illegitimate.(2)

Presumptions as to marriage.

The fact of marriage is generally considered as sufficiently proved by evidence of cohabitation, or even by general reputation.(3) Even where a marriage between parties is proved to have been illegal, it may be competent for a jury to presume, from the circumstances of the case, where the parties have cohabited as man and wife, that a subsequent valid marriage has taken place.(4)

But in actions for adultery, and on indictments for bigamy, an actual and valid marriage must be proved.(5) The reason why such strict proof is required in these instances, is in consequence of their penal nature, and because in cases of alleged adultery, the action might be turned to bad purposes, if persons could give the name of *wife* to a woman to whom they were not married.(6) It is not sufficient *prima facie* evidence to show that the alleged husband and wife went through a religious ceremony, with the *bona fide* intention of thereby contracting a valid marriage, and afterwards lived together as man and wife in the belief that they had thereby con-

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adultery, although the husband have an opportunity of access, it would be monstrous to suppose that, under these circumstances, he would avail himself of such opportunity. The legitimacy of a child born under such circumstances could, therefore, not be established." But in 1 Moo. & R. 275, the words are reported thus; "Even where the husband is shown to have had these opportunities of access, and was not impotent, still this presumption also (of sexual intercourse) may be rebutted; as where the wife is living in open and notorious adultery, and the husband on one single occasion only had opportunity of access to her, and then at a time, and under circumstances rendering it extremely improbable that he availed himself of the opportunity, these facts might, perhaps, be urged as a reasonable ground for concluding that sexual intercourse did not take place." See this case commented on in R. v. Mansfield, 1 Q. B. 444, 450, 451. See further, Head v. Head, 1 Sim. & Stu. 152; S. C, 1 Turn. 139. It has been said, that if a man marries a woman visibly pregnant, it is a conclusive inference of law that the child is legitimate.

As to the existence of any presumption respecting the length of the period of gestation, see the evidence in the Gardiner Peerage Case. Harg. Co. Litt. 123 b, n. 1 and 2; Alsop v. Bowtrell, Cro. Jac. 541. As to the presumption, when a widow marries again, and has a child within nine months, Harg. Co. Litt. 8 a, n. 7.

(1) By Lord Denman, C. J., in R. v. Mansfield, 1 Q. B. 444.

(2) St. George v. St. Margaret, 1 Salk. 123.

(3) Doe d. Fleming v. Fleming, 4 Bing. 266; Reed v. Prosser, Peake, 233. See, also, Sayer v. Glossop, 2 C. & K. 694.

(4) Wilkinson v. Payne, 4 T. R. 468.

(As to the effect of an illegal marriage, as where the wife married again, supposing her husband dead, see Williamson v. Williamson, 1 Johns. Ch. 488.

(5) Morris v. Miller, 4 Burr. 2057; S. C., 1 W. Bl. 632; R. v. Allison, R. & R. 109. See, also, Scrimshire v. Scrimshire, 2 Hagg. Cons. R. 395, 407; Middleton v. Janverin, Id. 437; Kent v. Burgess, 11 Sim. 376; R. v. Simmons, 1 C. & K. 174; Willmett v. Harmer, 8 C. & P. 695, upon a plea of justification to a libel charging the plaintiff with "polygamy."

(6) By Lord Mansfield, C. J., in Birt v. Barlow, 1 Doug. 171, 174.

tracted a valid marriage, if in law such marriage was not valid.(1) But it seems that proof of a marriage having been celebrated, by a person who was present, is sufficient, without proving expressly the reading of the service.(2)

As to intention.

There is a general presumption in criminal matters, that a person intends whatever is the natural and probable consequence of his own actions.(3) Where a prosecutor, on an indictment for forging a receipt with intent to defraud him, swore that he believed the prisoner had no such intent, the judge directed the jury, that the defrauding, being the necessary effect and consequence of the forgery, was sufficient evidence of the intent of the prisoner to warrant them in convicting.(4)

Presumption of malice.

It seems to be clearly a presumption of law, which ought not to be left to the discretion of the jury, that where an act is done by one person injurious to another, malice (that is, an attempt to injure) is *prima facie* to be presumed in the person doing the act. A new trial has been granted, because a judge left it to the jury to say, whether a defendant intended to injure the plaintiff by the publication of a libel, the court determining that the law would presume the intention.(5) Where a communication is *prima facie* privileged, and therefore not libelous (as, an answer to an inquiry as to the character of a servant), yet if the plaintiff can show that such communication was untrue, and known to be so by the person making it, it will raise the presumption of malice.(6) In actions for malicious prosecutions, and the like, malice may be presumed from want of proba-

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(1) Catherwood v. Caslon, 13 M. & W. 261.

(2) Hemmings v. Smith, 4 Doug. 33.

(At common law, no ceremony is necessary, nor is it generally required in this country. Starr v. Peck, 1 Hill, 270. See Cheney v. Arnold, 15 N. Y. Rep. 345).

(3) See R. v. Dixon, 3 M. & S. 15; R. v. Hunt, 1 Moo. C. C. 93; R. v. Beard, 8 C. & P. 148; R. v. Hill, Id. 276; R. v. Cooke, Id. 582; R. v. Farrington, R. & R. 207; R. v. Philp, 1 Moo. C. C. 263; R. v. Lovett, 9 C. & P. 462.

(So, in a civil action, as where the holder of a mortgage sues the mortgagor or purchaser of the premises for waste, the law imputes the design to injure, where the acts of a party necessarily tend to the injury of another. Van Pelt v. M'Graw, 4 Const. 110.)

(4) R. v. Sheppard, R. & R. 169. The judges held the conviction to be right. See, also, R. v. Mazagora, Id. 291.

(5) Haire v. Wilson, 9 B. & C. 643. See, also, Fisher v. Clement, 10 B. & C. 475; Baylis v. Lawrence, 11 A. & E. 925; R. v. Shipley, 4 Doug. 73, 177. The plaintiff may, however, prove malice in fact, with a view to the damages. Pearson v. Lemaitre, 5 M. & G. 700. As to proof thereof, see Edgell v. Francis, 1 M. & G. 222. The distinction between malice in fact and in law is explained by Bayley, J., in Bromage v. Prosser, 4 B. & C. 253.

(6) Fountain v. Boodle, 3 Q. B. 5.

(Malice is presumed from the publication of a libel, but the defendant may show that there was no actual malice or intention to injure in the publication. Taylor v. Church, 4 Selden R. 452.)

ble cause :(1) but the want of probable cause is only presumptive evidence of malice, and ought not to be left to the jury as conclusive.(2) In like manner, if a party knowingly makes a false representation, whereby injury comes to another, the law will presume malice, whatever his real motives may have been.(3) Sir M. Foster observes, that in every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity or infirmity are to be satisfactorily established by the prisoner, unless they arise out of the evidence produced against him; for the law presumes the fact to be founded in malice, unless the contrary appears.(4)

Of negligence.

Where any peculiar obligation is cast upon a person to take care of goods intrusted to his charge, if they are lost or damaged while in his custody, the presumption is, that the loss or damage was occasioned by the negligence, that is, the want of care, of himself or of his servants. This presumption will arise with regard to goods lost or injured, which had been deposited in a public inn,(5) or which had been intrusted to a common carrier.(6) But such presumption in all such cases is only *prima facie*, and may be rebutted.(7)

Various presumptions.

Where a libel is sold at a bookseller's shop by his servant, the sale is said to be presumptive evidence of a publication by the master. This is stated to be upon a ground of policy, lest irresponsible persons should be put forward, and the person who really produces the publication, and without whom it could not be published, should escape.(8) But the evi-

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(1) Burley v. Bethune, 5 Taunt. 583. See further, Turner v. Turner, Gow, 20; Brooks v. Warwick, 2 Stark. R. 389; Cozer v. Pilling, 4 B. & C. 26.

(2) Mitchell v. Jenkins, 5 B. & Ad. 588. And see Hounsfield v. Drury, 11 A. & E. 98.

(In such actions, the plaintiff must prove want of probable cause and malice in fact. Bulkley v. Smith, 2 Duer (N. Y. Sup. Ct.), 261.)

(3) Tapp v. Lee, 3 B. & B. 371; Foster v. Charles, 6 Bing. 396; 7 Id. 105; Pontifex v. Bignold, 3 M. & G. 63.

(The intention to deceive and defraud must be alleged and proved; but the falsehood uttered in the recommendation is sufficient proof of that intention. Allen v. Addington, 7 Wend. 9; S. C., 11 Id. 374; Williams v. Wood, 14 Id. 126.)

(4) Fost. Disc. 256, 257. See, also, 1 Hale P. C. 455; 1 East P. C. 340; 3 M. & S. 15; R. & R. C. C. 169, 207, 291.

See, also, The People v. McLeod, 1 Hill R. 377; Shorter v. The People, 2 Comst. 193; 4 Barb. 460.

(5) Dawson v. Chamney, 5 Q. B. 164. And see Richmond v. Smith, 8 B. & C. 9; Calye's Case, 8 Rep. 32.

McDonald v. Edgerton, 5 Barb. 560, 564; Hill v. Owen, 5 Blackf. (Ind.) 323.

(6) Coggs v. Barnard, 2 Lord Raym. 918.

Day v. Riddley, 16 Vt. 48.

(7) See Dawson v. Chamney, *ut supra.*

(8) R. v. Gutch, M. & M. 433. And see Harding v. Greening, 8 Taunt. 42; R. v. Almon, 5 Burr. 2686. As to newspapers, see R. v. Walter, 3 Esp. 21. And see further, as to the evidence of publication of a libel, R. v. Lovett, 9 C. & P. 462.

dence is not conclusive, and under the plea of "not guilty" the master may still prove that the publication took place "without his authority, consent or knowledge," and that there was "no want of care or caution on his part."(1)

In like manner a baker, who sells bread containing an ingredient which renders it noxious, is responsible for the offence, if he ordered the ingredient to be introduced into the bread, although he gave directions for mixing it up in a manner which would have rendered it harmless.(2) So upon an indictment against the directors of a gas company for a nuisance, it has been ruled, that the defendants were answerable for acts done by their superintendent and engineer, under a general authority to manage the works, though they were personally ignorant of the particular plan adopted, and though such plan were a departure from the original and understood method, which the directors had no reason to suppose was discontinued.(3) Lord Denman, C. J., there laid down the rule in very broad terms: "It is said that the directors were ignorant of what had been done. In my judgment that makes no difference; provided they gave authority to (the superintendent)(4) to conduct the works, they will be answerable. It seems to me both common sense and law, that, if persons, for their own advantage, employ servants to conduct works, they must be answerable for what is done by those servants."(5)

On indictments for larceny, proof that part of the stolen goods have been found upon the person of the prisoner, or in his house or possession, is presumptive evidence against him of his having stolen them, so as to call upon him for his defence, and may be sufficient to warrant a conviction if no facts appear in evidence to repel that presumption.(6) The goods are

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(1) See 6 & 7 Vict., c. 96, § 7.

(2) R. v. Dixon, 4 Camp. 12; S. C., 3 M. & S. 11. See Att. Gen. v. Riddle, 2 C. & J. 493.

(3) R. v. Medley, 6 C. & P. 292.

(4) The superintendent was one of the defendants indicted.

(5) 6 C. & P. 297.

The principle stated in the text does not apply in the case of a sub-contractor. Edwards on Bailments, 317, and cases there cited.

(6) See 2 & 3 Vict., c. 71, § 24, as to the power vested in the metropolitan magistrates to deal with such cases summarily as a misdemeanor.

NOTE 183.—The rule laid down in the text, that proof of a larceny committed, and soon after finding the stolen goods in possession of the prisoner, shall be received as *prima facie* evidence of his guilt, is so familiar in all its various applications and qualifications, that our author has deemed it unnecessary to cite authorities. Should the student feel desirous to look farther, he will find at least the general rule so well established as to be taken for granted, or used rather by way of illustration, than as requiring any reported case to sustain it. 2 Hal. P. C. 289; Russ. on Cr. 1154; 4 Stark. Ev. 840. Other English authorities hereinafter cited. Pennsylvania v. Myers, Add. 320, 321; State v. Jenkins, 2 Tyl. 377, 379; State v. Bennett, 2 Const. Rep. 692; State of Connecticut v. Weston, 9 Conn. Rep. 527, 529. Other American authorities, *infra.*

But it is always desirable to be well and particularly advised, not only of the condition precedent which lets in the rule, but the time and nature of the prisoner's possession; and how the *prima facie* evidence may be sustained and repelled after it has arisen.

1. In all cases, but especially in this, the larceny itself must be proved (Russ. on Cr. 1153; per Colden, Mayor, 3 C. H. Rec. 138) by the best evidence the nature of the case admits. Murray's Case, before Riker, Recorder, N. Y. Gen. Sess., Oct. 1821, 6 C. H. Rec. 65, 66. This should be by the testimony of the owner himself, if the property was taken from his immediate possession, or if from the actual possession of another, though a mere servant or child of the owner, that other must be sworn, so that it may appear that the immediate possession was violated, and this, too, without the consent of the person holding it. Id. Where non-consent is an essential ingredient in the offence, as it is here, direct proof alone, from the person whose non-consent is necessary, can satisfy the rule. You are put to prove a negative; and the very person who can swear directly to the necessary negative must, if possible, always be produced. Rex v. Rogers, 2 Campb. 654; Williams v. The East India Co., 3 East, 192, 201; S. C., *post.* Other and inferior proof cannot be resorted to, till it be impossible to procure this best evidence. If one person be dead who can swear directly to the negative, and another be living who can yet swear to the same thing, he must be produced. In such cases, mere presumptive, *prima facie* or circumstantial evidence, is secondary in degree, and cannot be used till all the sources of direct evidence are exhausted. Williams v. The East India Company, *supra.* And see *post*, note.

Indeed, the rule is general. You shall not be permitted to grope in the twilight of circumstantial evidence, when the broad daylight of direct and positive proof is attainable. A strong case to this effect occurred in a court to which we are much indebted for manifold and various illustrations in the different branches of our criminal law.

On a charge of stealing a watch from a lodger (one Dimmick), the watch was positively sworn to as belonging to Dimmick; and was then traced to the prisoner's possession directly after they had lodged together in the same bed. The prisoner had left it in care of one H. P. On being arrested, he told the officer that he had given the watch to the right owner; but, on their way to the police office, he offered money to the constable, if he would permit him to escape; and, after they had arrived, attempted to escape forcibly. Dimmick had been heard, the very morning after the prisoner had lodged with him, to complain that the prisoner had stolen the watch. The prisoner led the police officer to different parts of the city in search of the watch, and finally to the house of H. P., where it was found. It appeared, also, that he had sought to bribe Dimmick not to appear against him; and his character turned out to be infamous, even from the very witnesses whom he produced in its support. But Dimmick had left the place on necessary business; and was not produced. Colden, Mayor, stopped the case, therefore, and directed an acquittal. He said Dimmick was the only person who could positively swear that the watch was stolen. Sometimes the owner could not be produced; and other evidence was necessary: but where circumstances were resorted to, in order to establish the *felony*, they must be such as are reconcilable only with the guilt, and are wholly inconsistent with the innocence of the prisoner. He might in this case have done the acts imputed, in order to avoid the odium of a public prosecution. N. Y. Gen. Sess., Sept. 1818; Plunket's Case, 3 C. H. Rec. 137, 138.

"Not that it is *absolutely necessary*, for the purpose of proving that the goods were stolen, to produce the owner; for cases frequently occur where such proof cannot be obtained." Per Colden, Mayor, in Plunket's Case, *ut supra.* Thus, where the owner died before the trial, his land steward's oath was received, with other circumstances usually attending a larceny, from which the jury inferred the non-consent of the owner. Rex v. Hazy, 2 Car. & Payne, 458. But where several persons are owners, or bailees, &c., the rule would probably not be so strict as to require the oath of all. On trial of an indictment for obtaining goods on pretence that the prisoner had been sent for them by Titus & Townsend, the owners, Townsend swore that he did not send the prisoner for them; and he thought his partner was absent at the time, but could not say certainly. The goods not having been delivered to T. & T., this was held to cast the onus of showing consent on the prisoner. The People v. Tilton, before Riker, Recorder, N. Y. Gen. Sess., Jan. 1823, 2 Wheel. Cr. Cas. 251, 252.

And the rule has lately been relaxed in favor of the king, who had his deer stolen from his forest; and the Prince of Saxe Coburgh, whose fish were stolen from a pond in his park; and one John Greenwood, a Quaker, whose fish had also been stolen from a pond in his yard. The respective agents of these several persons who had the management of the above respective properties were sworn, and their oaths, with the circumstances of the larcenies, held sufficient by the twelve judges. The particular ground of this departure from the general rule is not stated;

but was probably because the king and prince must have been presumed never to trouble themselves with giving or withholding consent in so small a matter. Swearing them would have been an idle form. Greenwood being a Quaker, could not be affirmed (*ante*), and would not swear; and so, on the whole, the best available evidence was received. Rex v. Allen, Ry. & Mood. Cr. Cas. 154, 155. The court, doubtless, took judicial notice of that dignity and elevation of character and employment which disqualify kings and princes to give any information concerning a matter so minute; while the conscientious scruples of the Quaker worked a disability equally permanent. It was much like the case of an attesting witness, who resides without the jurisdiction of the court, which lets in, as we shall see hereafter, secondary proof to establish the document; whereas Dimmick, in Plunket's case (*supra*), was a resident of the state; whose disability, from absence, was temporary. Prisoners must still submit to farther delay on bail or confinement, as the case may require, where there is an unavoidable failure to bring forward the essential prosecuting witness from a temporary cause, until this can be removed. Commonwealth v. Carter, 11 Pick. 277.

2. Due proof of non-consent, with the fact that the property is missing, having made out that a larceny has, in the abstract, been committed, the next step is to fix it on the prisoner; and the act of taking being generally perpetrated in secret, the possessor is, therefore, sought for by those interested, or by an officer with his proper search warrant. The goods being soon after found, either on the prisoner's person or in his house, &c., he is, *prima facie*, deemed guilty. Here, however, we must attend to several things; and *first*, of the *time*. Hale says, if the goods be found with the person the day of the theft being committed, this is a strong presumption; and yet, even in such a case, C., a very subtle horse thief, being pursued, procured B. to lead the horse, under pretence that he (C.) was pressed to go aside; thus escaping, and leaving the presumption to fall on B., who was, though tried before a very learned and wary judge, condemned and executed. 2 Hal. P. C. 289. It is agreed, therefore, that where you rely on simple possession, the interval between the time of the taking and finding should be short. Rex v. ———, 2 Carr. & Payne, 459; Rex v. Adams, 3 Carr. & Payne, 600. Where sixteen months had elapsed, Bayley, J., directed an acquittal (Rex v. ———, 2 Carr. & Payne, 459); and afterwards, where three months had elapsed. Rex v. Adams, 3 Carr. & Payne, 600.

The reason for desiring a short time is, that otherwise the goods may have changed hands often; or the difficulty of the prisoner be rendered greater, in accounting for the manner of obtaining them; or their identity may be rendered more doubtful. But all these considerations depend much on the nature of the property. 2 East's P. C. 656; 4 Stark. Ev. 841. Light, pocket articles, or those which are portable in a small compass, especially if they be common or cheap, would of course be purchased, or received with less probability of the transaction coming under the observation of others who could be witnesses, than ponderous, large, rare, curious or expensive things. A horse being stolen on the 10th, and found on the 16th of the same month, at sixty miles distance from the place of taking, in the prisoner's possession; this was holden to raise the presumption. State v. Adams, 1 Hayw. 463. So where notes were mailed the 17th April, possession of them by one employed in the post-office on the 21st, was held evidence of secreting the letter, under the stat. 7 G. III, c. 50. 4 Stark. Ev. 841. And in another case two months were held not to rebut the presumption. State v. Bennett, 2 Const. Rep. 692. But note: there were concealment and other circumstances in this case. In State v. Adams (*supra*), the prisoner gave an improbable account; and in the case, 4 Stark. 841, the man was employed in the very office where the money was deposited. See and note the next paragraph, *infra*.

But possession of the goods is always competent evidence, be the time longer or shorter; however insufficient it may be, *per se*, after a considerable lapse of time. In such a case some circumstances additional to the possession, are necessary to raise the presumption, which may be the prisoner's conduct or language before or after the larceny; or his proximity to the time and place of the taking. 2 East's P. C. 655; Russ. on Cr. 1154. Among these are false or improbable representations, to account for the possession. Armistead's Case, 1 Ch. Rec. 174, before Riker, Recorder, 4 Stark. Ev. 841; Ball's Case, 4 C. H. Rec. 157, 158, before Riker, Recorder. As where he said he had purchased the horse at E., when there was not time to have done that and reached the place where the horse was found with him. State v. Adams, 1 Hayw. 464. So the prisoner's readiness or unwillingness to meet the charge, may be considered (4 Stark. Ev. 841); his selling the article for an inferior price. Pennsylvania v. Myers, Addis. 320, 321;

Armistead's Case, 1 C. H. Rec. 174, before Riker, Recorder. So the prisoner first consenting to a search by a police officer; then questioning his authority; first saying she was a widow; then that she had a husband; first saying she bought the property at P., a distant city; then that it was brought to her house by A., an insolvent, to conceal it from his creditors. Riley's Cases, N. Y. Gen. Sess. before Radcliff Mayor, Feb. 1816, 1 C. H. Rec. 23. So where the prisoner secretes the property. State v. Bennett, 2 Const. Rep. 692; Rex v. Watson, 2 Stark. Rep. 137.

Secondly, as to *place*. No doubt, as suggested in the text, a finding at the prisoner's house, is equally competent in evidence as a finding upon his person. In Rex v. Watson (2 Stark. Rep. 139), Abbott, J., observed, that an assize had scarcely ever occurred, where it did not happen that a part of the evidence against the prisoner consisted of proof that the stolen property was found in the house after his apprehension.

So it may be shown that the goods were found where the prisoner had been seen, or near where he had been seen. In Rex v. Watson (*supra*), Lord Ellenborough cited this case from recollection: "a butler to a banker at Malton, had been taken up upon suspicion of having committed a great robbery. The prisoner had been seen near the privy, and this circumstance having excited suspicion in the minds of the counsel who considered the case during the assizes at York, at their instance, search was made, and in the privy all the plate was found. It was produced, and the prisoner was in consequence convicted. He had been separated from the custody of the plate, since he had been confined in York castle for some time, but no doubt was entertained as to the admissibility of the evidence." So on the trial of an indictment for having in possession counterfeit bills, with intent to pass them, it need not be proved that they were found on the person; it is enough that they appear to have been under the control of the prisoner. Connor's Case, 5 C. H. Rec. 115, before Colden, Mayor, N. Y. Gen. Sess. Sept. 1820. But it should be remembered that although a finding even in the prisoner's house is admissible; yet, where there is not a more direct possession shown, and there are no other inmates in the house capable of stealing the goods, this finding, *per se*, would not raise the presumption. Other circumstances should be shown. 4 Stark. Ev. 840, note z. And the reason is stronger of a finding in the prisoner's open shop. A blacksmith secretly deposited a piece of iron in a heap of coal which lay in the coal-house of a neighboring blacksmith (a Mr. Lamb, Moreau, Saratoga county); then swore out a search warrant on which he found the iron, to Lamb's great astonishment; and was proceeding to convict Lamb before a special session. He would probably have succeeded, had not a boy of Mr. H. Billings, who resided within a few rods of the shop, accidentally seen the prosecutor, a few mornings before, passing with something into the shop about daylight, and returning in an unaccountable manner. This led to a suspicion that the whole affair was simulated; resulted in a thorough investigation; and the prosecutor afterwards suffered the penalty of his fraud and perjury. Lamb was a man of excellent character. This, to be sure, was not the case of a genuine circumstance; but it proves that an open shop of this character may too easily be perverted to the ruin of an innocent man, to warrant a reliance upon the finding alone, as a full foundation for the usual inference.

Thirdly. All this presupposes the goods to have been duly identified, which may be by marks, or the witness's confident general knowledge of the particular goods. 2 East's P. C. 656, 657; 2 Ev. Poth. 249, 250. A witness may safely be relied on as to his acquaintance with a specific article of familiar use (as his *own clothes*), though he can give no reason for his means of identity, or give, as he often may, a false or absurd reason. 2 Ev. Poth. 249, 250. But where, as it often happens, the goods stolen cannot be thus identified, as if the charge relate to grain in a barn, sugar in a ship or on wharves and the like, the identity must then be made out by circumstances. These may be the detection of the prisoner in the very act of leaving the place, with the grain, or sugar, &c., upon him, which is found to be missing. 2 East's P. C. 657; Russ. on Cr. 1155. The prisoner concealing the property is corroborative. Id. Silk being missed from a store package lying open for sale, the same kind of silk was traced to the possession of three persons (squalid looking negroes) who had labored about the store the same day, and who had sold this silk to S. as coming from a venture at sea. Some buttons stolen at the same time were identified directly, and traced to one of the prisoners. The identity was holden to be well made out by these circumstances. Case of Ferguson et al., before Radcliff, Mayor, N. Y. Gen. Sess. April, 1816, 1 C. H. Rec. 65. So, where an habitual laborer about a store, well acquainted with the premises, was indicted for stealing bank bills and silk; the proof was that the bills and the silk were pur-

sometimes found in the prisoner's house before his apprehension, frequently found afterwards; and there can be no objection to proof of their being found at one time or the other.(1) This kind of evidence is frequently strengthened materially by other circumstances—as by proof that about the time of the offence the prisoner was near the spot from which the goods were taken—or that he gave some false account respecting the goods on being charged with the crime—or endeavored to conceal them, or, perhaps, tried to prevent an inspection—or by some other proof of suspicious circumstances in his behavior. On the other hand, the inference arising from the mere fact of possession, will be much weakened, if any considerable time has elapsed between the loss of the property and the finding of it again, or if the property was from its nature likely to pass in the interval through many hands; especially where the prisoner betrayed no appearance of guilt at the time of his apprehension; nor will the mere discovery of stolen property in the house of the accused be of itself sufficient to raise the presumption against him, if there were other inmates capable of committing the larceny.(2)

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loined through a secret approach from the cellar to the store; and bills, some of them of the same denomination with those taken, were afterwards found on the laborer, which the clerk thought were the same as those taken from a desk in the store. The laborer had sold silk of the same description as that which was missed. The circumstances were left to the jury as sufficient to show the identity; and they found the prisoner guilty. Williamson's Case, before Radcliff, Mayor, N. Y. Gen. Sess. July, 1816, 1 C. H. Rec. 115.

3. The presumption arising from the possession or other circumstances, may, of course, be explained away or repelled by opposing circumstances. The better opinion seems to be that the presumption arising from possession alone is completely removed by *the good character alone* of the prisoner. This was denied by Radcliff, Mayor, in Ferguson's Case (*supra*); but he considered that a very strong case. In another, where the goods were, soon after the larceny, found on the prisoner (a female), though her own account was not entirely satisfactory, yet the court directed her to be acquitted on proof of her good character. People v. Turell, 1 Wheel. Cr. Cas. 34, 35, before Riker, Recorder, N. Y. Gen. Sess. Sept. term, 1822. And in another case, in the same term (People v. Preston, Id. 41), the recorder said to the jury: "Where stolen property is found in possession of the prisoner, and he is unable or refuses to give a satisfactory account how he came in possession of it, *and proves no good character*, it is always taken as evidence of his guilt."

The possession of the goods may also be accompanied with circumstances (such as unsuspicious conduct) repelling the presumption. Sales' Case, 5 C. H. Rec. 178, 179. The prisoner may also show that he was an accessory after the fact; and thus rebut the inference of stealing arising from the possession. But if his statements be (on giving an account of the property) false and inconsistent, this may be relied on to rebut the proof that he was a mere accessory. Ball's Case, 4 C. H. Rec. 157, 158, before Colden, Mayor, N. Y. Gen. Sess. Nov. 1819. See also Pennsylvania v. Myers, Addis. 320, 321.

That finding part of the goods is proof of stealing the whole, see *post*, and note.

In these cases the judge is not precluded from giving his opinion to the jury upon the evidence as well as the law; which are often so blended that it is difficult to take a distinct and disconnected view of each separately. State v. Bennett, 2 Const. Rep. 692.

(1) See by Lord Ellenborough, C. J., and Abbott, J., in R. v. Watson, 2 Stark. R. 139.

(2) See the observations on this presumption, 2 East P. C. 656, 665; 2 Hale's P. C. 289; 1 Russ., C. & M., by Greaves, 122. As to the interval elapsing between the loss and discovery of

Where a person is proved to have suppressed any species of evidence, or to have defaced or destroyed any written instrument, a presumption will arise that, if the truth had appeared, it would have been against his interest, and that his conduct is attributable to his knowledge of this circumstance. The general rule is,—*Omnia præsumuntur contra spoliatorem.*(1) Where a testator made a will, and devised premises to A.; afterwards he made another will, which was lost, and which the jury stated in a special verdict to be different from the former will, but they did not find in what particular the difference consisted: the court decided that the devisee under the first will was entitled to the estate;(2) but Lord Mansfield, C. J., said, that if the devisee under the first will had destroyed the second, it would have been a good ground for a jury to find a revocation.

It has been considered that, upon a charge of robbery, it is not necessary that actual fear should be strictly proved, because, as it is said, the law, *in odium spoliatoris*, will presume fear, where there appears to have been a just ground for it. Accordingly, an indictment for robbery has been sustained, where the party robbed sought out the robber and submitted to be robbed by him, purposely with the view of bringing him to justice.(3)

The fabrication of evidence is calculated to raise a presumption against the party who has recourse to such a practice, not less than when evidence has been suppressed or withheld. Legal experience, however, has shown that false evidence has sometimes been resorted to for proving facts which are true.(4) In the Douglass Peerage Case, the successful party had to

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the property; see Anon., 2 C. & P. 459; R. v. Partridge, 7 C. & P. 551; R. v. Adams, 3 C. & P. 600; R. v. Cockin, 2 Lew. R. 235. As to property being found in the prisoner's house, see R. v. Hall, 2 Cowp. 728. It may be observed that this presumption is frequently as strong in favor of receiving stolen property, as of stealing it. See as to the possession of stolen property being evidence of another felony, *post.*

(1) Evans Poth. Obl. 292.

(2) Harwood v. Goodright, Cowp. 86. For other examples of this presumption, see Annesly v. Anglesea, 17 How. St. Tr. 1430, where the presumption arose from the plaintiff being kidnapped and sold for a slave. Sir S. Romilly's argument on Lord Melville's trial, 29 How. St. Tr. 1194, where most of the cases are collected. Cowper v. Cowper, 2 P. Wms. 720, 748, 752; Gartside v. Radcliffe, 1 Ch. Ca. 292; Delany v. Tenison, 3 Br. P. C. 659; Dalston v. Coatsworth, 1 P. Wms. 731; Anon., 1 Ld. Raym. 731; Newcastle (Duke) v. Kinderly, 8 Ves. 363; R. v. Arundel, Hob. 109, cit. 2 P. Wms. 748; Barker v. Ray, 2 Russ. 73; Clunnes v. Pezzy, 1 Camp. 8, n; Braithwaite v. Coleman, 4 N. & M. 654; Armory v. Delamorie, 1 Str. 505. As to the inferences to be drawn from withholding books, after notice to produce, see Cooper v. Gibbons, 3 Camp. 363; Lawson v. Sherwood, 1 Stark. R. 314; Crisp v. Anderson, Id. 35; Bate v. Kinsey, 1 C., M. & R. 41.

So where a party shows that he has burnt up an instrument, he must go further and show that it was done under circumstances that repel all inference of a fraudulent design on his part. Blade v. Newland, 12 Wend. 173.

(3) Fost. Dis. 128; 2 East P. C., c. 16, § 128.

(4) See a remarkable instance, 3 Inst. 232.

contend with a presumption against him, arising from the fabrication of several letters.(1)

In general, there is a presumption in favor of the continuance of what is once proved to have existed.(2) In questions concerning the duration of human life, there is a presumption which has been much sanctioned and acted upon (if it be not obligatory upon juries), that where a person has been absent abroad for seven years, he is to be presumed to be dead. This period has been adopted as the ground of such presumption, from analogy to the statute 1 Jac. I, c. 11, § 2,(3) relating to bigamy, and to the statute 19 Car. II, c. 6, relating to the continuance of lives on which leases are held.(4) Lord Denman, C. J., has said,(5) that there was no rigid rule of presumption upon such questions of fact, without reference to accompanying circumstances, as, for instance, the age or health of the party.(6) The fact of absence for seven years raises no inference as to the exact time of the death, or that the death took place at the end of seven years.(7) Death, without issue, may be presumed, where marriage and issue are two affirmative facts to be proved.(8)

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(1) See Appendix to Evans' Pothier, respecting the four letters of Lamarre, the surgeon, fabricated by Sir J. Stewart.

(2) Wilson v. Hodges, 2 East, 312; Throgmorton v. Walton, 2 Roll. R. 461; Att. Gen. v. Parnther, 3 Br. Ch. Ca. 25; Exp. Holyland, 11 Ves. 10; White v. Wilson, 13 Ves. 88; Hargr. Co. Litt. 185, n.; White v. Driver, 1 Phillim. 100; R. v. Budd, 5 Esp. 259; Ludlow (Mayor, &c.) v. Charlton, 9 C. & P. 242.

NOTE 184.—S. P., Lessee of Battin v. Bigelow, Peters C. C. Rep. 452. And see *ante*, note 177. But where this presumption necessarily involves in its consequences the commission of a crime by another person, the rule is otherwise; for the presumption against crime is stronger than that which ordinarily exists in favor of life. Rex v. The Inhabitants of Twyning, 2 Barn. & Ald. 386.

(3) See also 9 Geo. IV, c. 31, § 22.

(4) In Doe d. George v. Jesson, 6 East, 85, the presumption is spoken of as a rule of law. See also Doe d. Lloyd v. Deakin, 4 B. & A. 433; Rowe v. Hasland, 1 W. Bl. 404; at the period of which last-mentioned decision the presumption does not appear to have been so definite as to time. The presumption of death, from absence for seven years, was formed, however, previous to the statute of bigamy, in Thorne v. Rolffe, Dyer, 185; Bendl. 86. See Hopewell v. De Pinna, 2 Camp. 113; where in a plea of coverture, the defendant was held to be bound to prove her husband alive within seven years.

(5) In R. v. Harbonne, 2 A. & E. 544.

(6) See Watson v. King, 1 Stark. R. 121; S. C., 4 Camp. 272; where it was held, that the time of death of a person, sailing on board a missing ship, was to be judged of according to the special circumstances. See also Norris v. Norris, Rep. tem. Finch, 419; Dixon v. Dixon, 3 Bro. Ch. Ca. 510; Sillick v. Booth, 1 Y. & Col. 117; In re Hutton, 1 Curt. 595.

(7) Doe d. Knight v. Nepean, 5 B. & Ad. 86; S. C. in error, 2 M. & W. 894; where the lessor of the plaintiff sought to place the period of death at the end of seven years, in order to avoid an adverse possession.

(8) Doe d. Oldnall v. Deakin and Wooley, or Wolley, 3 C. & P., 402; S. C., 8 B. & C. 22. And see Doe v. Griffin, 15 East, 293; Richards v. Richards, Id. 294, n.; Rust v. Baker, 8 Sim. 443.

NOTE 185.—In New Jersey, the statute attaching on the fact of seven years' absence from the state raises the presumption of death, which, however, may be rebutted by proof that the absentee has been alive within that period. Wambough v. Schank, 1 Penn. Rep. 229. So in South Carolina, seven years' absence from the state is reasonable ground for presuming death.

Presumption of survivorship.

By the civil law,(1) and in foreign codes,(2) several rules are laid down for the direction of courts, in ascertaining the fact of survivorship, where several persons have perished by the same calamity. No very definite rule has been adopted in this country upon the subject; but there appears to have been a leaning to consider the person possessed of the property in dispute, to have survived; and some regard appears to have been paid to the probability of the survival of the stronger party.(3) In the Ecclesiastical Courts, the presumption appears to be adopted that all the sufferers perished together, and could not, therefore, transmit rights the one to the other.(4)

Woods v. Woods' Adm'r, 2 Bay, 476. In Kentucky, to justify the presumption of death after seven years' absence, the person must be proved absent for that period out of the country of his residence. Spurr v. Trimble, 1 Marsh. Ken. Rep. 278; Hull v. Commonwealth, Hardin's Ken. Rep. 479; Amer. Ch. Dig. 176. In Pennsylvania, proof that a person has not been heard of for seven years is sufficient to rebut the presumption of life; and the lapse of twenty-four years, without proof of inquiry or other circumstances, is enough to warrant the presumption that a person, of whom nothing has been heard for that length of time, is dead. Innis v. Campbell et al., 1 Rawle, 373. In Massachusetts, also, the mere absence of a person from the state without being heard from for seven years, is sufficient to raise the legal presumption of death; but absence for a shorter period is not so. Where letters of administration, however, have been granted, it is different; for then the fact of death does not rest on presumption, but on an adjudication of the Probate Court. Newman v. Jenkins, 10 Pick. 515. Ignorance in a family of the existence of one of the children, who had gone abroad at the age of 22, unmarried, and had not been heard of for upwards of forty years, is sufficient, with other circumstances, to warrant the presumption of his death *without issue*. McComb v. Wright, 5 John. Ch. Rep. 263. See Crouch et ux. v. Eveleth, 15 Mass. Rep. 305; University of North Carolina v. Johnston, 1 Hayw. Rep. 373. In New York, it is provided by statute, that "if any person, upon whose life any estate or tenements shall depend, shall remain beyond sea, or shall absent himself, in this state or elsewhere, for seven years together, such person shall be accounted naturally dead, in any action concerning such lands or tenements, in which his death shall come in question, unless sufficient proof be made in such case of the life of such person." 1 R. S. 749, § 6; 1 R. L. 103, § 1. See Clarke v. Cummings, 5 Barb. 354. In King v. Paddock (18 John. Rep. 141), Spencer, C. J., delivering the opinion of the court, seemed to think, in this case, that the facts authorized the jury also to presume the death of the husband, from the wreck or foundering of the vessel in which he left.)

(The presumption of death from absence beyond sea or elsewhere for seven years in succession, without having been heard from, is very general. Primm v. Stewart, 7 Texas, 178; Forsaith v. Clark, 1 Foster (N. H.), 409; but the only presumption is, as stated in the text, that he is then dead, not that he died at any particular time. Spencer v. Roper, 13 Ired. (N. C.) 333; McCartee v. Carmel, 1 Barb. Ch. 455; The State v. Moore, 11 Ired. 160. No presumption of death arises from mere lapse of time and the previous bad health of the party. Matter of Hall, Wallace, jr. 85.

(1) See Dig. l. 34, t. 5; l. 9, t. 1, 3; l. 16, t. 22, 23.

(2) See Code Civ. (Fr.), §§ 720–722.

(3) See Sillick v. Booth, 1 Y. & Col. 117, 126.

(4) See Taylor v. Diplock, 2 Phillim. 261; Colvin v. Proc. Gen., 1 Hagg. Ec. R. 92; R. v. Hay (Case of General Stanwix), 1 W. Bl. 640. See also Fearne's Posthumous Works, 38; 2 Phillim. 268, n.; 5 B. & Ad. 91, 92. And see Selwyn's Case, 3 Hagg. Ec. R. 748; In the goods of Murray, 1 Curt. 596; Mason v. Mason, 1 Mer. 308, n.; Broughton v. Randall, Cro. Eliz. 503; Wright v. Nether-

Presumption as to loss of a ship.

With respect to the presumption of the loss of missing ships, a practice is said to prevail among underwriters, that a ship shall be deemed lost, if not heard of for six months after her departure for any port of Europe, or in twelve months after departure for any greater distance.(1)

As to appointments and official acts.

It has been seen, that it is a rule that all public officers, who are proved to have acted as such, are presumed to have been duly appointed to the office, until the contrary is shown, and that the force of this presumption is so strong as to supersede the rule which excludes secondary evidence.(2)

Where acts are of an official nature, or require the concurrence of official persons, a presumption arises in favor of their due execution; it has been said on such occasions, "*Omnia præsumuntur rite esse acta.*" Thus, in order to support a parish certificate, a custom was presumed, contrary to the common law, of the parish having only one churchwarden, and it was also presumed that a party to the instrument had died within a very short period,—on the ground that the certificate had been sanctioned by justices.(3)

With regard to judicial proceedings in inferior courts and before magistrates, the maxim "*Omnia rite acta,*" will apply in support of an order of justices, provided their jurisdiction appear on the face of the order,(4) but it does not apply to convictions, which, being proceedings of a summary nature, are always watched with jealous vigilance by the superior courts;(5) still, though they can intend nothing in favor of convictions, they will intend nothing against them.(6) The maxim, however, will not

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wood, 2 Salk. 593, n.; S. C. nom. Wright v. Sarmuda, 2 Phillim. Ec. R. 266, 277, n. *c*, a question of revocation of a will, a father, wife, and child dying by shipwreck.

(See, also, Moehring v. Mitchell, 1 Barb. Ch. 264; McComb v. Wright, 5 Johns. Ch. 263; King v. Paddock, *supra.*)

(1) Park Ins. 106, 107; Patterson v. Black, Id. 433; Newby v. Reed, Id. 148; Green v. Brown, 2 Str. 1199; Cohen v. Hinkley, 2 Camp. 51; Coster v. Innes, R. & M. 333; Twemlow v. Oswin, 2 Camp. 85; Houstman v. Thornton, Holt, 242; Koster v. Reed, 6 B. & C. 19; Watson v. King, 1 Stark. R. 121.

(2) *Supra,* Chap 9, *Of the Rule Requiring the Best Evidence.*

(3) R. v. Catesby, 2 B. & C. 820. And see R. v. Hinckley, 12 East, 361; R. v. Bestland, 1 Wils. 128; R. v. Benson, 2 Camp. 508; R. v. Whitchurch, 7 B. & C. 573; R. v. Upton Gray, 10 B. & C. 807; Bastard v. Trutch, 3 A. & E. 451.

(4) R. v. Morris, 4 T. R. 552. As to the presumption in favor of the regularity of the proceedings in the Ecclesiastical Courts, see Chesterton v. Farlar, 7 A. & E. 713; Hall v. Maule, Id. 721; Hallack v. Cambridge (Univ.), 1 Q. B. 593, 614.

(5) See R. v. Morris, *ut supra;* R. v. Baines, 2 Lord Raym. 1265, 1269; R. v. Little, 1 Burr. 613; R. v. Corden, 4 Id. 2281; R. v. Pain, 7 D. & R. 678; R. v. Daman, 2 B. & A. 378; Fletcher v. Calthrop, 6 Q. B. 890, 891.

(6) By Lord Ellenborough, C. J., in R. v. Hagell, 13 East, 141; Paley Conv. 74—77. See, also, by Pratt, C. J., in R. v. Helling, 1 Str. 8; by Coleridge, J., in Christie v. Unwin, 11 A. & E. 379; by Lord Denman, C. J., In re Clarke, 2 Q. B. 630.

apply so as to give jurisdiction(1) therefore, where an examination of a soldier, taken before two magistrates, was tendered to prove his settlement, but it did not appear by the examination itself, or by other proof, that the soldier, at the time he was examined, was quartered in the place where the justices had jurisdiction, it was held that such an examination was not receivable in evidence.(2)

Private formal acts.

This presumption has been extended to the acts of private individuals, especially when they are of a formal character, as writings under seal. Thus, in an action in which the plaintiff's title was founded on the assignment of a term to secure an annuity, it was objected that there was no proof of the annuity being enrolled; but Lord Ellenborough, C. J., held that proof of the want of enrollment should come from the other side, and that he would presume the security to be valid, till the contrary was shown.(3) Where there was proof that a party had signed a deed which purported to have been sealed and delivered, it was held, that the judge at Nisi Prius had not done wrong in leaving it to the jury to infer that the deed had been sealed and delivered.(4)

Upon a similar principle, and in accordance with the law of merchants,

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(1) By Holroyd, J., in R. v. All Saints, Southampton, 7 B. & C. 790; R. v. Hulcot, 6 T. R. 583; R. v. Helling, 1 Str. 8, overruling R. v. Gouche, 2 Salk. 441.

(2) R. v. All Saints, Southampton, 7 B. & C. 789. In Carratt v. Morley (1 Q. B. 18), it was held that the jurisdiction of commissioners of a local court of requests could not be inferred merely from their having acted.

(3) Doe d. Griffin v. Mason, 3 Camp. 7. And see Doe d. Lewis v. Bingham, 4 B. & A. 672; London and Brighton Rail. Co. v. Fairclough, 2 M. & G. 674.

(4) Talbot v. Hodson, 7 Taunt. 251. And see Fasset v. Brown, Peake, 23; Grellier v. Neale, Id. 146; Burling v. Paterson, 9 C. & P. 570; Davidson v. Cooper, 11 M. & W. 784; R. v. St. Paul, Covent Garden, 7 Q. B. 238. As to the presumption that a deed was duly stamped, see Doe d. Fryer v. Coombs, 6 Jur. 930, Q. B. See, also, Crisp v. Anderson, 1 Stark. R. 35; R. v. Long Buckby, 7 East, 45; Pooley v. Goodwin, 4 A. & E. 94; Hart v. Hart, 1 Hare, 1. The illustrations of this presumption are very numerous. For example:—Necessary priority of conveyances of the same date, Barker v. Keate, 1 Freem. 251; Taylor v. Horde, 1 Burr. 107:—Sheets of a will present in a room, Bond v. Seawell, 3 Burr. 1773; S. C., 1 W. Bl. 407, 422, 454:—Subscription in testator's presence, Hands v. James, Com. 531; Brice v. Smith, Willes, 1; S. C., Com. 538; 2 Eq. Ca. Abr. 317; Croft v. Pawlet, 2 Str. 1109:—Interlineations before sealing, Trowell v. Castle, 1 Keb. 22; Hargr. Co. Litt. 225 b, n. 1; Glanville v. Paine, Barn. 19; Fitzgerald v. Fauconberge, Fitz. 204. But see Cooper v. Bockett, 4 Moo. Pri. Coun. R. 419:—Consecration of chapel, 2 Hagg. Ec. R. 50:—Confirmation of conveyance of glebe, Cro. Jac. 456:—Sanction of right of presentation to a chapel of ease, 2 Eden, 360; Ambl. 528; 4 B. & C. 455:—Confirmation of modus, 2 P. Wms. 573:—Composition real, 2 Anstr. 372:—Consent to inclosure, 1 Vern. 32; 5 Vin. Ab. 8, pl. 32:—Republication of will, 8 Ves. 129:—Induction, Chapman v. Beard, 3 Anstr. 332;—Enrollment of charitable use, 3 B. & A. 152:—Surrender of copyhold, 1 J. & W. 620; 10 East, 409:—Copyhold advittance, Blunt v. Clarke, 2 Sid. 61; Froswell v. Welsh, 1 Roll. Rep. 415; Roe d. Eberall v. Lowe, 1 H. Bl. 446; Watkins on Copyholds, 269, n.; 7 East, 21; Dyer, 292, *a*; Cooks v. Hellier, 1 Ves. 234. See, also, Doe d. Woodhouse v. Powell, 8 Q. B. 579, and cases there cited.

a negotiable security will be presumed *prima facie* to have been made for a valuable consideration.(1)

It may also be stated as a general rule, that a document will be presumed to have been made at the time when it bears date.(2) There are some exceptions, however, to this rule; as, where an instrument is produced for the purpose of proving a petitioning creditor's debt, to support a proceeding in bankruptcy; in that case some evidence besides the date is necessary, to show that the instrument had its existence before the act of bankruptcy. But the ground for requiring that proof is, that a proceeding in bankruptcy differs from an ordinary suit. The effect of a proceeding in bankruptcy is retrospective, and the object of it is to invalidate all transactions which have taken place between the act of bankruptcy and the time when the commission takes effect. And as it is the interest of the petitioning creditor to support the fiat, the courts feel a reasonable jealousy of collusion between him and the bankrupt.(3) Upon the same principle, where, in an action for criminal conversation, the letters of the wife are given in evidence, for the purpose of showing the terms upon which she was living with her husband, some other evidence besides their date is required, to show the period when they were written.(4)

In a case where a defendant gave in evidence a letter of the plaintiff, dated the 17th of January, purporting to be an answer to one written by one W., and the plaintiff in reply proposed to put in a letter, proved to be written by W., and dated the 16th of January, as that to which the one of the 17th was an answer, it was ruled to be inadmissible, without further evidence to show that it was the letter to which the plaintiff's was written in answer, or, at least, that it was in existence before the date of the plaintiff's answer.(5)

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(1) Collins v. Martin, 1 B. & P. 651; Holliday v. Atkinson, 5 B. & C. 501. (12 Wend. R. 484; 13 Id. 557; 8 Cowen, 77.)

(2) As to *deeds*, see Davies v. Lowndes, 6 M. & G. 52. And see 6 N. C. 300: *Awards*, Doe d. Clarke v. Stillwell, 8 A. & E. 645: *Bills of exchange and promissory notes*, Anderson v. Weston, 6 N. C. 296; Obbard v. Betham, M. & M. 486; Smith v. Battens, 1 Mo. & R. 341: *Accounts*, Sinclair v. Baggaley, 4 M. & W. 312: *Letters*, Hunt v. Massey, 5 B. & Ad. 902; Goodtitle d. Baker v. Milburn, 2 M. & W. 853; Anon., 2 Chitt. R. 294; Potez v. Glossop, 2 Exch. R. 191.

Wherever fraud or mistake is alleged, it may be shown that the instrument was not made at the time it bears date. Breck v. Cole, 4 Sand. 79. But the instrument is presumed to have been executed on the day of its date. Glenn v. Grover et al., 3 Md. 212.

(3) *Per Cur.*, in Anderson v. Weston, 6 N. C. 301, 302. And see Hoare v. Coryton, 4 Taunt. 560; Wright v. Lainson, 2 M. & W. 739, 743; by Lord Abinger, C. B., in Sinclair v. Baggaley, 4 M. & W. 318. The case of Taylor v. Kinloch (1 Stark. R. 175) is overruled by these decisions. See, also, Gibson v. King, Car. & M. 458, where Alderson, B., said the decision of the Court of Exchequer, in Sinclair v. Baggaley, *ut supra*, had been greatly doubted.

(4) Edwards v. Crock, 4 Esp. 39; Trelawney v. Coleman, 2 Stark. R. 191; S. C., 1 B. & A. 90; Wilton v. Webster, 7 C. & P. 198.

(5) M'Namara v. Gibbs, Car. & M. 412.

Presumption from course of public office.

Presumptions are frequently made from the regular course of a public office. Thus, where it was proved that the custom-house would not permit an entry to be made, unless there had been an indorsement made upon a license, it was held, after proof that the license had been lost, that the indorsement might be presumed from the entry.(1) If a letter is sent by the post, properly directed,(2) there is a *prima facie* presumption, from the usual course of a department of the public service, that it reached its destination, till the contrary is proved.(3) And presumptions are frequently drawn from the usual course of private offices, that letters have been sent by the post, or notices delivered, where the persons are dead, who alone could give direct evidence of the fact.(4)

In like manner, underwriters are generally presumed to know the contents of Lloyd's Shipping List, as being a document to which, in the ordinary course of business, they have access; but this presumption will not bind an underwriter, if it should appear that, owing to a false representation by the assured, he did not in fact look at the list.(5) So, the underwriters, upon a foreign ship, or a foreign voyage, are presumed to know the usages and laws of foreign states, which affect that ship or that voyage.(6)

Course of events.

Where two things are proved to have been done on the same day, that which ought to have been done first, will be presumed to have been done so;(7) but, where there is a doubt which took place first, the party who is to act upon the assumption that they took place in a particular order, ought to make the inquiry.(8)

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(1) Butler v. Alnutt, 1 Stark. R. 222. And see Van Omeron v. Dowick, 2 Camp. 44.

(2) See Walter v. Haynes, R. & M. 149.

(3) Saunderson v. Judge, 2 H. Bl. 509; Kufh v. Weston, 3 Esp. 54; Dobree v. Eastwood, 3 C. & P. 250; Warren v. Warren, 1 C., M. & R. 250. A similar presumption arises if a letter is delivered to a postman. Skilbeck v. Garrett, 7 Q. B. 846. But see Hawkins v. Rutt, 1 Peake, 186. Post marks are evidence that the letters were in the office at the times which the dates specify. R. v. Plumer, R. & R. 264; Fletcher v. Braddyl, 3 Stark. R. 64; R. v. Johnson, 7 East, 65; R. v. Watson, 1 Camp. 215; Colton v. James, M. & M. 276.

(4) See Doe d. Patteshall v. Turford, 3 B. & Ad. 890, 895, as to service of a notice to quit. As to the effect of the course of business, in proving that letters have been sent by the post, where the clerks of an office are dead, see Pritt v. Fairclough, 3 Camp. 305; Hagedorn v. Reid, Id. 377; Toosey v. Williams, M. & M. 129; Champneys v. Peck, 1 Stark. R. 404. As to the effect of the like course of business, where the clerks are living, see Hetherington v. Kemp, 4 Camp. 193; Hawkes v. Salter, 4 Bing. 715.

(5) Mackintosh v. Marshall, 11 M. & W. 116.

(6) *Per Cur.*, in Young v. Turing, in error, 2 M. & G. 593, 603. And see Noble v. Kennoway, 2 Doug. 513; Da Costa v. Edmonds, 4 Camp. 142. As to knowledge of a particular custom, where the jury have expressly negatived notice, see Milward v. Hibbert, 3 Q. B. 120.

(7) By Alderson, B., in Aikman v. Conway, 3 M. & W. 72.

(8) By Lord Denman, C. J., in Castrique v. Bernabo, 6 Q. B. 500.

Presumption from possession.

Several presumptions are made with reference to persons in possession of property. A person in possession of land, is *prima facie* presumed to be seized in fee.(1) This presumption, however, may be rebutted by a

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(1) See the cases (*supra*), of declarations against interest by persons in possession of property, which depend on this presumption. And see Doe d. Welsh v. Langfield, 16 M. & W. 497. As to presumptive right to minerals, see Rowe v. Grenfel, R. & M. 396; Rowe v. Brenton, 8 B. & C. 737; Hodgkinson v. Fletcher, 3 Doug. 31: of quit rent, Doe d. Whittick v. Johnson, Gow, 173: of property in mines, B. N. P. 33. See, also, Trotter v. Harris, 2 Y. & J. 285, as to possession of the franchise of a ferry. Doe d. Laurie v. Dyeball, M. & M. 346; S. C., 3 C. & P. 610; Doe d. Harding v. Cooke, 7 Bing. 346, as to possession of title in ejectment against a wrongdoer. See further, as to presumptions from possession, Sutton v. Buck, 2 Taunt. 302; Thomas v. Foyle, 5 Esp. 88; Catteris v. Cowper, 4 Taunt. 547; Graham v. Peat, 1 East, 244; Sheriff v. Cadell, 2 Esp. 617.

NOTE 186.—See note 177. The mere prior possession of property, however recent, will enable the occupant to recover or defend against a stranger, in ejectment, trespass, trover, &c.

A plaintiff in ejectment recovered on prior possession. Doe ex dem. Carr v. Billiard, 3 Mann. & Ryl. 111; Doe ex dem. Harding v. Cooke, 5 Moore & Payne, 181; Day v. Alverson, 9 Wend. 223; Doe ex dem. Hughes v. Dyball, 3 Carr. & Payne, 610; a brief possession by the plaintiff's tenant; S. C., 1 Mood. & Malk. 346; Jackson ex dem. Weidman v. Hubble, 1 Cowen's Rep. 613; Jackson ex dem. Murray v. Hazen, 2 John. Rep. 22; Jackson ex dem. Duncan v. Harder, 4 John. Rep. 202; Allen ex dem. Harrison v. Rivington, 2 Saund. 111; Jackson ex dem. Murray v. Denn, 5 Cowen's Rep. 200; Catteris v. Cowper, 4 Taunt. 547; Smith ex dem. Teller v. Lorillard, 10 John. Rep. 338, 356, and cases there cited at the last page.

So in trespass *quare clausum fregit.* Myrick v. Bishop, 1 Hawks, 485, a case of constructive possession under a deed covering the whole; Wendell v. Blanchard, 2 N. H. Rep. 456, 457, overruling Wickham v. Freeman, *contra*, 12 John. Rep. 183; Brandon v. Grimke, 1 Nott & M'Cord, 356; Cutts v. Spring, 15 Mass. Rep. 135.

In trespass, as to personal property, the plaintiff was allowed to recover on possession. Gelston v. Hoyt, 13 John. Rep. 361, 378. See Ougton v. Steppings, 1 Barnw. & Adolph, 241, S. P. Though form of action was for the money received for the goods. And Odiorne v. Colley, 2 N. Rep. 66, 67.

So in assumpsit on the defendant's receipt of a raft for sale, which the plaintiffs found. Bone v. Hillen, 1 Rep. Const. Ct. 197, 199.

So in trover on the plaintiff's possession. Rowe v. Brenton, 8 Barnw. & Cress. 737; Pinkham v. Gear, 3 N. H. Rep. 404; Duncan v. Spear, 11 Wend. 54; Daniels v. Ball, Id. 57, note. But in trover, the plaintiff having shown ownership, a short possession of the defendant, without the plaintiff's knowledge and acquiescence, was held no proof that the property was changed. Tompkins v. Haile, 3 Wend. 406.

So, possession is *prima facie* sufficient to maintain an indictment for a forcible entry and detainer, averring a fee in the relator (The People v. Leonard, 11 John. Rep. 504); or on an indictment for cutting timber or wood contrary to the statute (Commonwealth v. Hoover, 1 Browne's Rep. 25, Appendix); or on a claim of property in a prize court. Miller v. The Resolution, 2 Dall. 5.

So, possession of an incorporeal hereditament, *e. g.* an exclusive right of fishery, was allowed as the ground of a plaintiff's recovery in trespass against a mere stranger. Russell v. Stocking, 8 Conn. Rep. 236. So of a ferry. Trotter v. Harris, 2 Younge & Jervis, 285. So of the joint user of a party wall. Cubitt v. Porter, 8 Barnw. & Cress. 257.

A long possession and adverse use of personal property, as for two or three years, may also be shown as auxiliary evidence of title against the former owner. Bullard v. Billings, 2 Verm. Rep. 309.

The presumption derivable from possession is, that the possessor owns absolutely. Thus, pos-

stronger presumption arising from circumstances—as, from subsequent possession by a daughter, while the heir at law was living; and it is not conclusive evidence of a seizin, which can only be divested by deeds.(1) The possession of personal property affords a *prima facie* presumption of ownership.(2) Thus, although a documentary title is essential to the ownership of ships, it is sufficient, in an action upon a policy, for the plaintiff to rest upon the mere fact of possession, unless further proof be rendered necessary by the contrary evidence being adduced.(3) So the possession, by the plaintiff, of an "I. O. U.," signed by the defendant, but not addressed to any one, is *prima facie* evidence that it was given by the defendant to the plaintiff.(4) In like manner, where a letter is given in evidence, with the direction torn off, it will be presumed *prima facie* that it was addressed to the party who produces it.(5)

There are certain *prima facie* presumptions in respect to the ownership of property, which seem not to have the force of rules of law, though a jury are to draw the conclusion which is derived from them. Thus, the ownership of a road, *ad medium filum viæ*, presumptively belongs to the owner of the adjacent land;(6) and there is the like presumption in respect of the property and right of fishing in unnavigable rivers.(7) It is a presumption also, that strips of waste land, which adjoin a road, belong to the owner of the adjoining inclosed land, whether he be

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session with permanancy of the profits, or claim of title, is evidence in respect to land, of a seizin in fee; but this may be rebutted or qualified by possession or other opposite evidence. Jayne v. Price, 5 Taunt. 326; per Savage, C. J., in Livingston v. The Peru Iron Co., 9 Wend. 520, 521; People ex rel. Gault v. Van Nostrand, 9 Wend. 50, 53; People v. Leonard, 11 John. Rep. 504, 510; Day v. Alverson, 9 Wend. 223; Ricard v. Williams, 7 Wheat. 59; Jackson ex dem. Sparkman v. Porter, 1 Paine's Rep. C. C. U. S. 457.

It was agreed that the defendant might defend in ejectment on a prior possession. Doe ex dem. Burrough v. Reade, 8 East, 353, 356; Gilliland's Lessee v. Hana, Addis. 251.

It was denied that the goods can be laid as belonging to the sheriff's receiptor, in an indictment for larceny, because the latter is a mere servant. Commonwealth v. Morse, 14 Mass. Rep. 217; Norton v. The People, 8 Cowen, 137; Dillenback v. Jerome, 7 Id. 294, 299.

Nor has he such a possession as will maintain trover or trespass against even a wrongdoer. Dillenback v. Jerome, 7 Cowen's Rep. 294; Ludden v. Leavitt, 9 Mass. Rep. 104; Warren v. Leland, 11 Id. 265; Whittier v. Smith, Id. 211; Waterman v. Robinson, 5 Id. 303. But see Pool v. Symonds, 1 N. H. Rep. 289, *contra.*

(1) Jayne v. Price, 5 Taunt. 326. As to rebutting the presumption arising from possession, by showing that an ancester has not conveyed by true recovery, see Doe d. Smith v. Pike, 3 B. & Ad. 738.

(2) Webb v. Fox, 7 T. R. 397.

(3) Robertson v. French, 4 East, 130.

(4) Curtis v. Rickards, 1 M. & G. 46, recognized in Douglas v. Holme, 12 A. & E. 641.

(5) By Tindal, C. J., in Curtis v. Rickards, *ut supra.*

(6) Berry and Goodman's Case, 2 Leon. 148; by Gibbs, C. J., in Grose v. West, 7 Taunt. 40. See Headlam v. Hedley, Holt N. P. C. 463.

(7) Hale de Jure Maris, part 1, ch. 1; Carter v. Murcott, 4 Burr. 2163. As to navigable rivers, the presumption is that the soil is in the crown; see the same authorities. And see R. v. Landulph, 1 M. & Rob. 393, as to the boundaries of parishes divided by a river.

a freeholder or copyholder, and not to the lord of the manor, unless the strips communicate with open commons, or larger portions of land.(1) This presumption has a reasonable foundation, since, if the road was out of repair, travelers might go upon the adjacent land, which would be a reason for the owner not inclosing up to the margin of the road.(2) In speaking of this presumption, Bayley, J., has said,(3) it is very desirable, that there should be one certain and definite rule applicable to all cases of this description; and Holroyd, J., remarked,(4) that it was of considerable importance, that the *prima facie* presumption should be constant and uniform. The presumption in question may, however, always be rebutted by evidence tending to raise a contrary presumption.(5) Where the lord of the manor has conveyed land to A., and afterwards other land to B., and it appears that a narrow strip of land passed by one or other of the conveyances, but it was doubtful by which, no presumption arises in favor of A., from the fact that a strip of land lies between a highway and land indisputably comprised in the conveyance to A.;(6) for the presumption that the ownership of the land extends up to the middle of the road does not apply, when the whole has belonged to one party, who has granted a part to one grantee and a part to the other.(7) Lord Denman, C. J., said in this case, that he always thought presumptions of this nature were put too widely.

Presumption as to nature of tenancy.

Upon proof of payment of rent, in respect of premises that are ordinarily let from year to year, it will be presumed, especially if such payments are made quarterly, that the party making the payments holds under a tenancy from year to year.(8)

By the Prescription Act, 2 & 3 Wm. IV, c. 71, various presumptions, which juries had been ordinarily recommended, if not directed, to make

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(1) Doe d. Pring v. Pearsay, 7 B. & C. 304; Steel v. Prickett, 2 Stark. R. 463; Grose v. West, 7 Taunt. 40; Cook v. Green, 11 Pri. 736.

(2) The presumption appears not to exist where the road is defined for the first time under an inclosure act. R. v. Hatfield, 4 A. & E. 165; R. v. Edmonton, 1 Moo. & Rob. 32.

(3) In Doe d. Pring v. Pearsay, 7 B. & C. 304.

(4) Id. As to presumptive ownership of walls, see Newcastle (Duke) v. Clark, 8 Taunt. 613; Wiltshire v. Sidford, cited 8 B. & C. 259; Matts v. Hawkins, 5 Taunt. 20; Callis on Sewers, p. 74. As to presumptive ownership of trees, see Masters v. Pollie, 2 Roll. R. 141; Holder v. Coates, M. & M. 112; Waterman v. Soper, 1 Ld. Raym. 737; 2 Roll. R. 265; B. N. P. 85. Of materials of public bridge, see Hamson v. Parker, 6 East, 154. As to presumptive ownership of soil in separate fishery, see Lofft, 364; Vowles v. Miller, 3 Taunt. 138; Guy v. West, 2 Selw. N. P. 1218. See also Godmanchester (Bailiffs) v. Phillips, 4 A. & E. 556.

(5) Doe d. Harrison v. Hampson, 4 C. B. 267.

(6) White v. Hill, 6 Q. B. 487.

(7) By Patteson, J., Id.

(8) Bishop v. Howard, 2 B. & C. 100. And see Doe d. Lord v. Cargo, 6 C. B. 90, as to how this presumption may be rebutted.

from modern user, as to the existence of immemorial rights, or of modern rights founded on supposed non-existing grants, have been converted into positive rules of law. Previous to this act, a technical effect was given to the evidence of enjoyment of certain incorporeal rights for the period of twenty years, which, though in theory only presumptive evidence, was in practice and effect a bar. The statute does not prevent a jury from presuming a grant from possession with other circumstances, if they believe one to have been actually made; but it precludes the presumption from possession alone for a less period of enjoyment than that prescribed.(1)

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(1) By Parke, B., in Bright v. Walker, 1 C., M. & R. 212. See 2 & 3 Wm. IV, c. 100, amended by 4 & 5 Wm. IV, c. 83, as to tithes. And see Fellowes v. Clay, 4 Q. B. 313.

NOTE 187.—See also Wolley v. Brownhill, M'Clel. 317. So fifteen years' possession of a benefice was held presumptive evidence that the incumbent was regularly inducted, and had read the thirty-nine articles. Chapman v. Beard, 3 Anst. 942.

See also 2 P. Wms. 573; 1 Eq. Cas. Abr. 367, 368.

The cases on lights and ways, are mixed in the text. The following is a summary of the cases on lights. They relate mainly to the enjoyment of open, unobstructed, windows overlooking another's land. This right is often purchased; but though it originate in temporary permission of the adjoining owner, or mere usurpation of the party claiming the right, yet an enjoyment for twenty years affords presumptive evidence of an agreement, license or grant (Lewis v. Price, 2 Williams' Saund. 175 a, 175 b, note 2; 1 Vin. Suppl. 162; S. C., Esp. N. P. 636; S. C., 2 Esp. N. P. (Gould & Banks' ed. of 1811), 268; Dougal v. Wilson, 2 Williams' Saund. 175 b, note 2; Darwin v. Upton, 2 Williams' Saund. 175 b, c and d; Moore v. Rawson, 3 Barnw. & Cressw. 332, 335, *et seq.;* Penwarden v. Ching, 1 Mood. & Malk. 400); and this though the messuage requiring the light be erected somewhat within the boundary of the owner's premises; but so near that the light is sensibly diminished by a subsequent obstruction. Cross v. Lewis, 2 Barnw. & Cressw. 686. Nor can the inference be rebutted by evidence that the right claimed had no existence previous to the commencement of the twenty years. Darwin v. Upton, 2 Williams' Saund. 175 b, c and d. But it may, by the reversioner showing that the acquiescence was by his lessee; for this could not be prevented by the reversioner, unless his knowledge be shown, so that he could interfere; and though it may conclude the lessee, who is not incommoded, and would not naturally give notice to his landlord, it ought not to bind the latter. Daniel v. North, 11 East, 372. And see also Cross v. Lewis, 2 Barnw. & Cressw. 686. So, that the adjoining proprietor was an infant, or under coverture, or other personal incapacity to grant, when the user began. So, that he was absent from the kingdom; and, therefore, ignorant of that fact, and incapable of resisting, or that the party alleged to have authorized the easement, had only a particular interest, as a life estate; and could not bind the reversioner. Barker v. Richardson, 4 Barnw. & Alders. 579. So a particular local usage or by-law; as in London, authorizing the stopping of adjoining lights at any distance of time. Wynstanley v. Lee, 2 Swanst. 333. But see Bland v. Mosely, cited in Alfred's Case, 9 Rep. 58. So non-user or abandonment will occasion the loss of the easement claimed, nor is twenty years necessary for this. Thus, pulling down a wall of ancient lights, and substituting a plain wall, is enough, unless some cotemporary act be done, to show an intention of resuming the former right. Moore v. Rawson, 3 Barnw. & Cressw. 332. The presumption in such case is, that the right has been relinquished as needless, or released for a valuable consideration. Lawrence v. Obee, 3 Campb. 514. See also 12 Ves. 265.

The right to enjoy light, is not absolute and unqualified in degree; but is limited by the extent and manner of usage; so that one cannot demand more room for his windows, or an increase of light; and if he enlarge his window, this will not protect him from its being partially covered by the adjoining building, provided the ancient quantity of light yet remain to him. Chandler v. Thompson, 3 Campb. 80. See also per Wilmot, C. J., in Dougal v. Wilson, 2 Williams' Saund.

Of public way.

With respect to the presumed creation of rights of way, it is to be observed, that notwithstanding the statute, the dedication of public ways is still a matter to be presumed by juries; and in making a presumption in such cases, numerous circumstances require to be taken into consideration, the effect of which has, in different instances, been more or less clearly defined by legal authorities. The question is generally affected by other stronger circumstances than mere lapse of time.(1)

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175 b, note 2. And so where the house lighted was a malt-house, but was changed into a parish work-house, requiring, and at first having, more light than the malt-house; a fence built so as to reduce the light to its former quantity, was held not actionable, though it diminished the necessary light of the work-house. Marsden v. Goble, 1 Camp. 320. A new trial was granted; but not on this point. And see Bealey v. Shaw, 6 East, 208, S. P., as to diverting water from a mill; and Ballard v. Dyson, 1 Taunt. 279, that a way is limited by user to the kind of carriage or passage, whether by cattle, carts, &c. Jackson v. Stacey, 1 Holt's N. P. Rep. S. P. As to raising a mill-dam claimed to a certain height by user for twenty years, so as to flow land above, beyond the user, see Stiles v. Hooker, 7 Cowen's Rep. 266; and other cases to this and the like effect, *post*, notes, 188, 189.

(1) See R. v. Lloyd, 1 Camp. 262; British Museum (Trustees) v. Finnis, 5 C. & P. 460; Rugby Charity (Trustees) v. Merryweather, 11 East, 376, n. See further as to the effect of a bar, Roberts v. Carr, 2 Camp. 262, n.; Lethbridge v. Winter, 1 Id. 263, n.: as to limited dedications, Stafford (Marq.) v. Coyney, 7 B. & C. 257; Woodyer v. Haddon, 5 Taunt. 125: as to the persons, whether tenants or trustees, competent to dedicate, R. v. Leake, 5 B. & Ad. 469; Wood v. Veal, Id. 454; R. v. Barr, 4 Camp. 16; Harper v. Charlesworth, 4 B. & C. 574.

NOTE 188.—The presumptions which respect both public and private ways, as presented upon English authority, are very fully collected (*post*); and, for want of a proper head here, we shall reserve the American authorities as to the former for that place; inserting now those only which relate to private ways, with the English cases on the same subject reported since our author wrote; and perhaps some others not cited by him.

In a recent Massachusetts case, a way was prescribed for in pleading, as appurtenant to a wood lot; and the prescription was maintained by proof of forty years' user; and held that the way would pass as appurtenant to the lot by a conveyance neither mentioning the way nor containing the usual words, "privileges and appurtenances." Kent v. Waite, 10 Pick. 138.

Twenty years' peaceable enjoyment or possession of a private way, confers a presumptive title. Per Lord Mansfield, C. J., in Folkes v. Chadd, 3 Doug. 343. The inference from such a long user is, that the right passed to the person using it by a regular grant. Livett v. Wilson, 3 Bing. 115; S. C., 10 Moore, 409; per Abbott, C. J., in Doe dem. Putland v. Hilder, 2 Barnw. & Ald. 791; Wright v. Freeman, 5 Har. & John. 497; Hill v. Crosby, 2 Pick. 466; Commonwealth v. Low, 3 Pick. 408; per Wilde, J., in Coolidge v. Learned, 8 Pick. 509. And evidence of the use of a way for a sufficient length of time, *e. g.* forty years and upwards, by the owners of a farm, and any other persons having an occasion to use the way, will sustain the allegation of a prescriptive right in the owners of the farm, notwithstanding it shows a right by custom in other persons. Kent v. Waite, 10 Pick. 138.

A town may, by user, like an individual, acquire a private way for itself, under peculiar circumstances; though not for the public at large. M'Clure v. Hill, 2 Rep. Const. Ct. 423, 424, per Cheves, J.

Evidence to rebut the inference of a grant, sought to be raised, is, of course, admissible. It may be shown that the usage suffered interruption (Hartwright v. Badham, 11 Price, 383, 394, 397; Sargent v. Ballard, 9 Pick. 251); or was allowed by the mere neglect, permission or indulgence of the owner (per Richards, Ch. B., in Hartwright v. Badham, 11 Price, 397); or had formed the subject of perpetual contest (Livett v. Wilson, *ut supra*); or it may be accounted for on the ground of leave, favor or otherwise, than as a claim or assertion of right. Per Le Blanc, J.,

With respect to the presumption of incorporeal rights from user not included within the statute, many presumptions may continue to be formed

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in Campbell v. Wilson, 3 East, 294, 302; Lawton v. Rivers, 2 M'Cord, 445; Hill v. Crosby, 2 Pick. 466; Sargent v. Ballard, *ut supra.* So it may be shown that the party was merely allowed to pass like other neighbors, without being confined to any particular track. Turnbull v. Rivers, 3 M'Cord, 131; Lawton v. Rivers, 2 Id. 455, 451. So the obstruction of the way, for only one year of the time, will defeat it. Cuthbert v. Lawton, 3 M'Cord, 194. So it may be shown that the way began short of twenty years before the trespass (the act of user) complained of (Strout v. Berry, 7 Mass. Rep. 385); or short of twenty years before the action commenced. Gayetty v. Bethune, 14 Mass. Rep. 49, 53. So, that the identity of the way is not fixed; but that the user has been fluctuating and ambulatory; changing with fields and fences (Alban v. Brownsall, Yelv. 163; Jones v. Percival, 5 Pick. 485; Lawton v. Rivers, 2 M'Cord, 445, 451; Turnbull v. Rivers, *ut supra*); or has been interrupted at any time within the twenty years (Odiorne v. Wade, 5 Pick. 421); as where the owner of the soil plowed up the way, declaring that there was none, though the claimant of the way was not present. Barker v. Clark, 4 N. H. Rep. 380. So where he has not used the way for a long time. Comstock v. Van Dusen, 5 Pick. 163. The right of way should have been exercised with the owner's knowledge, or he cannot be affected. Sargent v. Ballard, *ut supra.* The public use of a way for several years, for all purposes except carrying coals, is either a limited dedication or no dedication at all; and, if none, it is at most a license revocable; and so it would be trespass to carry coals along the way, after notice from the owner of the soil not to do so. Marquis of Stafford v. Coyney, 7 Barnw. & Cress. 257. An agreement for a way by parol is a mere license, revocable at the pleasure of the grantor. Wright v. Freeman, 5 Har. & John. 467, 478. A right of way can be only by prescription or grant at the common law. Id. The use, by a man, of a way to his land for less than twenty years; when his land is confiscated and granted to another, who continues the use till both make out the time; will not warrant the inference, because of the interruption by the confiscation. Though it would be otherwise if the twenty years were made out by the successive enjoyment of ancestor and heir, vendor and vendee, &c. Sargent v. Ballard, *ut supra.*

Non-user for a long time (probably twenty years) affords a presumption that a right of way has been released or surrendered. Per Abbot, C. J., in Doe ex dem. Putland v. Hilder, 2 Barnw. & Ald. 791; and per Littledale, J., in Moore v. Rawson, 3 Barnw. & Cress. 339; per Lord Erskine, C., in Hilliary v. Waller, 12 Ves. 265; Wright v. Freeman, 5 Har. & John. 467, 477; Hoffman v. Savage, 15 Mass. Rep. 130, 132, *per Cur.* Indeed, this point was directly adjudged in Maryland in 1823. Wright v. Freeman, 5 Har. & John. 467, 476, 477. But not, if the non-user be short of twenty years. Emerson v. Wiley, 10 Pick. 310. Nor if reserved or granted expressly, and so not dependent on user, would a non-user of twenty years work a loss of the way. White v. Crawford, 10 Mass. Rep. 182. But see Wright v. Freeman, *supra, contra.* So where a way had existed from 1769 to 1800; but after that, for more than twenty years, had not been used much, and been obstructed three or four times in different years, and some wide deviations made from its original course; yet held that it was not destroyed, as it had before been perfected by twenty years' possession. Cuthbert v. Lawton, 3 M'Cord, 194. Nor will the exclusive use and occupancy of the land by the owners, for agricultural purposes, destroy the claim; for this may not be inconsistent with the right of way. If the latter be entirely interrupted for twenty years, that will work a bar. Wright v. Freeman, 5 Har. & John. 467, 475, 476. An agreement by parol to discontinue an old way is but a license, and may be revoked. Id.

If there be a written grant, and this appear on the trial, it must be produced or otherwise proved, though the user have been more than twenty years; for perhaps the grant may show a qualification of the proposed way. Boynton v. Rees, 8 Pick. 329, 333.

So the lapse of time, in order to form a presumptive bar of an action to try the right of advowson, must be very great; and, in general, strengthened by other circumstances. St. 1 Mar. Sess. 2, c. 5; 3 Bl. Comm. 251; Bedle v. Beard, 12 Rep. 4; Powel v. Milbank, Cowper, 103. note; Gibson v. Clarke, 1 Jac. & Walk. 159, 162; 6 Ves. 673; per Eyre, C. B., 1 Jac. & Walk, 161; per Ld. Eldon, 8 Ves. 130, note.

by juries, and will, it is conceived, be recommended to them in deference to legal authority, and in consonance with the justice of a case, though contrary to their opinion of the real facts; as, when difficulties are presumed for regulating the right to pews or vaults.(1) The like may be said of copyhold customs,(2) and the liability to repair fences.(3) Various other instances might be added, resting as well upon modern as immemorial title.(4)

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(1) Rogers v. Brooks, cited 1 T. R. 431, n.; Pettman v. Bridger, 1 Phillim. 323; Fuller v. Lane, 2 Adams, 425; Walter v. Gunner, 1 Hagg. 314; Com. Dig. tit. Eglise; Byerley v. Windus, 5 B. & C. 1; Mainwaring v. Giles, 5 B. & A. 360; Stock v. Booth, 1 T. R. 430; Griffith v. Matthews, 5 T. R. 296.

(2) A single entry upon the rolls may afford evidence from which a copyhold custom may be presumed. Doe d. Mason v. Mason, 3 Wils. 63.

(3) Boyle v. Tamlyn, 6 B. & C. 329; Cheetham v. Hampson, 4 T. R. 318; 2 Wms. Saund. 285, n. 4; 290, n. 7; Booth v. Wilson, 1 B. & A. 59; Churchill v. Evans, 1 T. R. 529; Vin. Abtit. Fences; Com. Dig. tit. Action on the Case for Negligence.

(4) NOTE 189.—Beside the several easements enumerated by our author, there are various others acknowledged by the law; and which look, for the evidence of their existence, to the like ground of presumption.

1. Thus we shall see directly, that a right of fishery in the land of another may arise from user.

2. Again; where the acknowledged proprietors of a fishery, and their lessees, had, for above twenty years, publicly landed their nets on land belonging to another, and had, at various times, repaired and improved the landing place; it was held that the jury might presume a grant of the right so exercised, though there was no direct evidence in the case, to show that the owner of the land knew of the encroachment. Gray v. Bond, 2 Brod. & Bing. 667; Hart v. Chalker, 5 Conn. Rep. 311, S. P. But, to warrant this presumption, the right must be exercised by certain known persons, who can be clearly designated as taking the presumptive grant, and who have exercised it not only without interruption, but exclusively of the owner, and also accompanied such exercise with a claim of title. Otherwise, and especially where there is a general usage of the country for every person so to occupy this and the like places, the use would more naturally be referable to some other cause than a grant. The place occupied must also, like a way, be definite in its limits. Nor is it any aid to the claim, that the town authorities have laid it off; for they, as such, have no authority in the matter. These things were held of a landing ground for lumber on Eastern River, which had been occupied for more than twenty years by the inhabitants of Pittson, being accessible to them through an ancient path or cartway. Bethum v. Turner, 1 Greenl. 111. Yet there is no doubt that the right to a public or private landing place may be sustained by plain evidence of ancient, definite and exclusive usage. Id.; Coolidge v. Learned, 8 Pick. 504, 509. Under what qualifications such evidence is to be received by us, was practically and very sensibly shown by Mellen, C. J., in Bethum v. Turner (1 Greenl. 115); and they are applicable to more than one description of easement. "Generally speaking, the cases in the books relating to this subject, cannot be safely applied to lands a great portion of which has never been improved; where the proprietors reside at a distance; where settlements are made on small portions of large lots, without the knowledge of the owners, or any claim of title on the part of the settler; or where the usages of the country are such as to collect people near the margin of the river, for the more easy transportation or more ready sale of their lumber, and where the persons thus resorting have no intention to appropriate the banks of the river to any other than a temporary use, on account of the facilities thus furnished. In England where the decisions alluded to were made, the lands generally are under improvement, under the inspection of some landlord or his agent, where any encroachment on the land, or improper appropriation of it, must be known." And see the remarks of Duncan, J., on a kindred subject, in Wilson v. Stoner (9 Serg. & Rawle, 43), given also in note 190.

3. Rights to open and work mines; to dig clay or soil; or to cut and carry away timber, on the land of another; so, in the lord of a manor to make occasional approvements without the consent of the commoners, have been sustained upon the same principle of long and exclusive user. A grant or reservation may be presumed, accordingly as the circumstances point to either; simple adverse user in the land of another, inferring a *grant;* but if such user be continued by a former owner of the land, after having conveyed to another, then a reservation. Stanley v. White, 14 East, 322, 336, 337, 342; Folkard v. Hemmett, 5 T. R. 417, note *a*; Bateson v. Green, 5 T. R. 411. Upon ground somewhat similar, the Court of Errors presumed that the conveyance from a former owner had excepted a drain of ten feet wide for a collect. Bergen v. Bennett, 1 Cain. Cas. Err. 1, 2, 18, 19. And the presumption of a release or other discharge of these and the like rights (even though created by a written grant shown in evidence directly) will be generated by long neglect or disuse. Said of a right to cut timber and graze, per Kent, C., in Ten Broeck v. Livingston, 1 John. Ch. Rep. 362.

4. Much the most important and difficult class of presumptive easements have grown out of the conflicting use of running water. This, presented in the form of brooks, creeks and rivers, is appropriated in a great variety of ways to domestic, agricultural and manufacturing purposes. A single and inconsiderable stream, perhaps, ranges through many leagues, touching or intersecting the lands of fifty or a hundred successive proprietors, affording to many of these, falls of water, and other facilities for manufacturing establishments. At this point the law declares that the natural purity and course and flow of the stream shall not be so changed or modified by the act of one, as to injure any other proprietor, or impair his natural advantages. The common wants of all must be subserved, and an advantage given to no one at the expense of any other. The civil law is not more strict than our own in this respect. "One cannot do anything to make the current of the water slower or more rapid, should this change be any way prejudicial to particular persons." Again; "although one may divert the water of a brook or of a river, to water his meadows or other grounds, or for mills and other uses; yet every one ought to use this liberty so as not to do any prejudice to neighbors who should have a like want and an equal right." Dom. Supp. b. 1, tit. 8, § 2, art. 11; 3 Kent's Comm. (2 ed.), 441. Even the strict doctrine of Pothier, cited at the last page, and slightly qualified by the learned commentator, would yet seem to be *literally* supported by the two cases of Williams v. Morland, and Thompson v. Crocker, hereinafter cited. The language of the common law is equally pointed: "Every man has a right to have the advantage of a flow of water in his own land, without diminution or alteration." Per Lord Ellenborough, in Bealey v. Shaw, 6 East, 214. "The old course of the flood stream being along certain lands, it is not competent for the proprietors of those lands to obstruct that old course, by a sort of new water way, to the prejudice of the proprietor on the other side." Per Lord Chancellor, in Menzies v. Breadalbane, 3 Bligh (N. S.), 418. And such is the law of Scotland. Id. "A stream of water is, at first, the property of each person through whose land it flows." Per Holroyd, J., in Cross v. Lewis, 2 Barn. & Cress. 686, 690. "Every proprietor has an equal right to use the water which flows in the stream; and, consequently, no proprietor can have the right to use the water to the prejudice of any other proprietor. Without the consent of the other proprietors, who may be affected by his operations, no proprietor can either diminish the quantity of water, which would otherwise descend to the proprietors below, or throw the water back upon the proprietors above." Per Sir J. Leach, Vice-Chancellor, in Wright v. Howard (1 Simons & Stuart's Reports, 203), in giving judgment on the very point thus stated. "Every proprietor has a right to the use of the water flowing in its natural current, without diminution or obstruction. No proprietor has the right to use the water to the prejudice of another. It is wholly immaterial whether the party be a proprietor above or below, in the course of the river; the right being common to all the proprietors on the river, no one has a right to diminish the quantity which will, according to the natural current, flow to a proprietor below, or to throw it back upon a proprietor above. The true test of the principle and extent of the use is, whether it is to the injury of the other proprietors or not." Per Story, J., in Tyler v. Wilkinson (1827), 4 Mason, 401, declaring these positions to be supported by a very strong and controlling current of authority. Again; "mere priority of appropriation of running water, confers no exclusive use." Id. 401. In a late case (1832) in the King's Bench, the defendants, proprietors above, having appropriated most of the water of a small stream to the use of their factory, the plaintiff, a proprietor below, afterwards requiring for his own use the water thus diverted, for

some works of his, erected subsequent to the defendant's works, brought his action, showing that the previous appropriation of the water above, impaired the use of his works now newly set up below; a full and adequate supply of water not being afforded. A verdict being given for the defendants, by the direction of the judge, on the authority of what was said by some of the judges in Williams v. Morland (*supra*), upon a motion for a new trial, the English cases and dicta were fully gone into on the argument; and the court took time for advisement. They finally granted a new trial, after reading, as their own opinion, that of Leach, V. C., above stated; and added: "We all agree in the judgment thus delivered; and upon the authority of that decision, and the reasoning of the learned judge, we are of opinion that the defendants did not acquire a right by their appropriation, against the use which the plaintiff afterwards sought to make of the water." Mason v. Hill and others, 3 Barnw. & Adolph. 304. The same point was solemnly decided by the Supreme Court of New Hampshire, two years before (1830), saying: "Every man has a right to the use of the water flowing in a stream through his own land; and if any one divert the water from its natural channel, or throw it back, so as to deprive him of the use of it, the law will give him redress." Gilman v. Tilton, 5 N. H. Rep. 231; King v. Tiffany, 9 Conn. Rep. 152, S. P. The Supreme Court of New York have recently placed this doctrine on the plainest and strongest ground. The defendant having, on his side of the stream, a large surplus of water for his mills, the plaintiff, who had not enough, claimed the right to divert a portion, but no more than was necessary, to his mill on the other side, leaving still sufficient for the defendant, with a tight dam, and prudent use of the remaining water. For this purpose, the plaintiff erected a dam, above the defendant's mills. The defendant tore away the dam; and for that the action was brought. The court held, that the action was not sustainable. They say, "the defendant was entitled to all the natural advantages which the place he occupied afforded him. We cannot take from one party a *right* for the sake of the *convenience* of another. A person through whose farm a stream naturally flows, is entitled to have the whole pass through it, though he may not require the whole, or any part of it, for the use of machinery. Upon any other principle, this right to the stream, which is as perfect and indefeasible as the right to the soil, would always depend upon the use, and the party who did not occupy the whole for special purposes, would be exposed to have the same diverted by his neighbor above him, without remedy." Crooker v. Bragg, 10 Wend. 260; and per Nelson, J., who delivered the opinion of the court, 264, 265. Many other cases are directly or remotely to the same effect. King v. Tiffany, 9 Conn. Rep. 162; Weld v. Hornby, 7 East, 195; per Hale, J., in Cox v. Mathews, 1 Ventr. 237; Prescott v. Phillips, cited *arg.* in Bealey v. Shaw, 6 East, 213; S. C., 2 Ev. Poth. 136; Beissell v. Sholl, 4 Dall. 211; Colburn v. Richards, 13 Mass. Rep. 420; Cook v. Hull, 3 Pick. 269; Brown v. Best, 1 Wils. 174; Gardner v. Newburgh, 2 John. Ch. Rep. 162, 164; where the ancient authorities are cited by Kent, C.; Belknap v. Belknap, Id. 463; Merritt v. Parker, 1 Coxe's Rep. 460, 466; Coalter v. Hunter, 4 Rand. 58; Hammond v. Fuller, 1 Paige, 197; Hutchinson v. Coleman, 5 Halst. 74, 78 to 81, per Ford and Drake, J's; Campbell v. Smith, 3 Halst. 139, 149; Barron v. Baltimore, 1 Am. Jurist, 203; 3 Kent's Comm. 439, (2d ed.); Id. 446, 447; Shury v. Piggott, 3 Bulstr. 339, per Whitlock, J.; Bent v. Wheeler, 3 Dane's Abr. 16; Reid v. Gifford, Hopk. 416; Anthony v. Lapham, 5 Pick. 175; Sackrider v. Beers, 10 John. 241; Williams v. Gale, 3 Harr. & John. 231; Howell v. M'Coy, 3 Rawle, 256; Jennings v. Sherwood, 8 Conn. Rep. 122; Sumner v. Tileston, 7 Pick. 198; Wilson v. Myers, 4 Hawks, 73; Gavit's Adm'rs v. Chambers, 3 Hamm. Rep. 495.

The reader's attention should be more particularly turned to the late case of King v. Tiffany, cited *supra*, from 9 Conn. Rep. 162, where the leading opinion, per Williams, J. (163 to 170), ably sustains and clearly expresses the above doctrines. The defendant raised his dam below; at first it did not affect the plaintiff's wheel above; but the latter having occasion to lower his wheel, the back water from below then clogged it. Held, that an action lay.

Such, *prima facie*, are the rights of riparian owners; and we have been thus particular, because it is not to be disguised that the doctrines of exclusive right founded on mere priority of appropriation, received, at one time, strong countenance from dicta of learned judges, if not by direct adjudication. Bealey v. Shaw, 6 East, 208, 211, 216 to 219; Williams v. Morland, 2 Barnw. & Cress. 919; per Holroyd, J., in Saunders v. Newman, 1 Barnw. & Ald. 261, 262; per Kent, C., in Van Bergen v. Van Bergen, 3 John. Ch. Rep. 288; Hatch v. Dwight, 17 Mass. Rep. 289; Bigelow v. Newell, 10 Pick. 348. And in the anxiety of courts to maintain the concurrent

erection and use of mills, the claim to the natural flow seemed to rest on very uncertain ground. See Platt v. Johnson, 15 John. Rep. 215; and Merritt v. Brinkerhoff, 17 Id. 306; Palmer v. Mulligan, 3 Cain. Rep. 307; Martin v. Bigelow, 2 Aik. 184.

Priority of appropriation, it seems, is recognized as securing an exclusive right in mill owners, by a positive law of Louisiana. The first erected mill takes an adequate supply of water from above, and is entitled to be kept clear of back water from below, upon the mere circumstance of its being first erected. Aside from this positive provision, the law of that state would be the same as the common law. Boatner v. Henderson, 5 Mart. Lou. Rep. (N. S.), 186, 188 to 190.

No doubt that, in the exercise of the common right, the water above and below must be more or less affected, as by diminution of quantity, evaporation, absorption, retardation, acceleration, &c. But these things are to be tolerated, so long as they work no mischief. Per Story, J., in Tyler v. Wilkinson, *ubi supra*; Brown v. Best, 1 Wils. 174; Weston v. Alden, 8 Mass. Rep. 136; Bent v. Wheeler, 3 Dane's Abr. 16. The moment mischief ensues to another, an action lies; as if it injure the banks below (Williams v. Morland, 2 Barnw. & Cressw. 910); or throw back the water upon the plaintiff's wheel. Saunders v. Newman, 1 Barnw. & Ald. 258. But a small, an imperceptible or insensible injury (as it is variously expressed), arising from the use of the water, is said not to form the ground of an action; for *de minimis non curat lex.* Alder v. Savill, 5 Taunt. 454 *semb.* *Quere.* 3 Kent's Comm. (2 ed.) 440, 441; per Story, J., in Tyler v. Wilkinson, *ubi supra;* Palmer v. Mulligan, 3 Cain. Rep. *supra;* Platt v. Johnson, *supra;* Merritt v. Brinkerhoff, *supra;* Weston v. Alden, 8 Mass. Rep. 136; Bent v. Wheeler, 3 Dane's Abr. 16; Alexander v. Kerr, per Gibson Ch. J., 2 Rawle, 88, 89. In the latter case, Gibson, C. J., suggests that the distinction lies between the injury being proximate or remote. If the former, an action lies for any change in the state of the stream; for it directly touches and acts on another's property; but consequences, though great, if remote and affecting the stream generally, and perhaps greater numbers, are to be tolerated; as where the injury arises from necessary consumption, evaporation, or an irregularity in the flow by retention. He cites Shrunk v. The President, &c. of the Schuylkill Navigation Company (14 Serg. & Rawle, 71, 74), which was an action for obstructing the passage of fish by a dam. Large rivers are, however, public property in Pennsylvania, even above the flow of the tide. See *infra.* Yet several of these last cited cases appear to present real substantial injuries, which it would seem difficult to get over within the modern cases there cited. The injury was obvious in Platt v. Johnson (*supra*), where the upper mill occasionally dammed back the water, and by checking the flow, stopped the lower mill for days. The safer rule would seem to be, as laid down by a well considered modern case, that if the plaintiff sustains the slightest perceptible inconvenience, as by throwing back the water upon his wheel at high flood only, though in a trifling degree, the action lies. The court say, "We do not see how he can be refused his compensation because his damage was small; and we should feel at a loss to fix the amount of injury above which there should be a right of action, and below it none." Thompson v. Crocker, 9 Pick. 59, 61. The above case of Shrunk v. The President, &c., of the Schuylkill Navigation Company, certainly goes very far to establish the distinction set up by Gibson, Ch. J., *supra*, in Alexander v. Kerr. The same distinction was much considered, and greatly qualified, in Lady Hamilton v. The Marquis of Donegal, 3 Ridgw. Irish P. C., 267 to 328. The case passed from the Court of Exchequer, where it was originally tried, through the Court of Exchequer Chamber, and thence to the House of Lords. The distinction finally settled was, that the ordinary means of catching fish in a lower fishery, as by nets, rods, &c., though it diminish the value of the fishery above, shall not be considered an injury; but if by erections below, the fish be prevented from going up, this is an injury for which an action lies. See pp. 323, 324, 325, where the Lord Chancellor states the rights of the two owners very clearly. The two conflicting fisheries were on the river *Bann*, and extended through several counties. And note; this case may not directly conflict with the above Pennsylvania cases last referred to; for the river *Bann* here in question is treated as private property in respect to the fisheries. Otherwise, we have noticed, as to the Schuylkill. Per Tilghman, Ch. J., 14 Serg. & Rawle, 78, 79. And see *ante*, note 177.

It is safe to say that a mere theoretical injury shall never be a ground of action. Thompson v. Crocker, *supra.*

Yet, where the ground of one man is flooded by another, though it be in the least possible degree, the law implies damage; and in an action, nominal damages, at least, must be given.

Pastorious v. Fisher, 1 Rawle, 27, 28, and Alexander v. Kerr, cited at the last page by Gibson, J. The last case (reported 2 Rawle, 83), is very strong. The owner above had acknowledged the flow to be beneficial to him, and stood by silently and seen the mill below sold, without uttering a word of complaint; yet he was allowed his action. See per Gibson, Ch. J., Id. 88, 89.

As to the rights of repair by one of two men, owning each his mill at each end of a common dam, see Boynton v. Rees, 9 Pick. 528; and that one must not use water at his mill above, to which he has right, wantonly, unnecessarily, and with intent to injure the proprietor's mill below, see Twiss v. Baldwin, 9 Conn. Rep. 291, 305, 306, *et seq.*

The above arrangement of authorities having enabled us to see (and, we trust, clearly) what are, *prima facie*, the common rights of various settlers on the same stream, and to what extent they may be exercised with impunity, it follows that if any one would go beyond this, he must have the assent of those who are interested. This may be by grant or license; and even a parol license is good, if not revoked before the party avails himself of it; such an executed license, even in the land of another, being (as is said) not within the Statute of Frauds. See 3 Kent's Comm. (2d ed.) 452, 453, and the cases there cited.

But what is more directly material to the head of evidence upon which we are annotating; almost every one of the cases above cited in respect to the use of water, agree, in the very next breath, that an exclusive adverse enjoyment of the water in any particular manner, for twenty years (or other time limiting ejectments in the kingdom or state where the question arises, Alexander v. Kerr, 2 Rawle, 83, 89), raises the presumption of a grant or license. And here it makes no difference to what extent, or in what manner such exclusive use may injuriously affect others, whether by corrupting, impounding, crossing, diverting, or damming the water; unless, indeed, as we shall hereafter see, the act amount to a public nuisance. To this there are many cases beside those already noticed. Finch v. Resbridger, 2 Vern. 390; S. C., by the title of Ld. Guernsey v. Rodbridges, Gilb. Eq. Rep; Bush v. Western, Prec. Ch. 530; Balston v. Bensted, 1 Campb. 463; Belknap v. Trimble, 3 Paige, 577; Stiles v. Hooker, 7 Cowen's Rep. 267; Cook v. Hull, 3 Pick. 269; Strickler v. Todd, 10 Serg. & Rawle, 63, 68; per Rogers, J., in Read v. Goodyear, 17 Serg. & Rawle, 350, 353; Hazard v. Robinson, 3 Mason, 272; Manning v. Smith, 6 Conn. Rep. 289; Bullen v. Runnels, 2 N. H. Rep. 255; Ingraham v. Hutchinson, 2 Conn. Rep. 584; and Sherwood v. Burr, 4 Day, 244, overruling Howard v. Mason, 1 Root, 537; Baldwin v. Calkins, 10 Wend. 167; per Duncan, J., in Cooper v. Smith, 9 Serg. & Rawle. 26, 33.

Let us see a few illustrations. One was where the watercourse had run through the defendant's to the plaintiff's land for sixty years, but was then diverted by a sluice. Bush v. Western, Prec. Ch. 530. And the plaintiff having a watercourse cut through another's ground, where the water ran in pots for more than twenty years, and it being threatened to break it up (Lord Guernsey v. Rodbridges, *ut supra*), it was said by the Lord Chancellor (Gilb. Eq. Rep. 4): "Suppose two men front a river; each has not his own ground only, but the other's, between him and the water. So they cut through each other's ground for water, and this continues twenty years; I will presume an agreement." So where a spring of water has been occupied for twenty years at a given height, no adjoining owner has a right to cut the ground so as to diminish it. Adjudged where the water for the plaintiff's bath had been let off by a stone quarry and drain of the defendant on the adjoining lot. Balston v. Bensted, 1 Campb. 463. And see Bergen v. Bennett, *supra*. So where the defendant had flowed the plaintiff's land above, by a dam below, for twenty years. Stiles v. Hooker, 7 Cowen's Rep. 266; Russell v. Scott, 9 Cowen's Rep. 279. Admitted in Wright v. Howard, 1 Sim. & Stu. 190, 203, per Sir J. Leach, V. C. So one may acquire a right in the same time to diminish the quantity of water which descends on the proprietor below. Admitted in Wright v. Howard, 1 Sim. & Stu. 190, 203, per Sir J. Leach, V. C. So of a right to use a spring in another's land, or to a flow of water from it through the plaintiff's land. Tate v. Parrish, 7 Monroe, 325, 327. So of a right to a free flow at the tail of the plaintiff's mill (Saunders v. Newman, 1 Barnw. & Ald. 258); or a right to draw water from his flume for a fulling mill below. Mitchell v. Walker, 2 Aik. 266.

But the defendant's enjoyment must be exclusive, continuous, and adverse, so much so that, on a defence against a claim for land, it would satisfy the Statute of Limitations. Alternate enjoyment, the defendant now using the land for his pond, and now the plaintiff for agricultural purposes, will not raise the presumption. Shumway v. Simons, 1 Verm. Rep. 53, 57.

But short of twenty years will not raise the presumption. Tyler v. Wilkinson, 4 Mason, 401,

402; per Richardson, C. J., in Gilman v. Tilton, 5 N. H. Rep. 233. And this was held even where the owner, being flowed by the water of a mill, yet stood, and silently saw it conveyed to the defendant. Alexander v. Kerr, 2 Rawle, 83, 89. Yet "there is no doubt that the use of water in a particular manner, for a less period than twenty years, and even an interrupted use, may be evidence of a right, to be weighed among other evidence, by a jury." Said per Richardson, J., in Gilman v. Tilton, 5 N. H. Rep. 233; who cites 5 East, 215; 4 N. H. Rep. 14, 15; Wheaton, 109, 110, and 4 Stark. Ev. 1216.

The time having fully elapsed, some cases are so strong as to make the inference a presumption *juris et de jure*. Tyler v. Wilkinson, 4 Mason, 397. And though other cases do not go so far; but direct the matter to be left to the jury (see note 190, and per Wilde, J., in Coolidge v. Learned, 8 Pick. 509); yet where the fact of adverse enjoyment for twenty years is plain, or is found by the jury, the main current of the cases will be found substantially to accord with Tyler v. Wilkinson. And see 3 Kent's Comm. (2d ed.) 445.

After the prior occupant has enjoyed for full twenty years, in a particular mode, so as to raise the presumption, he is entitled to maintain his possession to an extent commensurate with the enjoyment. Saunders v. Newman, 1 Barnw. & Ald. 258; Van Bergen v. Van Bergen, 3 John. Ch. Rep. 282; Sherwood v. Burr, 4 Day's Rep. 244; Goodrich v. Knapp, 3 Kent's Comm. 448, (2d ed.) And this extent, which is an abridgement of the rights of others, must be limited by the evidence to the usage. *Post*, in text. Thus, a usage to take the whole of the water for the defendant's mill, when not sufficient for both his and the plaintiff's, will not justify a permanent obstruction diverting it at other times. Curtis v. Jackson, 13 Mass. Rep. 507, 514. If the twenty years, diversion be above by a sluice of given dimensions, and this be enlarged so as to diminish still farther the use of the proprietor below, though there be successive encroachments of that kind, an action will lie. The inference arising from a single encroachment by way of diminishing the flow of the stream below, is not that other like encroachments may be made; but the proprietor below is entitled to all the flow which remains, in its fullest extent. Bealey v. Shaw, 6 East, 208; Tyler v. Wilkinson, 4 Mason, 397. And several cases as to the use of lights and ways go on a similar ground. And this is so, although the injury arise in consequence of a new purpose of the plaintiff to avail himself of his common right. Wright v. Howard, 1 Sim. & Stu. 190, cited and proved per L. Tenterden, C. J., in Mason v. Hill, *supra;* Gilman v. Tilton, 5 N. H. Rep. 231; King v. Tiffany, 9 Conn. Rep. 162. The Supreme Court of New York have gone farther, and deny the common use of the water by diversion, although the injury to the plaintiff be merely potential. Crooker v. Bragg, 10 Wend. 260. The reason given is, because the limitation may attach before the new purpose of the owner may arise. Id. 265. So as to a usage for twenty years to build a dam and flow another's land above. The dam cannot, therefore, be raised, and the flow enlarged. Stiles v. Hooker, 7 Cowen's Rep. 266; Russell v. Scott, 9 Cowen's Rep. 279; Baldwin v. Calkins, 10 Wend. 167. And see Sumner v. Tileston, 7 Pick. 198. Where the ancient usage was for the party to dam back a stream on another's land, for the purpose of irrigation, by loose stones and a *board;* held that he could not fasten the board by *stakes*. Greenslade v. Halliday, 4 Mo. & Payne, 71; S. C., 6 Bing. 379. Nor can one make a mill dam plainly and permanently more compact and impervious to water, than the user would warrant. Shumway v. Simons, 1 Verm. Rep. 53, 56. But an exclusive usage of a certain portion of water for a mill, is not confined to the single mill or hydraulic establishment. It may be continued for new and additional erections, or buildings and machinery of any other kind, if the usual quantum of water be not increased. Per Abbott, C. J., in Saunders v. Newman, 1 Barnw. & Ald. 258; per Story, J., in Tyler v. Wilkinson, 4 Mason, 404; Bullen v. Runnels, 2 N. H. Rep. 255; Belknap v. Trimble, 3 Paige, 577. But see what is said in Strong v. Benedict, 5 Conn. Rep. 219, 220. Nor is it restricted by an occasional alteration, for the benefit of others; for instance the removal of a temporary dam above in a very dry time, by those below; unless such interruption be clearly acquiesced in by those above, who claim the presumptive right to encroach. At any rate, a court of chancery will not, upon doubtful evidence, against the answer of the claimant, adjudge that he so acquiesced. Tyler v. Wilkinson, 4 Mason, 397, 406. Nor will an occasional gate regulating the flow under the presumptive right, *e. g.* a gate at the head of a trench into which the water is diverted, be adopted in the admeasurement of the right, unless it appear clearly to have been placed and continued there for that purpose, and not merely to protect against water in the trench during the progress of repairs; and the circumstance that it varied in height from time to time, is

evidence against its having been fixed by consent as the measure of right. Tyler v. Wilkinson, 4 Mason, 397, 407. But permission to erect a dam for a saw mill, is for a temporary purpose; is terminated by the decay of the dam; and will not authorize the erection of another dam in its place. Hepburn v. M'Dowell, 17 Serg. & Rawle, 383. Otherwise of a license to build permanently. Rerick v. Kern, 14 Serg. & Rawle, 267, 272.

These, and the like presumptive rights, may be conditional; as to draw from the plaintiff's flume for a fulling mill below, the defendant doing one fourth part of all necessary repairs of the dam (Mitchell v. Walker, 2 Aik. 266); and the whole may be inferred from user. Id.

The presumption arising from a usage of twenty years, will not be rebutted, though it appear to have commenced when the land through which the water is derived was in the occupation of a lessee, if twenty years have elapsed since the lease terminated. Finch v. Resbridger, 2 Vern. 390; S. C., Gilb. Eq. Cas. 3, by title of Lord Guernsey v. Rodbridges. And it seems to have been thought that ineffectual attempts, meanwhile, to prevent or put an end to the watercourse, will not serve to weaken the presumption. Finch v. Resbridger, 2 Vern. 390. *Quere.* But it may be shown that the party sought to be concluded was, during the progress of the time, or some portion of it, incapable, by reason of infancy, coverture, or other disability, of giving the necessary license, or making the grant sought to be presumed. Lord Guernsey v. Rodbridges, Gilb. Eq. Rep. 3, admitted. Of this, *quere;* for it is denied by Story, J., that any such disability will avail. Tyler v. Wilkinson, 4 Mason, 402. He says that a mode of extinguishment binding on infants, *femes covert*, &c., may just as well be presumed as a grant; though he admits it stood originally on this ground. He says it is now a *presumptio juris et de jure*, and not necessarily resting on the presumed foundation of a grant. The case from Gilb. Eq. Rep. puts it on the latter ground alone. In Bradbury v. Grinsell (2 Saund. by Williams, 175 d, e), it was expressly held that a usage for twenty years, commencing and perfected by the consent and acquiescence of the particular tenant for life, to erect and keep up a weir on the river Thames, should not bind the reversioner; and this on the ground that the tenant for life had no power to grant or license the act. See *post*, text, and cases there cited. It seems quite doubtful, therefore, whether disability, as well as the estate being out on lease, would not be an answer to the claim at the present day. And see per Richardson, J., in Gilman v. Tilton, 5 N. H. Rep. 233, 234.

If the enjoyment originated in a written agreement or lease, there can of course be no presumption made in favor of a more extensive claim, than what the true construction of the contract shows. Davis v. Morgan, 4 B. & C. 8. See, also, Rex v. Hudson, Str. 909. If the party have, within fifteen (twenty) years before suit brought, acknowledged the plaintiff's claim, though under a mistake of the right, the presumption of a grant is rebutted. Mitchell v. Walker, 2 Aik. 266.

If the encroachment or erection be a public nuisance (as if it be on an arm of the sea, or injure the health of a whole neighborhood), no length of time will legalize it. Vooght v. Winch, 2 Barn. & Ald. 662; Weld v. Hornby, 7 East, 195; Mills v. Hall, 9 Wend. 315. This question stood quite doubtful on former dicta in New York (see Stiles v. Hooker, 7 Cowen's Rep. 266, and the reasoning of Kent, C. J., and Thompson, J., in Palmer v. Mulligan, 3 Cain. Rep. 315, 319), though it now seems at rest by the above direct adjudication (Mills v. Hall). In the famous Wells Harbor Case, a private conflict concerning an embankment on navigable water, which had stood twenty years, Lord Mansfield said, "The length of time is clearly not a bar, or anything like a bar. It is a public nuisance, which may increase every hour; and it is nobody's business to prosecute." Folkes v. Chadd, 3 Doug. 343. How this may be where the public have fixed for themselves a term of limitation, as has been done in New York, and whether the courts will not allow the analogous bar as to encroachments, is another question.

To complete the presumptive title, the adverse enjoyment must be continuous and uninterrupted for the whole term. An interruption may arise by a unity of seizin and possession. Thus, where A. and B. had adjoining closes; and A., having conducted the water from B.'s close on to his own, enjoyed it in a particular manner for a less period than fifteen years (the Connecticut limitation), and then conveyed his close in fee simple to B.; and B., after a few days' possession, re-conveyed it to A.; after which A. enjoyed the water in the same manner he had done before, for a period less, but with the former period making more than fifteen years; held a fatal interruption, and that A. acquired no right. Manning v. Smith, 6 Conn. Rep. 289. So, by an acknowledgment of the plaintiff's claim, even under a mistake of the defendant's rights (Mitchell v. Walker, 2 Aik. 266); or where the easement claimed is a right to flow the plaintiff's

Presumption as to act of Parliament.

It has been said that an act of Parliament may be presumed.(1) But such a presumption would only be made where the usage has been such as nothing but an act of Parliament could legalize, and which has prevailed in those obscure ages in which not only the records of Parliament may have been negligently kept, but even the form of a Parliament is scarcely to be discerned.(2) Where a road obstructing a navigable channel had existed for so long a time that the state of the channel could not be proved, it was considered that an act of Parliament, or a writ of *ad quod damnum*, might be presumed, which had extinguished the public right in the channel.(3)

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land, his occasional use of it within fifteen (twenty) years, for meadow, &c., and once fencing it off for that purpose. Shumway v. Simons, 1 Verm. Rep. 53.

A total non-user for twenty years affords a presumption either of the extinguishment of the former presumptive right in favor of some other adverse right; or where no such adverse right appears, then simply that the former has been surrendered, or that it never existed. Prescott v. Phillips, 2 Ev. Poth. 136; per Lord Erskine, C., in Hillary v. Waller, 12 Ves. 256; per Story, J., in Hazard v. Robinson, 3 Mason, 275, 276; 2 Ev. Poth. 136; Mr. Evans' remarks on the case of Prescott v. Phillips; 3 Kent's Comm. 448, 449, and the authorities there cited. The two last writers lean to the civil law, that mere non-user would not be enough; but some distinct act of abandonment should be done or allowed by the former claimant of the easement. It has, however, been distinctly adjudged in Maryland, that mere non-user for twenty years satisfies the common law; and that on this the jury should be instructed to find a release to the owner of the soil, in whatever way the grant may have been shown, whether under a statute or by user. Wright v. Freeman, 5 Har. & John. 467.

A unity of possession, though it generally extinguishes an easement (3 Kent's Comm. (2d ed.) 449), will not destroy the presumptive right to the use of water. Hazard v. Robinson, 3 Mason, 272, 277 to 279, and the cases there cited. So that where a mill and dam of B., standing below A., of right flows back on A.'s mill, if A. should purchase the mill and dam below, and sell them to C., the latter would have the same right as B. had; for the union of possession in A. would not change the rights of the lower mill. And in such a case, where the right to flow the mill above was lost by a non-user (viz: lowering the dam two feet), for twenty years, and then A. purchased the lower mill, and sold it to C., held that the former right to flow being severed before A. purchased, by the dam being reduced, no greater right passed to C. Hazard v. Robinson, 3 Mason, 272.

And see Campbell v. Wilson, 3 East, 298, 299; Goodtitle ex dem. Parker v. Baldwin, 11 East, 491.

As to who may dispose of a faculty; its different kinds, qualities and incidents, and presumptive evidence of a right to it, and the remedy for a violation of the right, see the books more at large. Corven's Case, 12 Rep. 105; May v. Gilbert, 2 Bulstr. 150; Frances v. Ley, Cro. Jac. 366; Langley v. Chute, Sir T. Raym. 246; Chambre's Arg., 1 T. R. 429, and per Buller, J., 1 T. R. 432; Mainwaring v. Giles, 5 Barn. & Ald. 356; 1 Lev. 71; 3 Id. 73, 74; Kenrick v. Taylor, 1 Wils. 326; Pettman v. Bridger, 3 Phillim. 324; Noy, 133; per Buller, J., 5 T. R. 298; per Willes, J., 1 T. R. 432, note; 1 T. R. 431, note; Morgan v. Curtis, 3 Mann. & Ryl. 389.

And see Dawson v. Duke of Norfolk, 1 Price, 251; Daniel v. North, 11 East, 371; Rex v. Barr, 4 Campb. 16. And see Livett v. Wilson, 3 Bing. 115.

(1) By Lord Mansfield, C. J., in Eldridge v. Knott, 1 Cowp. 215; citing Co. Lit. 95 a; and see n. 4 by Harg.

(2) By Lord Denman, C. J., in R. v. Exeter (Chap.), 12 A. & E. 512, 532.

(3) R. v. Montagu, 4 B. & C. 599. See 1 Eden, 296; 2 Ves. 583; 6 Ves. 215; 1 Jac. & W. 63; Lopez v. Andrews, Hayes' Conv. 11, n. That a private act of Parliament may be presumed, see

Presumption of grants from the crown.

Grants from the crown may be presumed; but where such a presumption has been made, it has been under particular circumstances, and after a much longer period of time than has been deemed sufficient for raising the presumption of a grant from private individuals.(1)

Skinner, 78; 12 Ves. 265. That the relinquishment of public rights is not to be presumed in the same manner as that of private rights, see Vooght v. Winch, 2 B. & A. 662.

(1) Roe v. Ireland, 11 East, 161; Goodtitle d. Parker v. Baldwin, Id. 488; R. v. Browne, cited by Lord Mansfield, C. J., 1 Cowp. 110; Kingston (Mayor) v. Horner, Id. 102; Eldridge v. Knott, Id. 115. See also Bedle and Beard's Case, 12 Rep. 5; R. v. Exeter (Chap.), 12 A. & E. 512; Brune v. Thompson, 4 Q. B. 543; Jervison v. Dyson, 9 M. & W. 540.

NOTE 190.—For the general doctrine and several particular instances, wherein acts of Parliament, crown grants and patents, may be presumed in favor of long continued possession or enjoyment, the reader may consult the following references in addition to those contained in the text. 1 Eden, 296; 6 East, 215; 2 Ves. jun. 583; 1 Jac. & Walk. 63; Id. 158; Rex v. Montagu, 4 Barnw. & Cress. 598; Lopez v. Andrews, 3 Mann. & Ryl. 329, note *a;* Farrar's Case, cited Skin. 78, and in Vin. Abr. Evidence Q, a. 2, pl. 11; Powel v. Milbank, 1 T. R. 399, note *d;* and S. C., by the title of Powell v. Milburn, 3 Wils. 353; and Schauber v. Jackson ex dem. Bogart, 2 Wend. 13.

The exercise of corporate rights in one case for forty (Dillingham v. Snow, 5 Mass. Rep. 347), and another for upwards of thirty years (Stockbridge v. Stockbridge, 12 Id. 400), were held presumptive evidence of a statute incorporation; and that the record of the statute was lost or destroyed, none being found in the proper place. From a user of thirty-five years, the jury may presume that a ferry had a legal origin. Trotter v. Harris, 2 Younge & Jerv. 285. And see Ld. Pelham v. Pickersgill, 1 T. R. 660; Rex v. Carpenter, 2 Show, 47; Crisp v. Bellwood, 3 Lev. 424; Colton v. Smith, Cowp. 47, and Rickards v. Bennett, 1 Barnw. & Cress. 223. Where bars had been kept up by the owners of the land for ninety years across a public highway, an extinguishment of the public right was presumed. Beardslee v. French, 7 Conn. Rep. 125. Under what circumstances a deed from the New York commissioners of forfeitures is, or is not to be presumed. Jackson ex dem. Williams v. Miller, 6 Wend. 228.

On a proceeding by caveat, after quiet possession of sixty years, a grant of land from the crown was presumed. Archer v. Sadler, 2 Hen. & Munf. 370, 376. This was accompanied with a payment of quit rents, and the fact that the records of the court where the patent should have been registered were destroyed. Id. 377, 378. Sixty-one years adverse possession was held conclusive against the lord proprietor of the northern neck in Virginia, under a patent which omitted words of inheritance. But it was denied that the maxim *nullum tempus occurrit regi* applied to a question between the lord and an adverse possessor; nor does the presumption of a grant appear to have been resorted to. Birch v. Alexander, 1 Wash. Rep. 34. Forty years adverse possession, with some very slight additional circumstances, were put to the jury in North Carolina, in 1801, as the basis on which they might presume a grant from the crown; and they found one (Den ex dem. Hanks v. Tucker, Tayl. 157); and a similar possession of forty-seven years, connected with other circumstances, was held in South Carolina, admissible to the jury as the ground on which they might presume a similar grant. Allston's Lessee v. Saunders, 1 Bay, 26. And so said in M'Clure v. Hill (2 Rep. Const. Court, 420, 424), and that now twenty years are enough; and held, that thirty years were sufficient against the estate (Id.); and twenty years is said to be enough against the crown. 6 East, 213.

And now in New York, the limitation of actions for real estate by the people is to twenty years, except suits in respect to liberties of franchises, and suits in consequence of patent or grants declared void. In the latter case the twenty years run from the judgment or decree of avoidance. 2 R. S. 292, 293. In Lopez v. Andrews (*supra*), an act of Parliament was presumed on slight evidence.

After the possession of land for ninety years, in the midst of a thickly settled country, building

a church on part of the land, and using it for public worship, and occupying a part as a burial ground, a grant from the commonwealth, of the land, or at least the pre-emptive right, may be presumed. Mather v. Trinity Church, 3 Serg. & Rawle, 509. So possession of thirty-eight years against the University of Vermont. University of Vermont v. Reynolds' Ex'rs, 3 Verm. Rep. 532.

For the general doctrine *nullum tempus occurrit reipublicæ*, see *post*, note 193, pl. 40, and the cases there collected.

On the subject of presuming grants, &c., our author very properly sets out by saying (p. 161, of 7th ed.), that the cases are "not within the Statute of Limitations." Sometimes the party is such as not to be affected by the statute; as the crown, the commonwealth, the state or the church, &c.; against which, in many common-law countries, the Statute of Limitations does not run. In numerous instances, the *subject matter* is not touched by the statute; being an incorporeal hereditament, or easement. Sometimes the peculiar relation of the parties precludes the setting up of an *original adverse possession*, as where they were landlord and tenant, tenants in common, &c. Sometimes the *land itself*, though capable of an adverse possession, has not been so enjoyed; but is affected by other acts running through a long series of years, which have been deemed equivalent to an adverse possession. In another instance, a title on paper is partially made out, and the residue (a link or links in the chain) sought to be supplied by presumption arising from possession, &c. Sometimes a deed, in the execution of a trust, is to be presumed; sometimes a surrender of terms; or a conveyance in pursuance of some agreement, or in the execution of some legal duty; or from some other circumstances. In all these cases, adverse possession, or what is equivalent, makes the main ingredient; but the time may overgo, or fall short of that required by the statute; and various auxiliary circumstances are admissible to support, or detract from the presumption.

Cases of direct, obvious adverse possession of land, &c., which come within the words of the statute, cannot, of course, look to this doctrine of presumption for aid. They do not require it, when the statute time has run. You then look to the statute alone which bars a right, and thus indirectly makes a title by its own proper force, subject to be explained away by bringing the case within some saving clause (Terrill v. Herron, 4 J. J. Marsh. 516, 527); while to presume a grant within a shorter time than the statute allows, would be an evasion.

These observations we thought necessary, in order to obviate a remark made in note a (p. 129), to the American edition of this work, published in 1823. It is there said, after noticing that the text is mainly confined to incorporeal subjects, to be "certain that the presumption arising from length of possession, equally applies to lands and tenements." That the remark was inaccurate, or must be taken with great qualification, we presume will be found on careful examination. Most of the cases there cited were considered, with a view to show this, by Gould, J., in Sumner v. Child, (2 Conn. Rep. 631, *et seq.*); and in the argument of that learned judge, from pp. 627 to 632 of the report, will be found a clear and able vindication of the distinctions with which we commence this note. With him, too, all the judges agreed. See the case at large, 607 to 632. For general remarks applicable to, and also sustaining these distinctions, other references may be consulted. Per Story, J., in Ricard v. Williams, 7 Wheat. 109, 110; per Cheves, J., in M'Clure v. Hill, 2 Rep. Const. Ct. 423, 424; *per Cur.* in Clark v. Faunce, 4 Pick. 246; per Washington, J., in Delancy's Lessee v. M'Keen, 1 Wash. C. C. Rep. 359, 360; per Hitchcock, J., in Courcier v. Graham, 3 Hamm. Rep. 349; per Sutherland, J., in Jackson ex dem. Erwin v. Moore, 6 Cowen's Rep. 723, 724; per Carr, J., in Bolling v. Mayor, &c., of Petersburg, 3 Rand. 577; per Lord Mansfield, Ch. J., and Aston, J., in Eldridge v. Knott, Cowp. 215, 216.

In a word, courts of law and equity adopt the presumption of grants, upon the same principle which governs them in the presumed payment and extinction of debts and other executory claims, which will be considered *post*, note 193. They go, it is true, in many cases, on analogy to the Statute of Limitations; but in others, upon circumstances entirely clear of it. Wherever the case is proper for the statute, as it has been understood and acted upon by the courts, nothing else can be substituted. Thus, in Sumner v. Child (*supra*), the heir entered upon the land of the deceased ancestor, in 1786; the land was sold to the plaintiffs on a probate proceeding for a debt of the ancestor, in 1817. The defendant claimed under the heir, who had been in possession from his father's death till 1814, when the defendant obtained title from the heir, and still continued the possession. The heir having entered subject to the claim of his father's creditors, of course, was not in by *adverse* possession, so as to bring him within the statute; and there

being no circumstances beside length of time and possession, from which a title could be presumed, the court held that the defence must be tested by the statute alone; that to bring in the doctrine of presumption would be an evasion, by setting up a kind of possession, as a defence, which the statute, in its true construction, would not allow; and the verdict, which presumed a conveyance, was set aside.

Again; in Du Belloix v. Lord Waterpark (1 Dowl. & Ryl. 16), which was an action on a promissory note, more than thirty years had elapsed, intermediate the time when the note fell due, and the commencement of the suit; and the presumption of payment being insisted upon as a defence, was disallowed because actions on this and the like simple contracts were covered by the Statute of Limitations, which must govern alone.

1. The class of cases to which the doctrine of presumptive grants has been applied, for want of a statute limitation against the *claimant*, are presented *ante*. These, as we mentioned above, are the crown, the state, &c.

2. The presumption in the case of *easements* will be hereafter considered. These are rights of ways, water, air, light, &c. To which it may be proper to add the late determination, on analogy to the statute, that forty years' adverse enjoyment of a fishery, in the land of another, authorizes the presumption of a grant. Melvin v. Whiting, 10 Pick. 295, 297, 298.

3. The relation between the parties may preclude the idea of adverse possession; as where the possession originally taken was perfectly consistent with, or in subordination to the title of the plaintiff; and yet, in some few instances, the courts have, from very long possession, especially if there be other circumstances, indulged the presumption of an assurance. A striking instance of this is found in Doe ex dem. Fenwick v. Reed, stated in the text, where the King's Bench seem to have gone farther than any other case has yet gone. Birch v. Alexander (2 Wash. Virg. Rep. 276), went nearly as far; for it allowed the defendant, who claimed under the plaintiff's deceased tenant for life, to hold as in fee upon an adverse possession. The tenancy for life arose from the accidental omission of the word *heirs* in a deed; and the land had been possessed and claimed as in fee, under the grant, for sixty-one years. Jackson ex dem. Webber v. Harsen, 7 Cowen's Rep. 323, S. P. But both these cases profess to go on the Statute of Limitations. Similar decisions have often been made as between tenants in common, the possession of each of whom is, *prima facie*, consistent with the claim of the others. Jackson ex dem. Krom v. Brink, 5 Cowen's Rep. 483; Jackson ex dem. Bratt v. Tibbits, 9 Id. 241, and the cases there cited. In these cases courts will, it seems, indifferently presume an ouster, and give effect to the statute, or a grant or release from one tenant in common to the other. See the cases *supra*, and per Ashurst, J., in Doe ex dem Fisher v. Prosser, Cowp. 220.

A lease in fee, or an agreement for such a lease, may be presumed on possession and payment of rent for eighty years. Ham v. Schuyler, 4 John. Ch. Rep. 1. But *semb.* not on a possession and payment of the term limiting the right of entry, even though the claim be of an easement, as the right of taking water from another's land. Mitchell v. Walker, 2 Aik. 266. But a lease for life was presumed on fifteen years' possession and strong circumstances, though the supposed lessor swore that he did not recollect giving any lease. Sellick v. Starr, 5 Verm. Rep. 255.

4. In other instances, where, from the character and situation of the property, and the want of deeds, neither an actual or constructive adverse possession could be made out, so as to let in the statute, circumstances considered equivalent have been received as the ground for presuming a grant. In this way the heirs of Sir Peter Warren made out their title to a tract of 14,000 acres in Montgomery county. The lands were patented to seven persons in 1735. In 1736, Sir P. Warren granted leases for life to different persons, of different lots in the patent, the whole of which was before surveyed and allotted. The lessees entered and enjoyed. The leases asserted his (the lessor's) claim to the whole tract, and he paid quit rent for the whole in 1737 and 1742, and died in 1752. In 1767, his heirs executed leases of two other lots: and about the commencement of the American Revolution, there were one hundred settlers who had agreed with the heirs for leases; and finally two-thirds of the tract were held under leases from the heirs; and their title was not disputed by the settlers till after the war. The defendant entered about the year 1771; and against him the action was brought by the heirs. The defence was the want of a conveyance from the patentees to Sir P. Warren. Held, that it should be presumed, on the ground that the acts of Sir P. Warren and the heirs were equivalent to an adverse possession of the whole tract. Jackson ex dem. Gansevoort v. Lunn, 3 John. Cas. 109, 113 to 118, cited and considered, 6

Cowen's Rep. 723. A similar doctrine was held in respect to the manor of Livingston. Jackson ex dem. Livingston v. Schutt, cited and stated per Kent, J., 3 John. Cas. 113. But in the latter case the court seem to go more distinctly on the facts making out an adverse possession within the statute. They do not speak of a presumptive grant. This decision has been followed, upon similar circumstances, in the late case of Jackson ex dem. Schuyler v. Russell (4 Wend. 543). There were other circumstances in this case; but Jackson v. Lunn (*supra*), was cited and approved by the chief justice; and the two cases do not appear to differ materially. In this last case the court go on the ground that a conveyance was to be presumed. Doe ex dem. Clinton v. Campbell (10 John. Rep. 479), is a farther illustration under this head.

This presumption from partial possession, &c., may be rebutted by showing a deed from the original owner, of other parts of the land, to persons other than the claimants, and a continued possession in the grantees. Rust v. Boston Mill Corp., 6 Pick. 158.

Again; Massachusetts granted a township to her soldiers in the Canada expedition, 1735, and a lot was drawn to S. D. as one of them, the other lots being drawn to others respectively. This lot was now, in 1820, demanded in a writ of entry, by persons deducing a legal title from S. D. But as early as 1738, L. was credited in the proprietors' books with taxes paid on S. D.'s lot, and so for several successive years, and down to as late as 1776. In 1778 he was chosen one of the committee to call a proprietors' meeting, and in 1770 presided as moderator, the proprietors being all this time a corporation. In 1788 the corporation was dissolved, and L.'s name placed opposite to the right of S. D. in the books. L. conveyed the right of S. D. by name to N. W., from whom, through various mesne conveyances, the defendant derived a paper title, one of the intermediate owners and his heirs having also for several years paid taxes. Since 1738 no one had claimed the S. D. lot adverse to the L. title, till 1815. But all this time the land was wild, and nothing of *pedis possessio* was established. The demandant's agent, in 1815, was however forbidden to enter by one of the intermediate claimants under the L. title. All that was wanting in this case was a single link connecting a chain of documental title with the patentee—a deed from him to L., under whom the defendant claimed, and with whom he was fully connected. To show this there were the series of acts on the part of L., holding office as a proprietor, paying taxes as such, his recognition as such on the books, and the acquiescence for about forty years by the proprietors, and seventy years on the part of the patentee and those claiming under him. The case was put to the jury on that question, and they presumed a conveyance. On a motion for a new trial, the court held the facts sufficiently warranted the presumption, although they felt constrained, on a technical objection, to repudiate the paper, where L.'s name was put opposite S. D.'s, that not being sufficiently identified as a corporation paper. Farrar v. Merrill, 1 Greenl. Rep. 17.

In another case, by an order in council in the colony of New York, P. was entitled to a patent of 2,000 acres; and by a royal patent to one M'Kenzie, in 1765, a two hundred acre lot in Washington county was recognized as belonging to P. But there was no patent to him found of record. M. however entered on the lot, and was in possession under a claim of title as early as 1776; and he afterwards admitted that he was present in that year, when the king's surveyors ran out the lot, the lines and location of which he pointed out as correct. He was in possession of the lot claiming title in 1794, and afterwards died in possession; and the now claimant, his heir at law, entered as such. In 1810 an act of the legislature passed, vesting all the state right to the lot in the heir. The defendant having given the declarations of M. in evidence against the now claimant, his heir, in order to fix the boundary and location, it was deemed material by the court to inquire into his possession and title. This was upon the supposition that the title, or at least possession in him, was necessary in order to render his declarations admissible. And they held that the jury might, on the evidence, say that he was in possession from 1776; and this possession continued by his heir, would extend through thirty-four or thirty-five years at least. Connecting this with the order in council, the survey by government and the recognition in M'Kenzie's patent, the court held that the jury might (on the authority of the reasoning in Jackson ex dem. Gansevoort v. Lunn, 3 John. Cas. 118, and the cases there cited), presume not only a patent to P., but a grant from him to M. Jackson ex dem. M'Donald v. M'Call, 10 Johns. Rep. 377, cited and considered in 6 Cowen's Rep. 724, and in 2 Conn. Rep. 631, 632.

It was not necessary for the court to struggle for such a conclusion, for it was enough to warrant the admission of the evidence, that the claimant came in under M., whose declarations were

sought to be given in evidence while he was in possession. This will be abundantly seen when we come to annotate upon the admissibility of declarations in evidence by ancestor against heir, and vendor against vendee. But the conclusion is sustainable in more than one point of view. It was the legal duty of the state to convey to P. It had contracted to do this; and a conveyance to M. might perhaps have been presumed on the ground which calls for the presumption of an intermediate link in the title accompanied by possession, where the main part of the chain is complete. Both patent and deed might perhaps have been put on the latter ground. But, at all events, waiving both, the adverse possession was enough, within the Statute of Limitations, for the purpose of the question then before the court. We make these remarks because this case was cited in a former edition of this work, as warranting the presumption of title to land on eighteen years' possession. Ed. of 1823, p. 129, note *a*; repudiated in Sumner v. Child, 2 Conn. Rep. 631, 632. Such a presumption would supersede the Statute of Limitations. It will be seen that the presumption was founded on a much longer possession than that act requires; and as to the patent, on other striking circumstances; and comes within a class of cases which are far from depending merely on possession and time.

The above cases doubtless proceeded much on the total abandonment of the apparently real owners of the premises, to the absolute dominion of others, for a long series of years. Such, too, was another recent case. The claimant (a soldier) abandoned his wild lot; left his family and embarked in the service of the Northwest Company in Canada for twenty years; and on his return to his residence within sixty miles of the lot, forbore to assert his title for eighteen years. Though the defendant failed to show anything more than occasional acts of ownership through a course of thirty-five years; not anything like an adverse possession under the statute; yet, the original letter patent being found in his possession, held that the jury might have presumed a grant. Jackson ex dem. Constantine v. Warford, 7 Wend. 62.

A partition between tenants in common was presumed, on evidence that a lot was for thirty years called and known as the several lot of a single tenant, among a general allotment of the whole tract, no proof being given of a claim by the other tenants in common to the particular lot during the whole period. Jackson ex dem. Williams v. Miller, 6 Wend. 228. And see Stevens v. Griffith, 3 Verm. Rep. 448.

5. Similar ground has not unfrequently been taken in respect to lands capable of adverse possession, and so held; but where for some other reason the statute did not apply. Thus the possession of a daughter for fifty years, the son and heir (her brother) being her neighbor, was put to the jury as a ground of presumption that the father's title was for life, remainder to the daughter in fee; and she recovered the land, as upon such a title, against one who had got possession by a deed from her deceased husband. Doe dem. Carr v. Billiard, 3 Mann. & Ryl. 111. In another case, a widow had married, one year after her dower right accrued, and resided out of the state, without interposing any claim for twenty-eight years; held, that though she continued a *feme covert*, the jury might presume a release of her dower. Barnard v. Edwards, 4 N. H. Rep. 321. *Quere:* and see Delancy's Lessee v. M'Keen, 1 Wash. C. C. Rep. *contra*, as to the effect of such a disability and residence abroad. In another case, the tenant and his grantor had held the land adversely for twenty years. The demandant, who lived near, took a mortgage of the land from the possessors, referring for a description to a deed in which the land was described as having been bought of the demandant. Held, that upon such a set of circumstances, the jury might presume a grant from the demandant. Clark v. Faunce, 4 Pick. 245. R. taking a deed in H.'s name; a lease and release in possession of R., subscribed with H.'s name, the house of R. having been burnt, and possession for twelve or thirteen years with the plaintiff's knowledge, were allowed as circumstances upon which to presume a deed from H. to R. Howell v. House, 2 Rep. Const. Ct. 80, 85, 86. And a long and exclusive possession by one tenant in common, with strong circumstances showing an abandonment by the others, difficult to be accounted for without supposing a conveyance, were received as sufficient ground for the presumption. Hepburn v. Auld, 5 Cranch, 262; Kingston v. Lesley, 10 Serg. & Rawle, 383, 389, 390. In another case, after one lease given for eighty-one years, a second and third leases were given to others by the reversioner, the original lessee being out of possession, leaving the latter lessees or their assignees in possession, who paid rent for a long time; held, that a surrender or assignment of the first lease might be presumed. Westropp's Lessee v. Moore, 2 Fox & Smith, 363. Again; the demandant in a writ of right, claimed under an ancient possession; the tenant had been in posses-

sion thirty-eight years, and relied upon that and evidence of a patent granted to a third person, prior to either of the possessions. The judge directed the jury to find for the tenant, on the ground of outstanding title; but the court say the question was, which had the better right; and that it should have been left to the jury to presume a conveyance to the demandant under the patent. Nase v. Peck, 3 John. Cas. 128, cited and approved by Stebbins, Senator, in Schauber v. Jackson ex dem. Bogart, 1 Wend. 61. The acceptance of a new lease, leads to a presumption that the first was surrendered; but the act may be explained by circumstances, and the presumption repelled. Van Rensselaer's Heirs v. Penniman, 6 Wend. 569, 578, 579. For the general doctrine, see several cases, which do not afford illustrative facts. Sullivant v. Alston, 2 Hayw. 128; Bigger's Administrator v. Alderson, 1 Hen. & Munf. 54, 60; Ricard v. Williams, 7 Wheat. 59, 109.

In a state where black color is presumptive evidence of slavery; as in North Carolina, or New Jersey (Fox v. Lambson, 3 Halst. 275, and Gibbons v. Morse, Id. 253), the full and actual enjoyment of freedom for twenty years is sufficient to overcome such presumption, and warrant the inference of an act of emancipation. Fox v. Lambson, 3 Halst. 275.

6. Another head of presumption was incidentally alluded to above, in considering the case of Jackson ex dem. M'Donald v. McCall, 10 John. Rep. 377. Where a change in the ownership of an estate, as evinced by possession and enjoyment, has taken place at a remote period, and the title deeds both previous and subsequent are mostly forthcoming, a chasm which occurs in the documental evidence is sometimes filled up by presumption.

In such a case, strong acts of acquiescence, abandonment or submission, have often been made the foundation of presuming even records as well as acts *in pais*, in finishing out the title, whether of corporeal or incorporeal property.

On this ground, the chancery enrollment of a decree for tithes, was presumed in favor of the clergy against the inhabitants of London. Macdougal v. Purrier, 2 Dow & Clark, 135. On due proof of a will, the acting as executrix, and sales as such, with the destruction of the probate records by fire, were allowed as the ground for presuming a regular probate. Calvert v. Fitzgerald, Litt. Sel. Cas. 388, 389, 392. A patent is evidence that all the previous steps leading to it have been regular. Brown v. Galloway, 1 Peters' C. C. Rep. 291; James v. Betz, 2 Binn. 12; Thompson v. Hauser, 2 Rep. Const. Court, 356.

On a partition made by commissioners under the statute of 1762, a balloting-book was necessary to be filed and kept of record; but, in one case, could not be found in the proper office. After long possession in severalty, other things appearing to be regular, a ballot book was presumed, according to the possession and the requisite map and field-book, which map and book were produced from the proper files. Jackson ex dem. Klock v. Richtmyer, 13 John. Rep. 367. So of a deed from the commissioners. Jackson ex dem. Gillespy v. Woolsey, 11 John. Rep. 446, 456. Where the court was asked to infer a warrant for a town meeting which altered a road, no loss, &c., of the warrant being shown, they refused to do so, though the transaction was of thirty years' standing. The court put the party to the usual proof of the warrant, which should regularly have been filed with the town clerk. It should be produced, or its absence accounted for. Brunswick v. M'Kean, 4 Greenl. Rep. 508. But *semb.* it may be presumed, after a long time, *e. g.* after seventy years, the corporate act insisted on having been evinced by a corresponding possession, and no warrant being found in the proper office. Monumoi Great Beach v. Rogers, 1 Mass. Rep. 159. And where an administrator conveyed a farm subject to the widow's dower, and possession of the two-thirds, under the deed, was held over thirty years, the presumption of regularity, in the administrator's proceedings prior to his deed, was held to arise in favor of the reversion of that part which was holden by the tenant in dower. In this case, most of the probate proceedings, preliminary to a sale; viz: the declaration that the estate was insolvent, the inventory and appraisal, account of the administrator on the sale, and order of the court to pay 19*s.* 1*d.* on the pound, were proved; also the clerk's minute of an order of sale; but no record could be found directing the sale or the manner of the sale; and that was presumed. Hazard v. Martin, 2 Verm. Rep. 77, 85.

A deed from executors being proved, the court will presume the sale to have been public: that being their duty. Turnspeed v. Hawkins, 1 M'Cord, 272. But a decree, and subsequent proceedings on sale of land, furnish no evidence that an inventory was filed. Goodwin v. Sheldon, 1 Day, 312. Yet, after twenty years' possession under an administrator's sale, other

things being proved to have been regular, the presumption will be that he took the oath and advertised the sale (Gray v. Gardner, 3 Mass. Rep. 399); and this even against the heir. Id.; Knox v. Jenks, 7 Mass. Rep. 488. As to strangers, other things being regular, the administrator's proceeding will at once be presumed to have been in pursuance of his authority. Knox v. Jenks, 7 Mass. Rep. 488. After twenty years' possession of most of the land in severalty, according to a partition duly proved among the proprietors, the posting of advertisements, which were necessary to the regularity of the proprietory meeting, may be presumed. Society for Propagating the Gospel v. Young, 2 N. H. Rep. 310, 313. So after a great lapse of time, as thirty years after a collector's sale of land for taxes, the regularity of tax bills, valuations, warrants, &c., may be presumed from circumstances. Coleman v. Anderson, 10 Mass. Rep. 105. So, that the assessors and collector were duly chosen by a legal meeting. Pejepscut Proprietors v. Ransom, 14 Mass. Rep. 145, 146. And see Id. 30, and Read v. Goodyear, 17 Serg. & Rawle, 350. So, that the collector was sworn, and that the assessors returned a valuation and copy of the assessment to the town clerk. Blossom v. Cannon, 14 Mass. 177, *per Cur.* 178. So, after sixteen years from a sale under a power in a mortgage, the presumption may be made that the notices of sale were regularly posted and published. Bergen v. Bennett, 1 Caines' Cases in Error, 1, 18. And after twenty years' possession of slaves, subsequent to the time of removing from one state to another, it shall be presumed that the proper oath of the proprietor was regularly taken, in order to prevent their manumission. But the presumption may be repelled by circumstances. Abraham v. Matthews, 6 Munf. 159. And although the requisite oath in Virginia, for conferring a capacity to purchase land, will not be presumed merely from the long residence of a foreigner (the oath being a matter of record); yet it will, if he has been uniformly possessed of the land in question, or held some office, such alone as a citizen is capable of holding, which requires the requisite oath to be taken. *Semb.* Blight's Lessee v. Rochester, 7 Wheat. 546, per Marshall, C. J. Where the alien came to South Carolina before the adoption of the federal constitution, and voted in that state for several years, being an active partisan, there being a local statute there authorizing naturalization summarily by oath before a magistrate; after the lapse of more than forty years, on the above and other circumstances, held that naturalization might be presumed. Nalle's Representatives v. Fenwick, 4 Rand. 585, 586—588. Every man is presumed to be a citizen till the contrary be shown. Ford, J., in Coxe v. Gulick, 5 Halst. 328, 331.

So in relation to acts of a mere private nature. The leading English case on this head is where an ejectment was brought by one Goodwin, who assumed to be the assignee of an old lease for one thousand years. He proved a possession in himself, and those under whom he claimed, for seventy years; but could prove only one of the mesne assignments, which was dated as of a time previous to the possession shown. Of late he had been ousted; and on the trial the judge thought he should have proved all the mesne assignments, and nonsuited him. But the nonsuit was afterwards set aside; the court saying that it should have been recommended to the jury to presume all the assignments. Earl ex dem. Goodwin v. Baxter, 2 Bl. Rep. 1228. So regular surrenders and admittances of copyhold lands, and a corresponding payment of rent for forty years being shown, the previous surrenders and admittances were presumed. Doe ex dem. Eberall v. Lowe, 1 H. Bl. 446. See several parallel cases. Anon., 12 Vin. 233, pl. 15; S. C., Lill. Pr. Reg. 556; Rex v. Barnsley, 1 Maul. & Selw. 377; Doe ex dem. Batten v. Murless, 6 Maul. & Sel. 110; per Lord Eldon, in White v. Foljambe, 6 Vesey, 349, 350; Lyford v. Coward, 1 Vernon, 195 (Raithby's edition); S. C., 2 Cas. Ch. 150; Green v. Proude, 1 Modern, 117; S. C., 1 Ventr. 257, and 3 Keb. 310, by title of Green v. Froud; Knight v. Adamson, 2 Freem. 106; Wilson v. Allen, 1 Jac. & Walk. 590; Wadsworth's Case, Clayt. 26; Anon., 12 Vin. Abr. 57, pl. 7; Warren ex dem. Webb v. Greenville, 2 Str. 1129; and per Lord Mansfield, commenting on that case, in Goodtitle ex dem. Bridges v. Duke of Chandos, 2 Burr. 1072, 1073; Haines Barley's Case, 5 Mod. 210. In ejectment, the lessor of the plaintiff deduced a chain of title from one of the original patentees, to the devisees of W., of one 26th part of the Kayaderosseras patent. This 26th part was partitioned and set off to the devisees in lots properly designated, of which they were seized in severalty in 1774. The lessor of the plaintiff then produced a lease from the devisees to C., dated in 1774, and which lease purported to be the foundation for a release from the devisees to C. of the one twenty-sixth part. He then proved that the lease was found among the papers of the lessor, at the time of his death in 1802, and a corresponding possession of part of the premises for forty years; and of two other small parts for twenty years; and a re-

lease of the rents and reversion of another small part by persons claiming under C., and also payment of rent for that part. The lessor of the plaintiff then deduced a regular paper title from C. to others, and so on of the premises in question to himself (the lessor). Held, that the lease was well proved as an ancient deed; and that the circumstances would warrant the jury in presuming a release from W. to C. Jackson ex dem. Wilkins v. Lamb, 7 Cow. Rep. 431.

It is to be collected from these cases, that, on possession and great lapse of time, and all other things being regularly made out in proof, the title shall not fail for any single item; as the assignment of a lease, deed creating a tenant to the præcipe, a surrender, release, or other conveyance in a chain of title, letters of administration, livery of seizin, surrender of a copyhold, &c. The cases, however, seem to go much on the presumption of losses from the great lapse of time, or from ineffectual search, &c. Indeed, legal presumptions generally apply to facts of a transitory nature, the proper evidence of which is not usually preserved with care; but not to records or public documents in the custody of officers charged with their preservation, unless proved to have been lost or destroyed. Brunswick v. M'Kean, 4 Greenl. Rep. 508.

But a limitation has recently been put upon this kind of presumption, even in respect to the incidental ceremonies of conveyance. Though the feoffee had been in possession seventeen years, yet the court declined to allow the presumption of livery of seizin; saying they would not admit this short of twenty years. Doe ex dem. Wilkins v. The Marquis of Cleveland, 4 Mann. & Ryl. 666; S. C., 9 Barn. & Cress. 864. See Biden v. Loveday, cited 1 Vern. 196; and Rees v. Lloyd, Wightw. 123.

Similar cases of presumption are usual in the American courts. "Presumption is often resorted to for the purpose of supplying defective evidence; and, in this country, is not oftener applied to any subject, than to supply defective title to lands. It would be difficult to make out the title to many of the elder tracts of land in this state, by a regular deduction of title deeds, from the patentees down to the present proprietors, without resorting, in some stage of them, to presumption. Records may sometimes be lost or destroyed, ancient title papers may be defectively executed, or the proof of them from lapse of time, may be impossible. Yet, in all these cases, the possession may have been invariably in the person claiming the land, and in those from whom he derives his title. In such cases, possession which has been long undisturbed, and which is, in general, the concomitant of title, induces a belief in the mind, of title, little short of that which would be produced by the adduction of the most undeniable and best authenticated evidences of right. Proprietary grants, under certain circumstances, are presumed. In general, these presumptions are bottomed upon the existence of certain facts, which can leave but little doubt upon the mind of the truth of the fact which we are called upon to presume. They frequently, too, derive their force and efficacy from that vigilance with which the law guards ancient possessions; which, sooner than they should be disturbed, presumes that they had, in contract, a rightful commencement." Per Archer, J., in Beall's Lessee v. Lynn (Maryland), 6 Harr. & John. 361; S. C., several times cited *infra*.

On a long possession, and an attempt to connect it with title, a defective and void deed was given in evidence and rejected; yet, on a train of circumstances, the jury were allowed to presume a good one. Gitting's Lessee v. Hall, 1 Harr. & John. 14, 18. But see Beall's Lessee v. Lynn, 6 Harr. & John. 336. So the jury may presume, on long possession, that an attorney had not exceeded his authority to convey, *i. e.*, that the condition precedent on which he was to convey, had been fulfilled. M'Connell v. Bowdry's Heirs, 4 Monroe, 395. And after twenty-three years' possession under a deed purporting to have been made by an attorney, the power itself may be presumed. Buhols v. Boudousquie, 6 Mart. Lou. Rep. (N. S.) 153. So the power of trustees, on a long possession under their deed. Fitzhugh v. Croghan, 2 J. J. Marsh. 429, 437. On claim under a conveyance by lease and release, with a long corresponding possession, the release not being produced, the recital of this in the release is auxiliary evidence, even against a stranger. Per Story, J., in Carver v. Jackson ex dem. Astor, 4 Pet. 83, 84; and in Crane v. Morris' Lessee, 6 Pet. 610, 611. And see Garwood v. Dennis, 4 Binn. 314. A power of attorney recited in an ancient deed was presumed. Doe ex dem. Clinton v. Campbell, 10 John. Rep. 475. And see Wickham v. Belknap, 12 Id. 96. A plaintiff produced a patent to B. for the premises in question, dated 1774; then a deed for the same land from C. to F., dated 7th November, 1785, containing *a recital of a deed*, also for the same land, from B., *the patentee, to C.*, and proved a possession in C., of a part of the land, until 1785, and in F. claiming under him,

and in the lessor of the plaintiff claiming under F., and all claiming to hold possession under a title to the whole tract. Held, that a conveyance from the patentee to C. might be presumed. Beall's Lessee v. Lynn, 6 Har. & John. 336, 353, 361, also stated for another purpose, *infra.*

Where adequate time has not run, though the defendant's possession and claim be under a supposed grant, and he give in evidence also a survey, by the surveyor-general, made for him, which is moral evidence of a grant; yet the court will not allow the presumption of a grant until proof be given of due search for a record of the grant; for the survey pointed to records in the land-office, where it might be found. Some evidence should therefore be given to show that it had perished by time or accident. Williams v. M'Gee, 1 Rep. Const. Court, 85, 88. And where the party produces a deed, there can be no presumption that it was legally acknowledged, though possession has gone with it, and though, if not produced, the deed itself might have been presumed. Beall's Lessee v. Lynn, 6 Har. & John. 336.

7. In all these cases, in order to found a presumption, there must not only be a possession, or what is equivalent, of the person in whose favor the inference is sought to be drawn; but it must be exclusive and adverse in its character; though it need not, in all cases, be by actual inclosure. Per Archer, J., 6 Har. & John. 361. It must not be consistent with the title sought to be divested. This circumstance of consistency, takes away all force from the evidence. The jury came to this conclusion in Doe ex dem. Fenwick v. Reed, cited in the text; and there are numerous authorities to the same point. Acherly v. Roe, 5 Ves. 565; Doe ex dem. Milner v. Brightwen, 10 East, 583; Cowper v. Earl Cowper, 2 P. Wms. 720; Roe ex dem. Pellatt v. Ferrars, 2 B. & P. 542; Goodtitle ex dem. Bridges v. Duke of Chandos, 2 Burr. 1065, 1074 to 1076; Doe ex dem. Harrop v. Cooke, 3 Mo. & Payne, 411; S. C., 6 Bing. 174. Thus, flowing land by a mill (a statute giving this right, subject to the payment of damages), would not, though continued for twenty years, be a circumstance in favor of the presumption. Tinkham v. Arnold, 3 Greenl. 120.

At any rate, the original consistency of relation between the possession and opposite title must have been clearly dissolved, and turned into an adverse possession, for many years before suit, in order to make it available as a ground of presumption. Per Lord Eldon, in Fenwick v. Reed, 1 Meriv. 125. This doctrine is illustrated in a recent case, where a tenant at will was allowed to claim the presumption against the landlord's heirs. The tenant possessed fifty-seven years after the landlord's death; and it was held that the jury might presume a restoration of possession to the heirs, then an ouster, and so a title. Camp v. Camp, 5 Conn. Rep. 291, 301, 302, *et seq.*

The length of time during which the possession continued is not to be presumed; but must be plainly and positively proved. Hurst's Lessee v. M'Neil, 1 Wash. C. C. Rep. 70, 80. And where this is relied on, it must be so great as to create a belief that the conveyance has been actually made. Per Sutherland, J., in Jackson ex dem. Erwin v. Moore, 6 Cowen's Rep. 125; per Washington, J., in Hurst's Lessee v. M'Neil, 1 Wash. C. C. Rep. 80. The force of possession as a ground of presumption may be repelled by many circumstances. Among these are the disability of the owner as recognized by the Statute of Limitations. See Mitchell v. Owings, 3 Marsh. 316; Demarest v. Wynkoop, 3 John. Ch. Rep. 129. Ignorance of the owner that the right existed. See Mitchell v. Owings, 3 Marsh. 316. The distant residence of the owner (as if it be in England), ignorance of the extent of the right under the American law; and the small value of the property in dispute. Hurst's Lessee v. M'Neil, 1 Wash. C. C. Rep. 70, 81. So where the country is new, and the population is sparse; possession being attended, therefore, with less notoriety. So where the land is among a people accustomed to lay the foundation of a title by taking possession without grant. Per Duncan, J., in Wilson v. Stoner, 9 Serg. & Rawle, 43, 44. And see some very sensible remarks, applicable to a like subject, by Mellon, Ch. J., in Bethum v. Turner, 1 Greenl. 115.

Mere neglect of the owner, for any length of time, will not raise the presumption; there being no adverse possession against him. Schauber v. Jackson ex dem. Bogart, 2 Wend. 13; Doe ex dem. Marston v. Butler, 3 Wend. 149. There being no adverse possession, the heirs of the true owner recovered even against an escheat grant, though they or their ancestors had made no claim for one hundred years. Hall v. Gitting's Lessee, 2 Har. & John. 112, 125, 126. So where the one in possession has no title, and asserts none. Ricard v. Williams, 7 Wheat. 59, 109, *et seq.* And accordingly where one has title to the whole and possession of part, this is a possession of

the whole; and no presumption of a grant can therefore arise in favor of another who is tortiously in possession of the same land concurrently with the true owner. Hammond v. Ridgley, 5 Harr. & John. 215, 264, 265. The possession must be positively and unequivocally adverse. Even possession and receiving rents, offers to sell, or partial sales effected, may as well be acts of a tortious possessor, or of an agent, as of one claiming title under the real owner. Delancey's Lessee v. M'Keen, 1 Wash. C. C. R. 354, 359, 360, *et seq.;* and distance and disabilities in the owner are to be considered and allowed (Id.); and an adverse character in the possession may be done away by surrender, acknowledgment of the owner's title, or by a discontinuance of the possession, &c. Holtzapple's Lessee v. Phillibaum, 4 Wash. C. C. Rep. 356, 363. Where a widow held a parcel of her husband's estate for nearly thirty years, under a deed in fee from one of the heirs; held, in an action by another of the heirs for an undivided portion of the same land, it could not be presumed that she claimed as tenant in dower, so as to raise the presumption from an acquiescence of the demandant in so long possession, that there was a regular assignment of dower. Hale v. The Inh. of Portland, 4 N. H. Rep. 77. A title to an undivided portion of land cannot, unless in a very strong case, be acquired by concurrent possession, or acts of ownership, while the real owner is in possession. Waldron v. Tuttle, 4 N. H. Rep. 371. So of a trustee as against his *cestui que trust*, as will be seen *post*, note 194. Per Nott, J., in Howard v. Aiken, 3 M'Cord, 468, S. P. So of a vendee in possession under an agreement to convey, but not having paid the purchase money. Richards v. M'Kie, 1 Harp. Ch. Rep. 184. The court refused to found the presumption on a claim of constructive possession under a deed, the description in which did not clearly include the land. Gibson v. Chappel, 1 Harp. Rep. 28. Nor will a grant of land to a certain boundary, by one claiming beyond it, be received as ground for a presumption that he had released all beyond, especially where he had since conveyed land lying beyond. Jackson ex dem. Van Schaick v. Vincent, 4 Wend. 633. See also Palmer v. Hicks, 6 John. Rep. 133, 135; per Robertson, J., in Fitzhugh v. Croghan, 2 J. J. Marsh. 436; and per Marshall, Ch. J., 7 Wheat. 546.

So, on the other hand, where the chain of title was compiete except one deed, and circumstances, including long possession, were proved by the lessor of the plaintiff, from which the intermediate deed was presumable, held that a possession by the defendant in order to defeat that presumption, he claiming under another and distinct title from that of the lessor of the plaintiff, embracing other tracts, but merely insisting that the location of his title covered a part of what the lessor of the plaintiff claimed to be included in his, did not rebut the presumption in favor of the lessor of the plaintiff. To repel that presumption, the defendant's possession must have been under a claim in hostility to the lessor's title, not merely in hostility to its location. Beall's Lessee v. Lynn, 6 Harr. & John. 336, 353, 354, 363, stated *supra.*

8. In the above and the like cases, although the court may instruct the jury upon what circumstances they are to rely in presuming a title, or the contrary (Stoever v. Whitman's Lessee, 6 Binn. 416, 419), yet the jury are, then, the proper judges upon the effect of the evidence; and the court will not, ordinarily, disturb their verdict. Doe ex dem. Fenwick v. Reed, cited in the text; Livett v. Wilson, 3 Bing. 115, reported more fully, 10 Moore, 439; S. C., 3 Mann. & Ryl. 239, note; Hill v. Crosby, 2 Pick. 466, 467, 468; Lopez v. Andrews, 3 Mann. & Ryl. 329, note. Tilghman, Ch. J. (6 Binn 419), says, "It is the duty of the court to give an opinion, whether the facts proved will justify the presumption." *Quere.* But with this agrees Cockey's Lessee v. Smith, 3 Harr. & John. 20.

9. Courts are in many instances very free to presume deeds, in the execution of trusts, according to the duty of the trustees; and sometimes, to avoid great mischief, where it is not their duty. Thus, to secure certain poor tenants who had been dealt hardly with by the notorious Howard (Earl Stafford), who pretended that he had the legal estate when it was out in trustees, and his right as *cestui que trust* was merely for life, the court threatened to presume a conveyance from the trustees to him of the legal estate, in order to validate his dealings with the tenants; and Pemberton, C. J., intimated that the earl might, before the birth of his son, he being till that time tenant in tail on the construction of the conveyance, have cut off the entail. Saunders, of counsel, said the estate tail was in trust, and so could not be cut off: "But my Lord Chief Justice Pemberton said that sure Mr. Saunders thought the court wanted brains; but he said he knew what he said." This seems to have been the intimation of a double presumption, first that the trustees had conveyed the legal estate tail to him; and then that he had docketed it by fine

or recovery. But the court were very indignant, and ready to presume anything against Lord Stafford, who would otherwise, it seems, have succeeded in defrauding his poor tenants out of £20,000 sterling. Lady Stafford v. Llewellin, Skin. 77, 78. See per Marshall, Ch. J., 7 Wheat, 546.

In respect to presuming conveyances from trustee to *cestui que trust*, the courts perhaps would not ordinarily go so far as the above case. They would not presume a conveyance where it would be a breach of trust (Keene ex dem. Byron v. Dearden, 8 East, 248); nor, in general, where it might stand indifferent whether it were a breach of trust or not; but these conveyances from trustees, where the *cestui que trust* is let into possession, as is ordinarily the case, and also where there is a duty in the trustee to convey at a certain time which has elapsed, or to convey generally, without time being mentioned; or on a certain contingency, or even where a constructive trust to convey arises (as in case of land out on trust for specific purpose, which has answered its object, but where there is no express direction to convey), will be presumed. And here courts do not wait twenty years, or any given period, after the duty arises, but the *cestui que trust* being in actual possession, and the duty of the trustees thus partially executed by allowing such possession, the presumption is that they fulfilled the additional duty of making an actual conveyance according to the trust. The cases on this head range from a very few years to fifty; but it is evident, from the principle on which the decisions go, that a very short time, in case of a clear trust, would readily be adopted. The rule prevails both at law and in equity. Law grounds its presumption on the fact that a court of equity would compel the execution of such trusts; and seems, in this instance, very nearly to follow the rule in chancery, that what ought to be done shall be considered as done. England ex dem. Syburn v. Slade, 4 T. R. 682; Doe ex dem. Bowerman v. Sybourn, 2 Esp. N. P. C. 496; S. C., 7 T. R. 3; per Lord Kenyon, 8 T. R. 122; per Yates, J., in Jackson ex dem Gillespy v. Woolsey, 11 John. Rep. 456; Jackson ex dem. Colden v. Moore, 13 John. Rep. 513; Waggener v. Waggener, 2 Monroe, 347, 348; Wilson v. Allen, 1 Jac. & Walk, 590, 600; per Sir W. Grant, M. R., 12 Ves. 251, 252; Hillary v. Waller, 12 Ves. 239; Doe ex dem. Howell v. Lloyd, Peak. Ev. (5th ed.) app. 41; Norris' Am. ed., app. 30; Van Dyck v. Van Beuren, 1 Cain. Rep. 84, 89; Lade v. Holford, Bull. N. P. 110; Goodtitle ex dem Jones v. Jones, 7 T. R. 43, 45; More v. Jackson ex dem. Erwin, 4 Wend. 58; S. C., 6 Cowen, 706; Jackson ex dem Bradt v. Brooks, 8 Wend. 426.

With several of the above cases, decided by the King's Bench, Lord Kenyon, C. J., presiding and assenting, a learned writer has sought to reconcile a previous determination by the judges on a trial at bar. Goodright ex dem. Grosvenor v. Swymmer, 1 Kenyon's Rep. by Hanmer, 385. In that case, the lessor claimed against the defendant on a conveyance in trust for his ancestor, with a covenant to convey to him, contained in the deed, by which the trustees declared the trust. His ancestors and himself had been in possession of the estate so conveyed for more than 120 years; yet the court refused to presume a conveyance, and nonsuited the plaintiff. This case is sought to be distinguished by Mr. Matthews (on Pr. Ev. 217, 218, 219), as *a conveyance to trustees, without any expressed or manifest object in view, requiring the separation of the legal and equitable interests.* Now, with deference, where a conveyance was so plainly intended as to be expressed in the deed of declaration and fortified by a covenant, the distinction, however well founded it may be in principle, can hardly apply. The decision seems referable rather to the unsettled notion which the King's Bench entertained on the subject of presuming these conveyances in a court of law. The decisions cited (*supra*) from 2 Esp. and Term Rep. had not yet been made. The case in 4 T. R. was A. D. 1792; in Esp. 1796. The latter was affirmed, on motion for a new trial, in 7 T. R. 3. Now, in 1788, previous to this course of decision, Lord Kenyon had himself held at Nisi Prius that the courts of law could not presume the execution of a plain trust. Godfrey ex dem. ——— v. Hudson, 2 Esp. Rep. 499, 500, note. This was after the case cited from his own reports, now published, which was decided in 1756, and just before Lord Mansfield, who broached the course of decision which finally prevailed, took his seat as chief justice. See Mem., 1 Kenyon's Rep. 385. On the same principle, after long possession of chattels to which one is entitled as distributee, the actual distribution, or setting off the property to him, will be presumed. Reed v. Price, 1 Harp. Rep. 3.

Conveyances should not in general be so presumed as to trench on the policy of family settlements (Doe ex dem. Milner v. Brightwen, 10 East, 583); and yet long and important acts of ownership by the *cestuis que trust*, on which the rights of third persons depend, such as granting

leases, mortgaging or selling, will induce the courts to presume such conveyances as shall support them at law. This we have seen as to leases in Earl Stafford's Case (*supra*), which was one of family settlement. Skin. 77, 78. And there are other cases, or at least dicta, which go upon or recognize a like principle. See per Le Blanc, J., in Keene v. Dearden, 8 East, 266; and per Lord Eldon, in Nouaille v. Greenwood, 1 Turn. 29.

10. It is upon the same principle, that where a mortgage debt has been paid, a reconveyance will be presumed, the mortgagee being considered a trustee for the mortgagor, and bound to convey in equity; and this especially where the mortgage deed is in the hands of the owner of the property. And if it be uncertain whether payment was made on or after the day, the law will presume it was at the day, in order to support the mortgagor's title. Cooke v. Soltau, 2 Sim. & Stu. 454; Emery v. Grocock, 6 Mad. Rep. 54; Barnardist. Ch. Rep. 93, per Lord Hardwicke; Wilson v. Witherby, Bull. N. P. 110. And see Noel v. Bewley, 3 Sim. 103. In New York, no such presumption is necessary; for, on payment at any time, the power of the mortgage is extinguished. Jackson ex dem. Roosevelt v. Stackhouse, 1 Cowen's Rep. 122. It is otherwise in Connecticut. Phelps v. Sage, 2 Day, 151.

11. From this presumptive execution of trusts, the transition was easy and natural to the presumed specific execution of contracts between vendor and vendee. Accordingly, where there is a contract to sell land, and the vendee has entered into possession, and paid the purchase money, this being also a case in which a court of chancery would at once decree a specific execution, the courts of law have presumed a conveyance, and treated the legal title as in the vendee.

The leading case under this head shows very long adverse possession of only a part of the lands covered by the agreement. The court extended this possession, by construction, to the vacant part, and allowed the jury to presume a grant of the whole. The partial possession had continued in the vendee and his family from time immemorial; and the presumption was treated by the court as a matter of course, very little comment being bestowed on the question. Jackson ex dem. Kip v. Murray, Anth. N. P. 105, 107, in connection with S. C., 7 John. Rep. 5, 10. A similar point, also indefinite as to the time of possession, appears to have been held by the Supreme Court of the United States. Hepburn v. Auld, 5 Cranch, 262, 276. And there are several American cases which recognize the general principle. Per Thompson, J., in Jackson ex dem. Smith v. Pierce, 2 John. Rep. 221, 226; per Sutherland, J., in Doe ex dem. Marston v. Butler, 3 Wend. 149, 152, 153; per Robertson, J., in Fitzhugh v. Croghan, 2 J. J. Marsh. 436; Richards v. M'Kie, Harp. Eq. Rep. 184, 192; Holtzapple's Lessee v. Phillibaum, 4 Wash. C. C. Rep. 353, 367. And see Edwards v. Bibber, 1 Leigh, 183.

But the contract must be fulfilled by a payment, on the part of the vendee, and a rightful possession, so that the mere form of a conveyance shall be all that is wanting. The party should appear to be legally or equitably entitled to a conveyance. Richards v. M'Kie, Harp. Eq. Rep. 184, 192, 193; per Sutherland, J., in Doe, ex dem. Marston v. Butler, 3 Wend. 152, 153. See also Den ex dem. Popino v. Cook, 2 Halst. 41, 56, *et seq.*; per Sutherland, J., in Jackson ex dem. Erwin v. Moore, 6 Cowen's Rep. 725; Mundell's Lessee v. Clerklee, 3 Har. & John. 462.

The time within which the specific execution of these agreements to convey may be presumed, is not well defined by the cases. Where tenants in common, under a lease in fee, made a written agreement with their landlord, in 1791, to release to him and take a new lease for their respective portions in severalty, it appeared that in 1792 and 1794, new leases were executed and followed by corresponding possession; but there was was no other direct or circumstantial evidence of a release. In about twenty years after the date of the last lease, the Supreme Court held, as one of the points in the cause, that a release should be presumed. Springstein v. Schermerhorn, 12 John. Rep. 357, 362. And see per Walworth, C., in Parks v. Jackson, 11 Wend. 455.

12. Another fertile head is, in England, the presumed surrenders of terms attendant upon the inheritance. These are terms which stand out in persons who are trustees for the benefit of the owner of the fee, whoever he may be; and if they stood on the ground of ordinary trusts, the cases might, perhaps, be used as valuable illustrations under the seventh subdivision of this note. But there is so much artificial learning, arising upon the connection of these trusts with family settlements and other objects peculiar to the English conveyancer, that the whole becomes nearly useless to the American lawyer. The presumption of surrender is almost always qualified or controlled by a reference to those objects. Our terms stand out in gross; surrenders are regarded

Of private conveyances.

Conveyances between private individuals are often recommended to juries, in more or less forcible terms, as presumable in favor of a party who has proved a right to the beneficial ownership of property, and whose posssession has been consistent with the existence of such a conveyance as is to be presumed, especially if the possession cannot be accounted for,

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simply as derivative conveyances; and must grow out of the same general ground of presumption with any other sort of assurance. The American student will, therefore, find all the learning which he can desire on this subject, in 4 Kent's Comm. 86–94 (2d ed.) Lect. 56. See the doctrine of presumed surrender, Id. pp. 90, 91, 92.

13. A question of great importance to the American lawyer, was mooted in Doe dem. Beanland v. Hurst (11 Price, 475, 489—492). It was no less than whether a deed respecting lands can be presumed in a registering county. The English act (see Id. p. 492), for registering deeds and conveyances in the West Riding of Yorkshire, on which act the question arose, declares that they shall be recorded, in order to protect the grantee against subsequent *bona fide* sales and mortgages. In a word, it is nearly the same as our general registry acts in the United States. In that case, a grant of coal in the West Riding of Yorkshire, was sought to be presumed from circumstances. This was resisted on the ground that the registry alone should speak; and there was no registry. The omission was relied on as effectually repelling all presumption in the case. The point does not appear to have been decided. But the question at the trial was left to the jury by Bailey, J., and on the argument at bar, Rex v. Long Buckby (7 East, 45), was cited, and appears to be conclusive, that such a case presents as fair a subject of presumption as any other. In the latter case an indenture of apprenticeship had been lost, and was to be proved by parol; but there was no evidence that it had ever been stamped; and no registry of that fact at the stamp-office, where it must have appeared, if there had been no irregularity. But after nearly twenty years, during which the indentures had been acted upon as valid, the court held that the evidence of non-registry was not sufficient *per se*, to repel the presumption, but they would rather suppose that the paper had been stamped, and that the proper office had omitted the registry by mistake.

Now this was a case where, without a stamp, the indentures would have been a nullity to all intents, and where, in the regular course of things, there must have been a registry. It was surely much stronger against the presumption than the omission to register a deed of conveyance. The latter are valid as against the party without registry; and the grantee being in possession, they would be valid against all the world, purchasers and mortgagees included. Gouverneur v. Lynch, 2 Paige, 300, 301, and the cases there cited. Neither are the registering acts imperative, nor is there, in case of a deed, any great danger in omitting to register. It is entirely optional with the party; and if purchasers or mortgagees are uninjured by lack of constructive notice, none others can complain. Where notice alone is the object, it is given by a change of possession to the grantee; and an absolute deed may ordinarily be withheld from the record, without any danger. Indeed, this is often so in practice. And it follows that there is nothing in the omission to register necessarily inconsistent with the common presumption which involves the previous existence and loss, and may equally well include the non-registry.

(The law presumes a conveyance where there has been long continued possession of land under a claim of title, and the parties are shown to have acted as though a deed had been given. Wendell v. Moulton, 6 Foster (N. H.) 41. Over twenty years' possession is held in South Carolina to raise the presumption of a grant. Thompson v. Peake, 7 Rich. 353; Kimbrall v. Walker, 7 Id. 422. The presumption of law is founded upon a fair presumption of fact, and is frequently resorted to to supply the place of lost deeds. Domeyn v. Legg, 18 Barb. 14; Simpson v. Hyatt, 1 Jones Law N. C. 517; Spears v. Oakes, 4 Rich. 347. Adverse possession of the land must be shown before any presumption will be made in favor of the claimant. Wadsworthville School v. Meetze, 4 Id. 50. Permissive possession will raise no such presumption. Roxbury v. Huston, 37 Maine R. 42.)

and would have been unlawful, except on the supposition of a conveyance; such presumptions are made to prevent justice being defeated by a mere formal objection to the party's title in a court of law.(1) But where the original possession of property may be accounted for, and is consistent with the fact of there having been no conveyance, it seems proper to direct a jury to presume a conveyance or not, according to their actual belief on the subject.(2)

With regard to the presumptions of a conveyance from a trustee to a *cestui que trust*, and of the surrender of outstanding terms, which are often necessary in order to constitute a legal title in an action of ejectment, considerable differences of opinion have been expressed. As these questions are somewhat removed from ordinary comprehension, it may be expected that, although they must be submitted to a jury, yet that, in point of fact, they will ordinarily be decided upon principles of law by the judge. A surrender of an outstanding term was, in general, presumed, where the trustees ought to have conveyed to the beneficial owner, and where it was set up by a mortgagor against a mortgagee.(3) But such a presumption was not made, where it would have been a breach of trust in the trustees to have surrendered the term;(4) or, in general, where the surrender would have been against the interests of the owner of the inheritance, especially if the term had been recognized as subsisting at a late period.(5) The presumptions which juries were used to be called upon to make, with regard to the surrender of outstanding satisfied terms, are now set at rest by the provisions of the statute 8 & 9 Vict. c. 112.

It may be considered, that when acts are done or omitted by the owner

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(1) By Tindal, C. J., in Doe d. Hammond v. Cooke, 6 Bing. 174, 180. See Matthews on Presumptions, ch. 4.

(2) Doe d. Fenwick v. Reed, 5 B. & A. 233. It was said that the presumption of grants and conveyances had gone to too great a length. See also Livett v. Wilson, 3 Bing. 115.

NOTE 191.—The question whether non-demand and non-payment of a quit rent for sixty years will not found a presumption of payment, was raised and argued, but not decided, in Ten Broeck v. Livingston (1 John. Ch. R. 357, 360, 263). Afterwards, forty-four years were held sufficient (Livingston's Ex'rs v. Livingston, 4 Id. 294), on a consideration of the English cases. Id. 297.

But these cases, and the remarks in the text, relate to the *body* of the rent. Where that is not disputed, there is no doubt that the lapse of twenty years since a particular rent fell due will, as in case of a bond, warrant the presumption of payment up to that time. This presumption may be repelled by like circumstances (for which, see *post*, note 193), as by showing that the parties resided in different countries, the denial of the lessee that he had ever paid rent, and the premises being situate in a foreign country. Bailey v. Jackson, 16 John. Rep. 210.

(3) By Lord Kenyon, C. J., in Doe d. Hodsden v. Staple, 2 T. R. 696. And see Doe d. Bowerman v. Sybourn, 7 T. R. 2; S. C., 2 Esp. 496; England d. Sybourn v. Slade, 4 T. R. 682; Wilson v. Allen, 1 Jac. & W. 611, 620; Emery v. Grocock, 6 Madd. 54. As to the presumption, where the duty of trustees to convey is only to be gathered constructively from the trust, see Doe d. Howell v. Lloyd, Pea. Ev. App. xli. (5th ed.); Hillary v. Waller, 12 Ves. 239, 251; 2 Sugd. Vend. & Purch. 196.

(4) Keene v. Dearden, 8 East, 867.

(5) Doe d. Graham v. Scott, 11 East, 478. See Doe d. Hanley v. Wright, 2 B. & A. 720.

of the inheritance and by persons dealing with him as to the land, which ought not reasonably to have been done or omitted if the term existed in the hands of a trustee, a surrender may be presumed.(1)

The principal difference of opinion has existed in respect of the presumption of the surrender of terms, from the circumstance of their not being noticed in recent marriage contracts or other conveyances. It should seem that the courts of law had, in some instances, proceeded on an erroneous opinion as to the practice of noticing outstanding terms upon such occasions. But the courts of equity having expressed great dissatisfaction at the decisions of the courts of law as to this matter, the courts of law appear to have been desirous, in later cases, to assimilate their decisions to those of the equity courts.(2)

Where the ground for the presumption of a conveyance between private individuals is simply that of length of possession, it should seem that the courts have imposed a restriction upon the discretion of juries. It has been held, that possession of land for any period less than twenty years by a feoffee, is not sufficient to found a presumption that livery of seizin has accompanied the feoffment.(3)

Licenses may be presumed after a shorter space of time than is ordinarily required for the presumption of actual conveyances. Thus, where an inclosure had been made from a waste twelve or fourteen years, and had been seen by the steward of the lord from time to time, without objection being made, it was left to the jury to say whether the inclosure was made by the lord's license.(4)

Of by-law.

Although there do not remain any traces of a by-law in the books of a corporation, and although there cannot be any proof given of the loss of it, yet, upon evidence of constant usage, a jury may be directed to pre-

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(1) By Abbott, C. J., in Doe d. Putland v. Hilder, 2 B. & A. 782, 791, 792. See further on this subject, Bartlett v. Downes, 3 B. & C. 616; Doe d. Blacknell v. Plowman, 2 B. & Ad. 573; Townsend v. Champernown, 1 Y. & J. 538; Doe d. Hammond v. Cooke, 6 Bing. 124; Day v. Williams, 2 C. & J. 460; Townsend (Marq.) v. Norwich (Bishop), Sugd. V. & P. 443; Cholmondeley v. Clinton, Id. 444; Aspinal v. Kempson, Id. 446; Doe d. Burdett v. Wrighte, 2 B. & A. 710; Daintree v. Brocklehurst, 18 L. J. (N. S.) Exch. 57; Matthews on Presumptions, 226 to 259.

(2) The subject is fully discussed, by Sir E. Sugden, in the last edition of his book on Vendors and Purchasers, Vol. 2, p. 196. He concludes, that the profession are justified by the authorities in considering the law to stand as it did, before the decision in Doe d. Putland v. Hilder, *ut supra.*

(3) Doe d. Wilkins v. Cleveland (Marquis), 9 B. & C. 871. And see 2 & 3 Wm. IV, c. 71. As to the presumption of livery of seizin, see Isack v. Clarke, Roll. Rep. 132, pl. 9; Biden v. Loveday, Vern. 196; Rees v. Lloyd, Wightw. 123. The period of twenty years has been adopted by the courts, in various instances, for the purpose of raising presumptions, in analogy, probably, to the statute of James; but in regard to the proof of written instruments, by their production from the proper custody, without further proof of execution, the period of thirty years has been adopted. 11 East, 504; 4 B. & A. 376; 5 T. R. 359; 2 M. & S. 337; 2 B. & C. 814.

(4) Doe d. Foley v. Wilson, 11 East, 56; Goodtitle d. Parker v. Baldwin, 11 East, 488; Ditcham v. Bond, 3 Camp. 525.

sume its existence. Sixty years' usage has been considered evidence of a by-law.(1)

Presumption of payment.

Presumptions of the payment of money have been sanctioned in various cases. Where it has been usual between parties to make payments that frequently become due, without taking written vouchers, and a long time has elapsed without any complaint being made of non-payment, the fact of payment may very properly be presumed.(2) If a landlord gives a receipt

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(1) See R. v. Head, 4 Burr. 2518; R. v. Bird, 12 East, 368. By Lord Mansfield, C. J., in Perkin v. Cutlers (Warden of Co.), 21 MSS. Serg. Hill, p. 65.

(2) See Lucas v. Novosilieski, 1 Esp. 296; Sellen v. Norman, 4 C. & P. 86; Evans v. Birch, 3 Camp. 10; Topham v. Braddick, 1 Taunt. 572.

NOTE 192.—Decker v. Livingston, 15 John. Rep. 479, S. P. The civil law requires, in order to raise this presumption, acquittances for three successive years. Poth. on Obl. No. 812. And on the same principle, a repeated statement of reciprocal debts between two, will, after the death of one, warrant the presumption that all debts between them were included, and throw the onus of establishing an omission on the survivor. 1 Dom. b. 3, tit. 6, § 4, art. 11. A payment or release of all debts not included in the statement will be presumed. Id. But a release of one debt, will not affect another not mentioned in the release; and where a demand appears to have been omitted in a single statement of accounts, it will not be discharged; but the omission will be considered rather as accidental, unless the parties are nearly related, or several accounts stated have passed in this way between them, or the creditor has died without asserting his claim. Poth. on Obl. No. 577.

If a promissory note or bond should chance to be found in the hands of the debtor, or if it be crossed, rased or torn in pieces, either of these circumstances will create a presumption that it has been acquitted; which presumption will remain until clear proof be brought that the debt is still owing (see Garlock v. Geortner, 7 Wend. 198; Palmer v. Guernsey, Id. 248); as that the appearances against the demand came by violence or accident, &c. 1 Dom. b. 3, tit. 6, § 4, art. 12; Poth. on Obl. Nos. 572, 573, 812; Novelli v. Rossi, 2 Barnw. & Adolph. 757. So where a bill of exchange was found in the hands of the acceptor. Gibbon v. Fetherstonhaugh, 1 Stark. N. P. Cas. 225.

Releasing the pledge creates no presumption that the debt is released. Poth. on Obl. No. 574. But if a contract involving mutual obligation be released on one side, the presumption is that the other is also released. Id. No. 575.

On a plea of payment, the acceptance of less in satisfaction may be left to the jury as evidence that the rest has been paid. Blanchard v. Noyes, 3 N. H. Rep. 518.

Giving a bond and mortgage furnishes a presumption of a liquidation of all accounts before their date, between the parties. Chewning v. Proctor, 2 M'Cord's Ch. Rep. 14, 15. See Ross v. Darby, 4 Munf. 428; where payment was presumed from lapse of time combined with other special circumstances, without any direct proof of payment. The pecuniary distresses of the creditor, his money transactions with third persons, &c., &c., were received in evidence. Giving a promissory note after the time of credit for goods purchased by the maker, of the payee, leads to a presumption that the price of the goods was included in the note. Mutrie v. Harris, 1 Mood. & Malk. 322.

An order to pay money is, in the hands of the drawee, evidence of payment. Blount v. Starkey's Adm'r, 1 Tayl. 110; Weidner v. Schweigart, 9 Serg. & Rawle, 385. But said to be otherwise of an order for goods. Blount v. Starkey's Adm'r, 1 Tayl. 110; Price v. Justrobe, 1 Harp. Rep. 111. But *quere* of the latter; Alvord v. Baker, 9 Wend. 323, is *contra;* and where the question was whether the defendant had returned a piece of cloth to the plaintiff, the possession, by the defendant, of the plaintiff's note to the defendant requesting the latter to return

for the rent last due, it is to be presumed that all former rent due from the tenant has been paid.(1) Where a bill of exchange, negotiated after ac-

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the cloth, was held *prima facie* evidence of its being returned. Shepherd v. Currie, 1 Stark. N P. Rep. 454.

The mere production of a paid check, payable to the plaintiff *or bearer, e. g.*, where it is found concealed among the drawer's papers, is not *per se* evidence of payment to the plaintiff (Egg v. Barnett, 3 Esp. Cas. 196; Patton's Adm'rs v. Ash et al., 7 Serg. & Rawle, 116, 125, per Tilghman, Ch. J.); otherwise if it be proved to have been in the plaintiff's possession or his name indorsed on it. Egg v. Barnett, 3 Esp. Cas. 196. And even where paid to the payee, if it be used to charge him with a debt, some evidence should be given to show that it was not drawn to pay a debt of the drawer; for *prima facie*, it seems to be taken as an act of payment. Patton's Adm'rs v. Ash et al., 7 Serg. & Rawle, 116, 125, per Tilghman, Ch. J. It is often given by way of payment; and the mere payment of money by A. to B. is presumptive evidence of the payment of an antecedent debt; not of a loan. Welch v. Seaburn, 1 Stark. N. P. Cas. 474; 1 Dom. b. 3, tit. 6, § 4, art. 10. So of a transfer of stock. Breton v. Cope, Peak. N. P. Cas. 30. Dallas, C. J., ruled that A., having received the money on a check payable to him, was not, *per se*, evidence of payment to him. Lloyd v. Sandiland, Gow, 16. Mr. Roscoe adds to this case, "*sed quere.*" Roscoe's Ev. 15. The drawee paying a money order is, *prima facie*, an act of payment, not a loan. Per Sutherland, J., in Alvord v. Baker, 9 Wend. 324.

One gives a bond to convey land, there being no counter bond for the consideration money; the presumption is that the money was paid. Mitchell v. Maupin, 3 Monroe, 187.

Every officer engaged in the United States service is presumed to have received the compensation allowed by law. United States v. Ripley, 7 Pet. 18.

A. holding a single bill against B.'s executors, paid them money as a balance of money in his (A.'s) hands belonging to their testator. Held evidence, in an action on the bill, that A. had withholden money received for the testator to the amount of the bill. Beekman's Ex'rs v. Beekman's Ex'rs, Anth. N. P. Rep. 123, 125, (2d ed.)

That a highway tax of one year was not included in a bill for the next, raises the presumption that it was paid; but this presumption may be repelled. Attleborough v. Middleborough, 10 Pick. 378.

A. having a demand against B. pays him money and takes a receipt in full of all accounts; A.'s demand shall be presumed paid. Alvord v. Baker, 9 Wend. 323.

For some instances of the presumptive payment of servants arising from the course of business, see *ante*, note 177, pl. 5.

(1) Gilb. Ev. 157.

NOTE 193.—Schauber v. Jackson d. Bogart, 2 Wend. 59, 60, per Stebbins, Senator; Price's Ex'r v. Fuqua's Ex'r, 4 Munf. 68; and agreed by all the cases on the subject.

1. The twenty years are in general computed from the time when the debt is payable by the terms of the bond. Or if there be circumstances simply repelling the presumption of payment previous to, or after the twenty years had elapsed, you must wait another twenty years before you can insist on time. Saunders v. Meredith, 3 Mann. & Ryl. 116.

The defence comes in upon a plea of *solvit ad* (or *post*) *diem*. Blackburn v. Squib, Peck's Rep. 6; *per Curiam*, in Rex v. St. Paul, Shadwell, 1 Mann. & Ryl. 506. And in all cases of presumptive payment at law or in equity, the pleadings must contain an averment of payment; otherwise the presumption cannot be raised. Tibb's Heirs v. Clark, 5 Munroe, 526, 527. Cases where payment is provable under the general issue, must, of course, be excepted.

The rule is said to have begun in courts of equity. 15 Vin. Abr. Length of time, pl. 5, 6; Carpenter v. Tucker, 1 Ch. Rep. 78; Geoffry v. Thorn, Id. 88—both cases, 10 Car. I. Though in neither of these cases is so short a term as twenty years mentioned. So of Powell v. Godsale, Rep. temp. Finch, 77; 25 Car. II. But a like case is found at law as early as 8 Car. I. Shellitoe v. Horsefall, Clayt. 102. And since those cases, the twenty years have very often been recognized, both at law and in equity, as the true period. 1 T. R. 271, and the cases there cited; Washington v. Brymer, 2 Peak. Cas. 200; *Post*, Vol. II, 171, *et seq*, and the cases there cited;

1 Dowl. & Ryl. 16; 3 Carr. & Payne, 43; 3 P. Wms. 396; 2 Atk. 144; 12 Ves. 266; 19 Id. 199. Held of an administrator's bond. Charleston Ordinary v. Steedman, 1 Harp. Rep. 287, 289. But the time does not begin to run on such a bond in Maine, till a decree for a distribution is passed. Potter v. Titcomb, 7 Greenl. 302.

A shorter period will not, *per se*, warrant the presumption. *Post*, Vol. II, 421, and the cases there cited; Henderson v. Hamilton, 1 Hall's Rep. N. Y. S. C. 314; Smith's Ex'rs v. Richardson, 2 Nott & M'Cord, 166, note *a;* Blackburn v. Squib, Peck, 60. Though a shorter period, with additional circumstances tending to prove payment, may go to the jury; or be relied on by the Court of Chancery. *Post;* Winstanley v. Savage, 2 M'Cord's Ch. Rep. 435, 439; Goldhawk v. Duane, 2 Wash. C. C. Rep. 323; per Colcock, J., in Blake's Ex'rs v. Quash & Pinckney's Ex'rs, 3 M'Cord's Rep. 340, 341, 342; and in Levy v. Hampton, 1 M'Cord's R. 146, 147. As if the parties have accounted together in the meantime (*Post*, Vol. II, 171; Penrose v. King, 1 Yeates, 344); or the obligee has purchased an estate of the obligor (Moyle v. Roberts, Nels. 9; injunction against bond after eighteen years); and in one case after fourteen years, with the circumstance that the debtor lived in the same street with the attorney, who held the bond for collection several years, and who was proved to be highly vigilant in his professional duties, was held sufficient. Blake's Ex'rs v. Quash & Livingston's Ex'rs, 3 M'Cord's Rep. 340, 343.

The presumption may be repelled by various circumstances. *Post*, Vol. II, 421, and cases there cited; per Duncan, J., in M'Dowell v. M'Cullough, 17 Serg. & Rawle, 53; per Robertson, J., in Fitzhugh v. Croghan, 2 J. J. Marsh, 436. The more common ones are an admission, within the twenty years, that the debt is due. M'Dowell v. M'Cullough, 17 Serg. & Rawle, 51; 6 Ves. 519, conceded; Washington v. Brymer, 2 Peak. N. P. Cas. 200, conceded; *Post*, Vol. II, and cases there cited; Toplis v. Baker, 2 Cox's C. C. 118; North v. Drayton, 1 Harp. Ch. Rep. 34; Boltz v. Bullman, 1 Yeates, 581, 586; Goldhawk v. Duane, 2 Wash. C. C. Rep. 323; Blackburn v. Squib, Peck, 60; Cottle v. Payne, 3 Day, 289. So payment of interest, which is plainly equivalent to an admission (per Duncan, J., in M'Dowell v. M'Cullough, 17 Serg. & Rawle, 53; *Post*, Vol. II, and cases there cited; Brearden v. Searcy's Heirs, 3 Marsh. 544, per Owsley, J.); and this, though the interest paid accrued before twenty years, being paid within that time. Saunders v. Meredith, 3 Mann. & Ryl. 116. To make the obligee's indorsement evidence of payment, it must be shown that it was made before the presumption attached. *Post;* Roseboom v. Billington, 17 John. Rep. 182. But indorsements by the hand of the obligor are of course admissible whenever made. *Post*, Vol. II; Boltz v. Bullman, 1 Yeates, 584, 586. A payment by the heir at law will not repel the presumption as to the executor. Blake's Ex'r v. Quash & Livingston's Ex'rs, 3 M'Cord's Rep. 340, 343. And see Osgood v. Manhattan Co., 3 Cowen's Rep. 611. A promise to pay stands on the same footing with an acknowledgment. Eustace v. Gaskins, 1 Wash. 188. "If I am allowed a certain credit I will pay the balance," held to be the same. M'Dowell v. M'Cullough, 17 Serg. & Rawle, 51, 53.

The admission of one joint obligor is receivable against the other; but it should be explicit, to have any effect. Stating that he had not paid, and *he believed* his co-obligor had not, held insufficient. Haskell v. Keen, 2 Nott & M'Cord, 160.

The presumption may also be resisted, by showing the obligor's inability to pay; as his poverty. Fladong v. Winter, 19 Ves. 196, and Wynne v. Waring, there cited; Daggett v. Tallman, 8 Conn. Rep. 168, 176; Blackett v. Wall, 3 Mann. & Ryl. 119, note. So his insolvency, or a state approaching to it. Boardman v. De Forest, 5 Conn. Rep. 1; 12 Ves. 266. So, that the parties were near relations. 12 Ves. 266. But the insolvency of one among several obligors is not sufficient. Boardman v. De Forest, 5 Conn. Rep. 1. Otherwise of a suit, and unavailable execution against one, and a general belief of his insolvency. Levy v. Hampton, 1 M'Cord, 145.

Another answer is the long continued and permanent absence of the debtor (Newman v. Newman, 1 Stark. Rep. 401; Boardman v. De Forest, 5 Conn. Rep. 1); as in a different state of the Union (Shields v. Pringle, 2 Bibb, 387), though this be an adjoining state. Daggett v. Tallman, 8 Conn. Rep. 168. But a temporary or occasional absence is not enough. Boardman v. De Forest, 5 Conn. Rep. 1. Nor the absence of one only of several obligors. Boardman v. De Forest, 5 Conn. Rep. 1.

So, it seems, the long continued absence abroad of the creditor is an answer, as this precludes the ready means of payment. 12 Ves. 266; 19 Ves. 200. So the creditor's residing in England,

the debtor in the United States (Bailey v. Jackson, 16 John. Rep. 210); or in the East Indies. Goodhawk v. Duane, 3 Wash. C. C. Rep. 323.

The period of a revolutionary war should be deducted from the twenty years (Jackson v. Pierce, 10 John. Rep. 414, *semb.;* Brewton's Ex'rs v. Cannoe's Ex'rs, 1 Bay, 482); especially if the courts are shut during that time. Quince's Adm'rs v. Ross' Adm'r, 1 Hayw. N. C. Rep. 180; S. C., 1 Tayl. 155. So of a period intermediate the obligor's death and the appointment of a personal representative. Id.

So, that the bond was wrongfully obtained by a third person, in an answer (Boltz v. Bullman, 1 Yeates, 584, 586); or that the obligee died leaving the bond with his attorney, who did not deliver it to the personal representatives; it not appearing that they knew of it. Jackson ex dem. Marvin v. Hotchkiss, 6 Cowen's Rep. 401. So, that the obligor was the obligee's executor (North v. Drayton, 1 Harp. Ch. Rep. 34); or that the obligee's representative had long been engaged in procuring evidence to establish the claim. Id.

Where the Statute of Limitations excepts certain time from itself, as from January, 1776, to June 21st, 1784, this should be deducted from the twenty years by analogy. Penrose v. King, 1 Yeates, 344. So the time during which the plaintiff was an alien enemy. Dunlap v. Ball, 2 Cranch, 184; per Owsley, J., in Brearden v. Searcy's Heirs, 3 Marsh. 544.

A suit commenced, but discontinued, is not enough. Palmer's Ex'r v. Dubois' Adm'r, 1 Rep. Const. Court, 178. Yet it is said, in Quince's Adm'rs v. Ross' Adm'r (1 Tayl. 155), that a suit against the true party, even though he be not arrested, and though the suit be imperfect, would go a great way to defeat the presumption.

So it is said a demand of the debt would be evidence. Quince's Adm'rs v. Ross' Adm'r, 1 Tayl. 155; and per Judge Owsley, in Brearden v. Searcy's Heirs, 3 Marsh. 554. And see Anon., 11 Mod. 2, and 6 Id. 22. And where a bond and mortgage were due to the state, and, just as the twenty years were about to attach, a reference was made to the surveyor and attorney-general, who reported the money due, this was held to repel the presumption. Jackson v. Pierce, 10 John. Rep. 414, 417.

In one case, though the presumption of payment was done away, the court directed the jury that they might presume a release. It was where the obligee was father-in-law to the obligor, and had given him direct encouragement that the money in the bond should never be demanded, but should be given as his wife's share; and this though a little less than twenty years had elapsed since the obligor acknowledged the debt. Washington v. Brymer, Peak. Ev. (4th ed.) app. 76; S. C., 2 Peak. N. P. Cas. 290.

2. Mortgages, being but a security for money, come within the same rule. Where they have lain dormant for twenty years (Stewart v. Nicholls, 1 Tamlyn, 307; per Lord Thurlow, in Trash v. White, 3 Brown's C. C. 289; Wilson v. Witherby, Bull. N. P. 110)—which dormancy, of course, excludes the act of payment by the mortgagor, and possession by the mortgagee—they are, like bonds, presumed to have been paid. This was formerly held to be otherwise, because there was between them the *quasi* relation of landlord and tenant, which was supposed to consist with longer delay. Leman v. Newnham, 1 Ves. 51; per Sir W. Fortescue, M. R.; Toplis v. Baker, 2 Cox's C. C. 118. But this notion has long since been exploded by the English courts (Wilson v. Witherby, Bull. N. P. 110; 12 Ves. 266; Trash v. White, 3 Bro. C. C. 291, per Lord Thurlow, C.; Christophers v. Sparke, 2 Jac. & Walk. 223, 234, per Sir T. Plumer, M. R.); and emphatically so by the American. Giles v. Baremore, 5 John. Ch. Rep. 545, 552; Collins v. Torry, 7 John. Rep. 278, 283; Jackson ex dem. The People v. Pierce, 10 John. Rep. 414; Jackson ex dem. The People v. Wood, 12 John. Rep. 242; Hughes v. Edwards, 9 Wheat. 489. And see Higginson v. Mein, 4 Cranch, 415, 420; Jackson ex dem. Sackett v. Sackett, 7 Wend. 94; and The People v. The Supervisors of Columbia, 10 Wend. 363.

Like the case of bonds, the presumption may be raised in a shorter time by auxiliary circumstances. Jackson ex dem. Sackett v. Sackett, 7 Wend. 94. Where the mortgagee looked on without giving notice to the purchaser, and saw the mortgagor convey in fee, payment was presumed, though there was the lapse of but about seventeen years (Sibson v. Fletcher, 1 Ch. Rep. 50); and in one case, only sixteen years. Abdy v. Loveday, Finch's Rep. 250. In Jackson ex dem. Martin v. Pratt (10 John. Rep. 381, 387), Kent, Ch. J., suggested that nineteen years, without auxiliary circumstances, would warrant the presumption. But *quere.* The cases in respe c to bonds, we have seen, are distinctly the other way. In Jackson ex dem. Sackett v. Sacket

(7 Wend. 99), Sutherland, J., intimates that the mortgage debt being secured by note or other simple contract, the presumptive bar would arise in six years. *Quere.*

The presumption may be repelled, as in the case of a bond. Stewart v. Nicholls, 1 Tamlyn, 307; per Robertson, J., in Fitzhugh v. Croghan, 2 J. J. Marsh. 436. And it was held an answer that the mortgage was on an unproductive reversion, or the party admitted the debt to be unpaid. Toplis v. Baker, 2 Cox's Ch. Rep. 118; Trash v. White, 3 Bro. C. C. 289, 291. See, also, Mede v. Earl of Bandon, 2 Dow, 268. Indeed, the common circumstances of payment and acknowledgment are mentioned in almost every case cited in this note. So, that the land was occupied by a mere naked possessor, not claiming under the mortgagor, is a circumstance to rebut the presumption of payment; and a statute foreclosure and sale by advertisement in New York, though merely *ex parte*, and though thirty-one years after the money fell due, is a conclusive answer to the bar. Jackson ex dem. Mackay v. Slater, 5 Wend. 295. So, that the mortgagor became bankrupt, and therefore unable to pay. Stewart v. Nicholls, 1 Tamlyn, 307.

In one case, where the defendant admitted the mortgage debt had not been paid, but disputed its original existence; the claim being very old, the Court of Chancery, on the principle of discouraging stale demands, presumed that the debt never existed. Christophers v. Sparke, 2 Jac. & Walk. 223.

3. On the other hand, by analogy to the Statute of Limitations barring a right of entry after twenty years' adverse enjoyment, a possession for that length of time by the mortgagee, without account or acknowledgment of an existing right to redeem, forms a presumptive bar to the equity of redemption. Pearson v. Pulley, 1 Cas. Ch. 102; Clapham v. Bowyer, 1 Ch. Rep. 206; White v. Ewer, 2 Ventr. 340; Jenner v. Tracey, 3 P. Wms. 287, note *b;* Knowles v. Spencer, 1 Eq. Cas. Abr. 315; Heaton v. Hugell, 1 Barnardist. K. B. Rep. 272; Aggas v. Pickerell, 3 Atk. 225; Anon., 3 Atkyns, 313; Foster v. Hodgson, 19 Ves. 184; Hodle v. Healy, 1 Ves. & Bea. 539; Moore v. Cable, 1 John. Ch. Rep. 385; Demarest v. Wynkoop, 3 Id. 129; Hughes v. Edwards, 9 Wheaton, 489; Harkey v. Powell, 1 Hawks, 17; Shepperd v. Murdock, 3 Murph. 218; Lamar v. Jones, 3 Har. & M'Hen. 328; per Parker, Ch. J., in Pomeroy v. Winship, 12 Mass. Rep. 520, 521; per Robertson, J., in Fitzhugh v. Croghan, 2 J. J. Marsh. 436; Slee v. The Manhattan Company, 1 Paige, 48; Bunce v. Wolcott, 2 Conn. Rep. 27; Saunders v. Hord, 1 Ch. Rep. 184; Floyd v. Mansell, Gilb. Eq. Rep. 185; Rakestraw v. Brewer, Mos. 189, 191; Frazer v. Moor, Bunb. 54; Barron v. Martin, 19 Ves. 326; Corbett v. Barker, 1 Anstr. 138, 142, 143; 3 Anstr. 755, 759; Belch v. Harvey, 3 P. Wms. 287, note *b;* Reeks v. Postlethwaite, Coop. C. C. 161; Bockford v. Close, cited 1 Bro. C. C. 644; Proctor v. Oates, 2 Atk. 140.

The twenty years are, of course, according to all the cases, to be computed from the time when the moneys fall due, which makes the forfeiture at law. Till that period, there is no power to redeem; and the right against which the statute runs cannot be said to have accrued.

It would seem that the same time is allowed before the equity of redemption of personal property would be barred, as of real estate. Lockwood v. Ewer, 2 Atk. 303; Mims v. Mims, 3 J. J. Marsh. 106; Harkey v. Powell, 1 Hawks, 17. The possession must be adverse, on a claim of absolute title, and so shown; or a possession as bailee will be presumed. Mims v. Mims, 3 J. J. Marsh. 103, 106.

A bill filed (which answers to suit brought at law) before the lapse of twenty years, will prevent the bar. But though a decree be obtained, twenty years more unexplained delay will bar. St. John v. Turner, 2 Vern. 418. So, though a suit be commenced and pending within the twenty years, if the answer do not admit, but deny the right, it must be proceeded on; and it seems that if it lie twenty years in such a case, the bar is complete. Cotterell v. Purchase, Cas. temp. Talbot, 61. *A fortiori*, a mere demand by the mortgagor, without process or acknowledgment, cannot be used to rebut the bar. Hodle v. Healy, 1 Ves. & Bea. 536, 540.

In adopting the Statute of Limitations, courts of equity take it with all its qualifications of disability, such as infancy, coverture, absence beyond sea, &c.; and where the time begins to run during such disability, they allow ten years after its removal. Proctor v. Cowper, 2 Vern. 377; Cornel v. Sykes, 1 Ch. Rep. 193; per Lord Keeper, in White v. Ewer, 2 Ventr. 340; per Lord King, in Jenner v. Tracey, 3 P. Wms. 287, note; per Lord Talbot, in Belch v. Harvey, 3 P. Wms. 287, note; per Lord Eldon, in Foster v. Hodgson, 19 Ves. 184; per Sir T. Plumer, in Hodle v. Healy, 1 Ves. & Bea. 539.

So they hold (as at law) that where there is no incapacity when the time begins to run, a sub-

sequent incapacity will not prevent its progress. Aggas v. Pickerell, 3 Atk. 225; Anon., 2 Atk. 333; Floyd v. Mansell, Gilb. Eq. Rep. 185; Knowles v. Spence, 1 Eq. Cas. Abr. 315; S. C., Mosel. 225; Stone v. Byrne, 5 Bro. P. C. by Toml. 209; St. John v. Turner, 2 Vern. 419. And see the argument of Kent, C., in Demarest v. Wynkoop, 3 John. Ch. Cas. 140 to 142.

The time allowed is twenty years, where no disability exists. If there be a disability when the twenty years would begin, that is, when the right accrues, the party shall have ten years to prosecute after the disability ceases; so that he may have thirty, forty, or fifty years, accordingly as the disability lasts. But in no case can he have more than ten years after his disability removed, unless the latter expire before the twenty years. So that he shall in all cases have twenty years from the time of the right accruing, and ten years after disability gone, though the latter is not necessarily added to the twenty years. Doe v. Jesson, 6 East, 80; Cotterell v. Dutton, 4 Taunt. 826; Belch v. Harvey, 3 P. Wms. 287, note *b*; Jackson ex dem. Swartwout v. Johnson, 5 Cowen's Rep. 74. See 2 N. Y. Rev. St. 395, §§ 16, 17.

Several disabilities too may exist when the right accrues, as infancy and coverture. These must all be removed before the ten years begin to run. Jackson ex dem. Swartwout v. Johnson, 5 Cowen's Rep. 74; per Chambre, J., in Cotterell v. Dutton, 4 Taunt. 830; 1 Plowd. 375. But neither courts of law nor equity will allow of cumulative disabilities. Thus if infancy exist when the right accrues, and then coverture, though before infancy terminated, the first alone will be reckoned, and the ten years be counted from the expiration of that. Jackson ex dem. Swartwout v. Johnson, 5 Cowen's Rep. 74; Demarest v. Wynkoop, 3 John. Ch. Rep. 129, 138; Doe ex dem. Francis v. Jesson, 6 East, 80, 84, 85; Eager v. The Commonwealth, 4 Mass. Rep. 182; Bush v. Bradley, 4 Day's Rep. 298, and Bunce v. Wolcott, 2 Conn. Rep. 27, overruling Eaton v. Sanford, 2 Day's Rep. 523.

But in following the law, it is not necessary to say that the statute shall not run against a remainderman, or reversioner of the equity of redemption, till his estate comes in by the expiration of the particular estate preceding it. This is so at law because no action will lie for him till that contingency arises. But in equity, he may file his bill to redeem in respect to his interest as a remainderman or reversioner, and need not wait as at law. And Blake v. Foster, 2 Ball & Beat. 565, 575, *et seq.*, which held the contrary, was afterwards reversed in the House of Lords, in the session of 1823. Math. Presump. Ev. 334, note *a*. Therefore a similar decision lately made by the Exchequer in Cowne v. Douglass (1 M'Clel. & You. 321), is equally erroneous. Math. Presump. Ev. 333, note *d*. Beside, that case is put on erroneous ground by the barons. They take it that the bar goes on the presumption of a release from lapse of time, which is repelled by the equity not being vested in possession in the plaintiff; whereas, all the cases go most emphatically on the Statute of Limitations. The decision cannot be sustained in any view. Beside, it is directly contrary to a previous decision of Sir Wm. Grant, M. R. A. D. 1812; Harrison v. Hollins, 1 Sim. & Stu. 471. Several other cases are supposed to go on similar principles with the last. Aynsly v. Ree, Dick. 249. See also per Eyre, C. B., 1 Anstr. 138; Roscarrick v. Barton, 1 Cas. Ch. 217, 220; Reynoldson v. Perkins, Ambl. 564; Woollaston's Case, cited 2 Cas. Ch. 62; Anon., 2 Atk. 333.

A common case is an ouster or possession of the wife's land adverse to the rights of her heir, commencing during her coverture; then coming her death, and a descent to her heir subject to her surviving husband's life estate as tenant by the curtesy. At law, the time will not run against the heir till the death of a tenant by the curtesy. Jackson ex dem. Swartwout v. Johnson, 5 Cowen's Rep. 74. But it is otherwise if the estate be an equity of redemption; for the heir may file his bill to redeem, though he cannot have his action. Anon., 2 Atk. 333. An exception is, however, where the mortgagee enters, not as mortgagee, but in virtue of a title from the husband independent of the mortgage; as if the husband sell him the equity of redemption; and he enters as owning that, thus becoming both payee and payor of the interest money during the husband's life. Corbett v. Barker, 1 Anstr. 138; S. C., 3 Anstr. 755. So that, in such case, the heir, or, if the wife survive, she herself may file a bill to redeem within twenty years after the husband's death. Price v. Copner, 1 Sim. & Stu. 347.

The presumptive bar may be repelled by evidence of fraud, imposition, or undue advantage in the terms of the original loan; as by restricting, or clogging, or narrowing any way the right to redeem, which should be left entirely open and general, and as broad as the rules of equity require (Jason v. Eyres, 2 Cas. Ch. 33; Newcomb v. Bonham, 1 Vern. 7; Ord v. Smith, Sel Ch.

Cas. 9; Howard v. Harris, 1 Vern. 33; Id. 190; Bowen v. Edwards, 1 Ch. Rep. 221; Willett v. Winnell, 1 Vern. 488; Marks v. Pell, 1 John. Ch. Rep. 594, 598, 599; Washburn v. Merrills, 1 Day, 139); unless indeed the parties did not contemplate a mere mortgage, but a purchase subject to the restriction, and everything was fair and on full consideration. Floyer v. Lavington, 1 P. Wms. 268; Meller v. Lees, 2 Atk. 494; Goodman v. Grierson, 2 Ball & Beat. 274, 278; Tasbburgh v. Echlin, 2 Bro. P. C. by Toml. 265; Cotterell v. Purchase, Forr. 61. So it will rebut the bar or enlarge the time, where, by agreement at the time, the mortgagee is to enter and possess, till paid by the profits, or a certain time beyond the day of payment. Marks v. Pell, 1 John. Ch. Rep. 594, 598, 599; Toth. 232; Ord v. Heming, 1 Vern. 418.

The bar may also be rebutted by circumstances. Per Robertson, J., in Fitzhugh v. Croghan, 2 J. J. Marsh. 436. Any act of the mortgagee showing that he holds as such, is enough. So stating or settling an account; or even keeping an account of the rents and profits. Proctor v. Cowper, 2 Vern. 377; Anon., 2 Atk. 333; Lake v. Thomas, 3 Ves. 17; Fairfax v. Montague, cited by Lord Loughborough, 2 Ves. jun. 84; Campbell v. Beckford, 4 Ves. 474. See also a case before the master of the Rolls in 1792, cited at the bar, 3 Ves. 20, 21. But see per Sir W. Grant, 19 Ves. 333. Though preparing and delivering an account by the steward or general agent of the mortgagee, without special authority, will not have that effect. Barron v. Martin, 19 Ves. 327; S. C., Coop. C. C. 189. Noticing the equity of redemption as subsisting in any legal instrument executed by the mortgagee, will let in the right to redeem; and twenty years must again run to make a bar. Smart v. Hunt, 4 Ves. 478, note; Price v. Copner, 1 Sim. & Stu. 337; Hansard v. Hardy, 18 Ves. 455. See the facts stated in Hardy v. Reeves, 4 Ves. 466. See also Ord v. Smith, Sel. Ch. Cas. 9; 3 Atk. 314, at the foot of the page; Perry v. Marston, 2 Bro. C. C. 399; and Whiting v. White, 2 Cox's Ch. Rep. 290. So filing a bill of foreclosure (Palmer v. Jackson, 5 Bro. P. C. by Toml. 281; and the case cited by Sir Joseph Jekill, M. R., in Ord v. Smith, Sel. Ch. Cas. 9); or agreeing with the mortgagor to purchase his equity (Conway v. Skrimpton, 5 Bro. P. C. by Toml. 187); or acknowledging it by letter expressly or impliedly (Hodle v. Healy, 1 Ves. & Bea. 536; see also Vernon v. Bethell, 2 Eden, 110); or even a parol acknowledgment of it. Perry v. Marston, 2 Bro. C. C. 397; S. C., 2 Cox's Ch. Rep. 295; S. C., Coop. C. C. 165, note; Reeks v. Postlethwaite, Coop. C. C. 161, 169, *et seq.* See 19 Ves. 333, per Sir Wm. Grant, M. R. But questioned 2 Cox's Ch. Rep. 300, and S. C., Coop. C. C. 6. But the proof of these points must be full and unequivocal. Per Sir T. Plumer, Coop. C. C, 169; Whiting v. White, 2 Cox's Ch. Rep. 290; S. C., Coop. C. C. 1; Reeks v. Postlethwaite, Coop. C. C. 161, 171, 172, and 19 Ves. 333. So the bar is done away, where the mortgagee submits to be redeemed in his answer. Proctor v. Oates, 2 Atk. 140. So if he possess only part of the mortgaged premises, leaving the mortgagor to possess part. Rakestraw v. Brewer, Sel. Ch. Cas. 55; S. C., 2 P. Wms. 511; S. C., Mosel. 189; Burke v. Lynch, 2 Ball & Beat. 426. But see Lake v. Thomas, 3 Ves. 22.

The case of what is called a Welch mortgage (from its being used in Wales), that is to say, a mortgage with a clause that the mortgagee may possess and receive the rents and profits in lieu of interest, and that the mortgage shall be redeemable at any time (1 Vern. 77; 2 Atk. 363; 1 Vern. 395, 477; 1 Ves. 406; 3 Atk. 280; 3 P. Wms. 361; Howell v. Price, Prec. Ch. 423), is usually an exception from the Statute of Limitations. 1 Ves. 406; 2 Atk. 363. Yet if the annual value be disproportionately high, an account may be called for. Fulthorpe v. Foster, 1 Vern. 476. And a subsequent covenant by the mortgagor to pay the principal, will bring the case within the law of common mortgages. Hartpole v. Walsh, 5 Bro. P. C. by Toml. 267.

Another class of mortgages provides that the mortgagee shall enter and hold till he be satisfied his principal and interest by the rents and profits; or by a conveyance in fee, with an agreement that he shall so hold. And these partake so strongly of the nature of Welch mortgages, that the mortgagee cannot compel, though he continue liable to a redemption. Yates v. Hambly, 2 Atk. 360; Ord v. Heming, 1 Vern. 419. Yet Lord Hardwicke admitted that should twenty years' possession elapse after satisfaction, the presumptive bar would attach. Yates v. Hambly, 2 Atk. 362, 363. See also, Cloberry v. Lymonds, 2 Ch. Rep. 393, where the defendant claimed by extent under an elegit; an interest to which Lord Harwicke, in Yates v. Hambly, compared the estate taken by Hambly. A like opinion was strongly intimated by Lord Eldon, in Fenwick v. Reed, 1 Meriv. 114, 124, 125. See Marks v. Pell, 1 John. Ch. Rep. 598, 599, per Kent, C.

4. All other sealed instruments or specialties are subject to the same doctrine of presumptive payment, satisfaction or performance, according to the nature of the obligation, as a bond, *e. g.* a single bill (M'Dowell v. M'Cullough, 17 Serg. & Rawle, 51); a sealed agreement to pay for land (Jackson ex dem. Marvin v. Hotchkiss, 6 Cowen's Rep. 401); an obligation to convey land (Barnet v. Emerson, 6 Monroe, 607, 608); a sealed lease and the rent due upon it (Bailey v. Jackson, 16 John. Rep. 210); or articles of agreement. Duke of Newcastle v. Cleyton, Finch's Rep. 246; Phillips' Ex'r v. Morrison's Ex'r, 3 Bibb, 105. So on a covenant against incumbrances, accord and satisfaction were presumed twenty years after breach. Jenkins v. Hopkins, 9 Pick. 543.

In New York, the presumptive bar of twenty years after action accruing on any sealed instrument, is adopted by statute (2 R. S. 301, § 48); repellable by part payment, or a written acknowledgment. 2 R. S. 301, § 48. In Maryland, twelve years is a statute bar, not avoidable even by payment or acknowledgment. Carroll v. Waring, 3 Gill & John. 491.

A fortiori does the doctrine extend to all securities, of a nature inferior to specialties. Lacon v. Briggs, 2 Atk. 105; Outerloney v. Earl Powis, Ambl. 231; Duffield v. Creed, 5 Esp. Rep. 52; Anon., 6 Mod. 22. As to these, though the defendant omit to plead the Statute of Limitations, he may still defend on the twenty years' presumption of payment, in all cases where evidence of payment is receivable upon the general issue; or collaterally without plea. One instance is an action on a note (Jackson ex dem. Sackett v. Sackett, 7 Wend. 94; Duffield v. Creed, *supra;* Rodman v. Hoop's Ex'rs, 1 Dall, 85; Perkins v. Kent, 1 Root, 312; Wells v. Washington's Adm'r, 6 Munf. 542; Daggett v. Tallman, 8 Conn. Rep. 168; but see Du Belloix v. Lord Waterpark, 1 Dowl. & Ryl. 16, *contra*); another on a claim for damages assessed under a statute (Young v. Price, 2 Munf. 534); or on an account (Bass v. Williams, 8 Pick. 187); and the court will, after twenty years, instruct the jury that they may presume a settlement of the account, and the balance paid. Id. 190.

Sutherland J., in Jackson ex dem. Sackett v. Sackett (7 Wend. 99), intimates that six years might be sufficient in cases of simple contracts. But no case has yet gone so far; and such a rule would evade another, which requires the Statute of Limitations always to be pleaded in such cases.

In this and the like cases, the presumption may be met and repelled by the like circumstances which are applicable to the like presumptions in respect to a bond. Daggett v. Tallman, 8 Conn. Rep. 168; Jackson ex dem. Sackett v. Sackett, 7 Wend. 94. Note. All this doctrine of presumptive bar, in respect to *simple contracts*, stands rejected in England by the above case of Du Belloix v. Lord Waterpark, on the ground that actions on such contracts are covered by the Statute of Limitations, *which must govern alone.*

5. The same doctrine of presumptive payment extends to judgments; in New York by statute, where it is conclusive, except on part payment, or a written acknowledgment (2 R. S. 301, §§ 46, 47); in other places (and before statute, in New York), by the common law, under which the presumption is qualified and flexible, as in cases of bonds. Curties v. Fitzpatrick, 2 Peak. N. P. Cas. 92; Flower v. Lord Bolingbroke, 1 Str. 639; Willaume v. Gorges, 1 Campb. 217; Boardman v. De Forest, 5 Conn. Rep. 1; Kennedy v. Denoon's Ex'rs, 2 Const. Rep. 617; Cohen's Adm'r v. Thomson's Ex'rs, 2 Rep. Const. Ct. 146; Payne v. Dudley, 1 Wash. Rep. 196; Herndon's Ex'rs v. Bartlett's Ex'r, 7 Monroe, 449, 450. In Blackett v. Wall (3 Mann. & Ryl. 119, note, before Wood, Baron, in the Court of Pleas at Durham), the defendant's poverty was allowed to repel the presumption of payment arising from the lapse of forty-eight years.

6. Warrants of attorney to confess judgment are also gone, by presumption, after twenty years (Hulke v. Pickering, 2 Barnw. & Cress. 555), and in one case said eighteen years, unless a demand of the debt, and an acknowledgment, be shown. Clark's Ex'rs v. Hopkins, 7 John. Rep. 556.

7. The same presumption applies to decrees in equity. 2 R. S. *supra;* Comber's Case, 1 P. Wms. 766. So of statutes merchant, statutes staple, and recognizances. Lady Hatton v. Jay, 1 Ch. Rep. 117; Dennis v. Nourse, Id. 106; Popham v. Desmond, Id. 135; Burgh v. Wolf, Toth. 258; Smith v. Rosewell, Id. 277; Abdy v. Loveday, Rep. t. Finch, 250. Though the time is not fixed by those cases, it is presumed, from analogy, that twenty years would create the presumptive bar. Matthews on Presumptive Ev. 360. And see Middleton v. Shelly, 1 Lev. 198; Corey v. Corey, Rep. t. Finch. 331. The ground on which the presumption may be repelled, is of course the same as that in respect to judgments; receipt of interest, acknowledgment of the

debt, prevention of execution by prior incumbrances, and (probably) the creditor's absence from the state.

8. So of annuities. Lying dormant for twenty years, they are presumed, not only in respect to ancient annual dues, but in whole, to have been extinguished by release, or otherwise. These being real estate (incorporeal hereditaments), the bar arises, by analogy, from the statute limiting an entry on lands. Smallman v. Hamilton, 2 Atkyn's Chancery Reports, 71; Higgins v. Crawford, 2 Ves. jun. 571, *contra.* And see Southcot v. Southcot, 1 Ch. Rep. 108; Bales v. Proctor, 1 Ch. Rep. 144. See, also, Bonnington v. Walthall, 2 Ch. Rep. 219; though there is a case (Christopher, Duke of Albemarle v. Elizabeth, Viscountess Purbeck, Rep. t. Finch, 252), where the presumption was denied of an annuity fixed on land by way of rent charge, of which no demand had been made for thirty years. The deficiency of time short of twenty years may be made up, it seems, by auxiliary circumstances, as in other cases. See Aston v. Aston, 1 Vessen. 264, 267; Cupit v. Jackson, M'Clel. 495; Bigg v. Roberts, 3 Carr. & Payne, 43. Whenever the right to the annuity itself is not defeated, all arrears are recoverable without the limitation of six years, which prevails in certain cases of account for rents and profits of land (as in Reade v. Reade, 5 Ves. 744, and see also 6 Ves. 215, opinion of M. R.) That the account extends to the whole was held expressly in the Exchequer Chamber. Cupit v. Jackson, M'Clel. 495. And see Aston v. Aston, 1 Ves. sen. 264, 267, and Wynn v. Williams, 5 Ves. 130. In the last case it is said the six years limitation has no application to an annuity. And see 2 Ves. jun. 571, 572, per Ld. Ch. Loughborough. It seems to stand on the same footing with our rent reserved by indenture. See Bailey v. Jackson, 16 John. Rep. 210. And as to the body of the annuity, the presumption is liable to be met by acknowledgment, &c., as in case of a bond. Wynn v. Williams, 5 Ves. 130, 134. Relationship, large expectations from the grantor, who was an old man peremptory with his relatives and very attentive to his pecuniary concerns, were allowed as circumstances against the presumption of a release, in Bigg v. Roberts (3 Carr. & Payne, 43). And no presumption was allowed against a supernumerary officer suing for his half pay. Commonwealth v. Lilly's Adm'r, 1 Leigh, 525.

9. An annuity to a wife for pin money is presumed to have been paid or received in consideration of maintenance, during every year she resides with her husband. 1 Ves. sen. 267; Offley v. Offley, Prec. in Ch. 26; Thomas v. Bennett, 2 P. Wms. 341; Ridout v. Lewis, 1 Atk. 269. And so of the income of any fund settled to her separate use, where she suffers her husband to receive and appropriate it. Powell v. Hankey, 2 P. Wms. 82, and note by Cox, Id. 84. Otherwise if they have lived separate without any distinct and particular allowance to her. 1 Ves. sen. 267. And so if she be insane; for she is then incapable of waiving her right. See Brody v. Barry, 2 Ves. & Bea. 36, 39. Thus it will be seen that the cases of pin money and the income of a fund, do not go on length of time, but on other circumstances. See 1 Ves. sen. 267.

10. The presumptive bar, or rather extinguishment by unexplained delay, also applies to portions charged on real property, though no precise time has yet been fixed by the cases. Standish v. Radley, 2 Atk. 177. This may be repelled by admission express or implied of its being due, as in case of a bond or annuity, &c. (Barrington v. O'Brien, 1 Ball & Beat. 173); and, it is presumed other circumstances applicable to like cases. It is deducible from Earl of Pomfret v. Lord Windsor (2 Ves. sen. 472), that the portioner's ignorance of his right, or fraud in those interested to prevent its assertion, will also rebut the presumption. It seems to be rather conceded in Barrington v. O'Brien (1 Ball & Beat. 178, 179), that the twenty years would, in general, bar.

11. As to the presumptive bar of a legacy or distributive share, to which the general Statute of Limitations in many places does not apply, see Thomas v. White, 3 Litt. 182; Joe v. Hart's Ex'rs, 2 J. J. Marsh. 349. No certain time could, in the nature of things, be adopted. See Hercy v. Dinwoody, 4 Bro. C. C. 257; Gist v. Cattell's Heirs and Representatives, 2 Dessauss. Eq. Rep. 53. Forty years, with other circumstances, were allowed as a bar (Jones v. Turberville, 2 Ves. jun. 11); and it is said that thirty-five years lapse of time alone will be sufficient. Pickering v. Stamford, 2 Ves. jun. 272. But see Tate v. Greenlee's Adm'rs, 2 Hawks, 486. And where the claimant received an order from the legatee on the executor for the amount of the legacy, he was held barred by the statute. Myers v. Skrine, 1 Harp. Ch. Rep. 179. This being the case of a trust in the personal representative (per Kent, C., in Decouche v. Savatier, 3 John. Ch. Rep. 206; Thomas v. White, 3 Litt. 177, 181, 182), which he may be longer or shorter in winding up;

and legacies and distributive shares themselves being of such different characters, and their payment depending on so many contingencies, the claimants, too, often being *femes covert* or infants, it is obvious that, in general, no definite period could be adopted. Clifton v. Haig's Ex'rs, 4 Dessauss. Eq. Rep. 330, 341; Myers v. Skrine, 1 Harp. Ch. Rep. 179. The cases accordingly allow more or less time, and exhibit the exercise of a discretion quite arbitrary. Cusse v. Ash, Rep. temp. Finch, 316; Lewis v. Ld. Teynham, cited 2 Ves. jun. 13; Jones v. Turberville, 2 Ves. jun. 11; S. C., 4 Bro. C. C. 125; per Lord Alvanley, 2 Ves. jun. 280; Higgins v. Crawford, 2 Ves. jun. 571; Prince v. Heylin, 1 Atk. 493; Stackhouse v. Barnston, 10 Ves. 466, 467; Pickering v. Stamford, 2 Ves. jun. 272; Coster v. Murray, 5 John. Ch. Rep. 522; Fotherby v. Hartridge, 2 Vern. 21; Arden v. Arden, 1 John. Ch. Rep. 313, 316; Winstanley v. Savage, 2 M'Cord's Ch. Rep. 435, 437; M'Cullough v. Montgomery, 7 Serg. & Rawle, 17; Wisner v. Ogden, 4 Wash. C. C. Rep. 631; Todd v. More's Adm'r, 1 Leigh, 457; Heald v. Heald, 5 Greenl. 387; Tate v. Greenlee's Adm'rs, 2 Hawks, 486; Falls v. Torrance, 2 Hawks, 490; Myers v. Skrine, 1 Harp. Ch. Rep. 179; Joe v. Hart's Ex'rs, 2 J. J. Marsh. 349. The presumptive payment of legacies and distributive shares rests on the same ground. Wisner v. Barnet, 4 Wash. C. C. Rep. 631. In general, legacies become due at twelve months after the testator's death (Marsh v. Hague, 1 Edw. Ch. Rep. 187, 188, and the cases there cited); and as to these, one would suppose that, in general, twenty years would be sufficient, as in case of debts founded on specialty. And see Wood v. Briant, 2 Atk. 521; Mackdowell v. Halfpenny, 2 Vern. 484; Ellison v. Moffatt, 1 John. Ch. Rep. 46; Rayner v. Pearsall, 3 John. Ch. Rep. 578. Delay in winding up the estate, &c., may be urged to repel the presumption. Ward v. Reeder, 2 Har. & M'Hen. 145, 154. And see 2 Ves. jun. 14.

The same doctrine prevails as to a proceeding in the Probate Court, under the statute of Maine, to discover the goods embezzled by an executor or administrator. O'Dee v. M'Crate, 7 Greenl. 467.

In countries where a remedy at law is given for a legacy, or distributive share, by action in a court of law, and a limitation to the action fixed, as is the case in New York, the limitation must be adopted in chancery. Wisner v. Barnet, 4 Wash. C. C. Rep. 639, 640; Kane v. Bloodgood, 7 John. Ch. Rep. 90; Souzer v. De Meyer, 2 Paige, 574. See 1 R. L., by Woodw. & Van Ness, 314, 315, §§ 19, 20, which gave debt, detinue or account for a personal legacy, or distributive share, and Id. 166, § 5, which limits these actions to six years. On these statutes the cases last above cited proceeded; but they do not extend to legacies charged on land, so as to give an action against the terre-tenant. Peletreau v. Rathbone, 18 John. Rep. 428; Souzer v. De Meyer, 2 Paige, 574. And to the latter, it seems, therefore the six years limitation would not apply. Souzer v. De Meyer, 2 Paige, 574, 577. See the present statute (2 R. S. 114, § 9), giving actions for legacies, &c., and Id. 296, for limitations at law, and 301, for limitations in equity And see *infra.*

Such statutes, however, being out of the question, in general, courts look to the doctrines of the presumptive bar. Wisner v. Barnet, 4 Wash. C. C. Rep. 639, 640. An implied admission by simply pleading or setting up the Statute of Limitations, has been holden, in such case, to repel the presumption, the defendant not denying the substantial justice of the claim. Parker v. Ash, 1 Vern. 256. See also Anon., 2 Freem. 22, ca. 20, and Higgins v. Crawford, 2 Ves. jun. 571.

12. On the other hand, an executor cannot, after great delay, and other circumstances indicating a waiver, maintain his bill against legatees, for advances made beyond assets in his hands. Robertson v. Archer, 5 Rand. 319.

13. A presumptive bar somewhat similar to that which runs against a mortgage, noticed *supra*, prevails in the case of the vendor's equitable lien for the unpaid purchase money of an estate which he has conveyed. The adjudged cases, which are very old, range from about twenty-three to sixty years, as the time creating the bar. Hunter v. Davies, 2 Ch. Rep. 44; Heupert v. Benn, Rep. temp. Finch, 344; Bidlake v. Lord Arundel, 1 Ch. Rep. 93.

As to the creation of this lien and its destruction from other causes than simple lapse of time, the student may consult the proper English authorities through Sugden's Law of Vendors, ch. 12. He will also find much on this subject in the American cases. Bayley v. Greenleaf, 7 Wheat. 46, 50; Carmichael v. Abraham, 1 Dessauss. 114; Brown v. Gilman, 4 Wheat. 255, 299; Frazier v. Carter, 1 M'Cord's Ch. Rep. 276; Gilman v. Brown, 1 Mason, 212; Hatcher v. Hatcher, 1 Rand. 53; Ghiselen v. Fergusson, 4 Har. & John. 522; Garson v. Green, 1 John. Ch. Rep. 303;

Wilson v. Graham, 5 Munf. 247; Duval v. Bibb, 4 Hen. & Munf. 113; Tayloe v. Adams, Gilmer's Rep. 329; Stouffers v. C———, 1 Yeates, 393; Wray v. Comptroller-General, 2 Dessaus. 509; Francis v. Hazelrigg's Ex'rs, Hardin's Rep. 48; White v. Casanove, 1 Har. & John. 106; Cox v. Fenwick, 3 Bibb, 103; Kennedy v. Woolfolk, 3 Hayw. 197; Wood v. Bank of Kentucky, 5 Monroe, 195, 198; Eubank v. Poston, 5 Monroe, 287, 292, 293; Blight's Heirs v. Banks, 6 Monroe, 198, 199, 203, 204; Meigs v. Dimock, 6 Conn. Rep. 458; Dean v. Dean, 6 Conn. Rep. 285; Mosely v. Garrett, 1 J. J. Marsh. 212, 215, 216; Meek's Heirs v. Ealy's Heirs, 2 J. J. Marsh. 329, 330; Poston v. Eubank, 3 J. J. Marsh. 42; Webb v. Bowman's Ex'rs, 3 J. J. Marsh. 70, 75; Ducker v. Gray, 3 J. J. Marsh. 163, 164; Clark v. Hunt, 3 J. J. Marsh. 553, 557, 558, 559; Stewart v. Hutton, 3 J. J. Marsh. 178, 179; Funk v. M'Keoun, 4 J. J. Marsh. 162, 169; Johnson v. Thompson, 4 J. J. Marsh. 380, 382; Roberts v. Salisbury, 3 Gill & John. 425; Griffith v. Depew, 3 Marsh. 179; Irvine v. Campbell, 6 Bin. 118; Kanfelt v. Baver, 7 Serg. & Rawle, 577; Tomkins v. Mitchell, 2 Rand. 428; Wilcox v. Colloway, 1 Wash. 38; Cole v. Scott, 2 Wash. 141; Graves v. M'Caul, 1 Call, 314 old ed., 360 new ed.; Semple v. Burd, 7 Serg. & Rawle, 286; Steele v. Adams, 1 Greenl. 1; Stafford v. Van Rensselaer, 9 Cowen's Rep. 316; Dixon v. Swiggett, 1 Har. & John. 252; Brocket v. Foscue, Ruffin, 54; S. C., 1 Hawks, 64; Wilkinson v. Scott, 17 Mass. Rep. 249; Shephard v. Little, 14 John. Rep. 210; Bowen v. Bell, 20 John. Rep. 338; Hamilton v. M'Guire, 3 Serg. & Rawle, 355; Jordan v. Cooper, 3 Serg. & Rawle, 564; Weigley's Adm'rs v. Weir, 7 Serg. & Rawle, 309; Thallhimer v. Brinckerhoff, 6 Cowen's Rep. 102; Jackson ex dem. Rounds v. M'Chesney, 7 Cowen's Rep. 360; Higdon v. Thomas, 1 Har. & Gill, 139. Mr. Sugden has faithfully collected the English cases; and we have here added the most, if not all of the American cases; not only those directly bearing on the doctrine of this equitable lien for purchase money; but also those which, it is conceived, have a more remote application. They relate to the questions when the lien shall be holden to remain or be waived, as between the original parties, in respect to purchasers from the vendee or subsequent incumbrancers, what shall operate as evidence that the purchase money is paid, or affect the purchaser from the vendee or subsequent incumbrancers, with notice of non-payment, &c. See 4 Kent's Comm. (2d ed.), 151 to 154.

14. The assent to a legacy, by an executor, may be inferred from circumstances, among which, it seems, taking possession by the legatee of a specific legacy, and enjoying with the executor's assent for a long time, is an important circumstance. Math. on Pr. Ev. 267.

15. It is proper to observe, as to annuities, portions and legacies, as well as liens for purchase money, that the cases are by no means definite in bringing down the bar to twenty years. They are generally of a longer time. Yet they bear such a striking analogy to other claims which are barred by an unexplained delay for that period, that this would, in the more modern and enlightened view of the question, probably be holden sufficient.

16. Direct, technical and continuing trusts, and especially such as are created by the act of the parties, such trusts not being cognizable at law, but only in a court of equity, are not affected by the Statute of Limitations, as between trustee and *cestui que trust*. Harrison v. Lucas, 1 Ch. Rep. 67; Beckford v. Wade, 17 Ves. 87, 99, 100; Cholmondeley v. Clinton, 2 Meriv. 172, 357; Kane v. Bloodgood, 7 John. Ch. Rep. 90, 111; Hovenden v. Lord Annesley, 2 Sch. & Lefr. 633; Lord Kingsland v. Lord Tirconnel, 1 Vin. Abr. 186, pl. 10; Thomas v. White, 3 Litt. 181, 182; Farnam v. Brooks, 9 Pick. 212; Falls v. Torrance, 4 Hawks, 412; Harrison v. Harrison, 1 Call, 419, 428, per Pendleton, President; Redwood v. Riddick, 4 Munf. 222; Spottswood v. Dandridge, 4 Hen. & Munf. 139, 145; Prevost v. Gratz, 6 Wheat. 481, 497; Thomas v. White, 3 Litt. 177, 181, 182; Townshend v. Townshend, 1 Bro. C. C. 554; Llewellyn v. Mackworth, Barnardist. Ch. Rep. 445; Howard's Adm'rs v. Aiken, 3. M'Cord, 467; Hemenway v. Gates, 5 Pick. 321; Pipher v. Lodge, 4 Serg. & Rawle, 310, 315; Walker v. Walker, 16 Serg. & Rawle, 379, 384; Wallace v. Duffield, 2 Serg. & Rawle, 521, 527, 528, 529; Jones v. Person, 2 Hawks, 269; Thompson v. Blair, 3 Murph. 583; Wisner v. Ogden, 4 Wash. C. C. Rep. 631; Van Rhyn v. Vincent, 1 M'Cord's Ch. Rep. 313; Arran v. Ld. Tyrawley, *Cor.* Ld. Manners, and cited by him in Medlicott v. O'Donel, 1 Ball & Beat. 170; Gist v. Cattell's Heirs and Representatives, 2 Dessauss. Eq. Rep. 53. So as against a purchaser of the trustee with notice. Rankin v. Bradford, 1 Leigh, 163; per Hutchinson, Chancellor, in Payne v. Hathaway, 3 Verm. Rep. 232.

An instance of this rule will be found in a bill filed by a *cestui que trust* to obtain an account of the rents and profits of land in the hands of his trustees (Lawley v. Lawley, 10 Mod. 32); a bill

to charge a wife's land conveyed in trust to her separate use, with her debts (Norton v. Turville, 2 P. Wms. 144); to compel the execution of a trust for raising money out of real estate (Pomfret v. Windsor, 2 Ves. sen. 472); to compel the re-surrender of a copyhold originally surrendered by the intended husband to the use of his intended wife, the marriage having never taken effect (Hammond v. Hicks, 1 Verm. 432); to enforce a claim to slaves purchased by an executrix with money belonging to the testator's estate (Redwood v. Riddick, 4 Munf. 222); in an action of detinue by the bailor against the bailee (Darden v. Allen, 1 Dev. 466, 469); in a bill filed to enforce a trust for the sale of land (Jones' Ex'rs v. Person, 2 Hawks, 269); or to reimburse to a trustee his equitable expenditures in regard to property holden by him under a direct trust. Overstreet v. Bate, 1 J. J. Marsh. 367, 370. Land is conveyed to A. in trust for a church; A. cannot, by possession, acquire a title as against the church (Howard's Adm'rs v. Aiken, 3 M'Cord, 467); nor can the trustee of land, devised to him in trust to apply the rents and profits to the use of B., acquire a title by possession as against B. (Hemenway v. Gates, 5 Pick. 321); nor can an executor who purchases land, part with his own and part with the funds of the estate, acquire title by possession (Wallace v. Duffield, 2 Serg. & Rawle, 521, in connection with German's Lessee v. Gabbald, 3 Binn. 302; Falls v. Torrance, 4 Hawks, 412); nor one who receives a deed of land in trust to sell and pay a debt (Jones v. Person, 2 Murph. 269, 290); nor (it is said) one who continues in possession of land after he has sold and is paid for it, and before he has given a deed. *Quere.* But said, that if the vendor conveys to another who enters, the statute runs. Pipher v. Lodge, 4 Serg. & Rawle, 310, 315, 569. A trust resulting from a payment of purchase money, or other consideration, and a deed taken by consent in another's name, the *cestui que trust* continuing in possession, is not affected by the Statute of Limitations. Zane's Devisees v. Zane, 6 Munf. 406; Oehler v. Walker, 2 Har. & Gill, 323. And so where he once held, but had been divested of the possession. Pugh's Heirs and Ex'rs v. Bell's Heirs, 1 J. J. Marsh. 398, 401.

17. But these are all cases where the question arises between *cestui que trust* and trustee. Where a stranger has usurped the character of *cestui que trust* of real estate, and excluded the beneficial owner for twenty years, the latter is barred, in analogy to the statute limiting a right of entry. Marquis of Cholmondeley v. Ld. Clinton (2 Jac. & Walker, 1, 145, *et seq.*), where all the cases are reviewed by Sir Thomas Plumer, M. R.; and at p. 189, note *a*, it will be seen that his views were concurred in by the House of Lords, on appeal in the same case. After a good deal of conflict, the doctrine now appears to be finally settled by the last case. See Harwood v. Oglander, 6 Ves. 169, 8 Id. 106; and Cholmondeley v. Clinton, 2 Meriv. 357, 358, 359; Benzien v. Lenoir, 1 N. Car. Law Repos. 504, 508, against the application of the statute bar as between *cestui que trust* and a stranger; and Scott v. Gallagher, 14 Serg. & Rawle, 333; Llewellyn v. Mackworth, Barnard. Ch. Rep. 445, 449; Dare v. Beardsham, 1 Cas. Ch. 38; and Cholmondeley v. Clinton, 2 Jac. & Walk. 1, 145, *contra.* See, also, Basket v. Pierce, 1 Vern. 226, and Townshend v. Townshend, 1 Bro. C. C. 551.

So both mortgagee and mortgagor may be barred by a possession adverse to both (Harrison v. Harrison, 1 Call, 419, 428); and the real *cestui que trust* was held barred, in analogy to the statute, by a possession of slaves claimed to be for the use of another, the whole being adverse to the true beneficial owner. Spottswood v. Dandridge, 4 Hen. & Munf. 139, 145. And see Wallace v. Duffield, 2 Serg. & Rawle, 521, 525.

18. Analogous to the above is the limitation set by courts to a statute power, conferred by several of the United States upon executors or administrators, to sell real estate of the testator or intestate for the payment of his debts. On this power, in Massachusetts and Connecticut, these statutes impose no limitation of time. But the courts say the executors, &c., must come within a reasonable time to make the sale; and they fix this to fifteen years, in analogy to the statutes of the same states limiting the exercise of a right of entry to that time. Ricard v. Williams, 7 Wheat. 59, 113—120.

19. So all trusts which are not express and direct, not cognizable in a court of equity exclusively, are affected by the Statute of Limitations even as between trustee and *cestui que trust.* It therefore applies to the whole class of trusts arising by implication or construction. Thompson v. Blair, 3 Murph. 583; per Sir William Grant, M. R., in Beckford v. Wade, 17 Ves. 97; Decouche v. Savatier, 3 John. Ch. Rep. 216; Goodrich v. Pendleton, 3 John. Ch. Rep. 384, 388; Van Rhyn v. Vincent, 1 M'Cord's Ch. Rep. 313; Walker v. Walker, 16 Serg. & Rawle, 379,

384; Shaver v. Radley, 4 John. Ch. Rep. 210; Farnam v. Brooks, 9 Pick. 312; Falls v. Torrance, 4 Hawks, 412; Jones' Executors v. Person, 2 Hawks, 269, 290. As on a bill by a trustee under a first deed, to set aside a second conveyance from the same grantor as fraudulent, and have the claimants, under the last, declared and made trustees to the plaintiff on account of the fraud. Such trust not being direct, but only to be made, or framed or implied by the court, and the *cestuis que trust* under the second conveyance having been in adverse possesion more than twenty years, the statute was held to apply. Townshend v. Townshend, 1 Brown's Chan. Cas. 550, 554, per Lord Commissioner Ashurst. And see per Taylor, C. J., in Jones v. Person, 2 Hawks, 290. So where the plaintiff claimed as *cestui que trust* under a deed of 1665, made by one against the defendant, who had been twenty-five years in possession as *cestui que trust* under a subsequent deed of 1693 made by another; and fraud was charged. Llewellyn v. Mackworth, Barnardist. Ch. Rep. 445, 449. So a fine and five years non-claim of a trust holden in tail were held to bar the remainder. Basket v. Pierce, 1 Vern. 226; Allen v. Sayer, 2 Vern. 368, S. P. So where an executor sold a term in fraud of the estate; and the bill was to set aside the purchase, and declare the purchaser a trustee on account of the fraud. Andrew v. Wrigley, 4 Brown's Chancery Cases, 125; Bonney v. Ridgard, cited 4 Brown's Chancery Cases, 138; and also cited, and fully stated and commented upon, 17 Ves. 97; and now reported in Cox's Cas. in Ch. 145, S. P. So of a bill to set aside a sheriff's sale. Bearfield v. Stevens, 1 Harp. Ch. 52; Bond v. Brown, Id. 270. So of a bill to charge one as purchaser from a trustee. Thompson v. Blair, 3 Murph. 583, 593; Rankin v. Bradford, 1 Leigh, 163, *contra.* So on a bill upon the Kentucky law of real estate to set up a junior entry of lands against a senior entry and patent of the defendant, he having held adversely for twenty years. Elmendorf v. Taylor, 10 Wheat. 152. And see Mills' Heirs v. Bodley, 4 Monroe, 249; and Estill v. Patrick, Id. 308, and other cases under this law, *infra.* So as to bills in general to set aside deeds, sales, or other acts, for actual or constructive fraud, the statute runs after the fraud is discovered by the party injured, and he is freed from the control of the opposite party. Fraud includes an advantage taken of ignorance, mistake, or mental imbecility, &c. And the rule extends also, to purchases by trustees, agents and other persons holding relations inconsistent with an equitable right of purchase. Medlicott v. O'Donel, 1 Ball & Beatty, 156, 165, 166, 167; Whalley v. Whalley, 3 Bligh, 1; Jones v. Person, 2 Murph. 290, per Taylor, Ch. J.; Hawley v. Cramer, 4 Cowen's Rep. 717, 742; Jenison v. Hapgood, 7 Pickering, 1; Davis v. Simpson, 5 Harr. & John. 147; Thompson v. Blair, 3 Murph, 583, 593; Banks v. Judah, 8 Conn. Rep. 145; Gregory v. Gregory; Cooper's Ch. Rep. 201; Thomas v. White, 3 Litt. 183; Haddix's Heirs v. Davison, 3 Monroe, 41; Breckenridge v. Churchill, 3 J. J. Marsh. 15; Crane v. Prather, 4 J. J. Marsh. 77, 78; Mulcahy v. Kennedy, 1 Ridgw. Ir. P. C. 331. And see 2 Id. 397; and Champion v. Rigby, 1 Russ. & Mylne, 539; S. C., 1 Tamlyn, 421.

Where the question is upon fraud in respect to land, or upon a land trust, &c., according to all the cases (see especially Medlicott v. O'Donel, 1 Ball & Beat. 156; Hawley v. Cramer, 4 Cowen's Rep. 717, 743; Bunce v. Wolcott, 2 Conn. Rep. 27; Ward v. Van Bokkelin, 1 Paige, 100, 101); the limitation is the same with the statute bar to a right of entry; generally twenty years; and in cases of personal property the same as the statute bar to an action of assumpsit, usually six years. Booth v. Earl of Warrington, 4 Bro. P. C. by Toml. 163; South Sea Company v. Wymondsell, 3 P. Wms. 143; Kane v. Bloodgood 7 John. Ch. Rep. 90; Hawley v. Cramer, 4 Cowen's Rep. 717, 725, 742, 743. And see Beard v. Griggs, 1 J. J. Marsh. 28.

20. Other rules make a very broad opening for the application of the statute. Where the remedy in chancery is concurrent with that in courts of law, even though there be a direct trust, and also where legal titles or legal demands are drawn in question by chancery, or even where there are rights at law analogous to that cognizable in chancery (see Kane v. Bloodgood, 7 John. Ch. Rep. 90, and Hovenden v. Lord Annesley, 2 Schoales & Lefroy, 629, 630; Miller's Heirs and Devisees v. M'Intyre, 6 Pet. 61, 65, 66); if in the two first cases, there be a statute limitation at law on the same subject, or in the last on the analogous subjects, the same time will bar in chancery; for equity follows the law. After considerable conflict of opinion even upon the two former points, after the statute bar had been often evaded by going into chancery in respect to legal claims, under the notion of their being mixed with fraud and trust, and obtaining a sanction of the evasion by the inadvertent opinions of several chancellors, the above rules seem to be fully established. See

Bertine v. Varian, 1 Edw. Ch. Rep. 343; Farnam v. Brooks, 9 Pick. 212; Lewis v. Marshall, 5 Pet. 470; Falls v. Torrance, 4 Hawks, 412.

In the 26 Car. II, money was in deposit, for which debt would have lain. But in regard this was barred by the statute, the depositor went to chancery avowedly to evade the statute, under the notion of direct and express trust. And the evasion was sanctioned by the court, though the statute bar was there insisted on. Lord Hollis' Case, 2 Ventr. 345. This would of course have carried the statute away from the numerous cases of bailment, had the decision been followed out. In 1792, this was taken for law by the Virginia Court of Appeals, who extended it to a bill against a sheriff for money collected upon execution, and fraudulently unaccounted for. Hunter & Herndon's Ex'rs v. Spotswood, 1 Wash. 145. The same idea was entertained in a court of law as to money received in trust by an agent. Grant v. Beall, 4 Harris & M'Hen. 419, since overruled in Green's Ex'x v. Johnson, 3 Gill & John. 396, 397. And as late as 1821, Chancellor Kent extended the same doctrine to questions between bailor and bailee, principal and factor, principal and agent, &c. Coster v. Murray, 5 John. Ch. Rep. 222, corrected on appeal, 20 John. Rep, 576, S. C. The same doctrine was formerly held in Pennsylvania (Styles v. Donaldson, 2 Dall. 264); and as late as 1826, the Supreme Court of that state inclined strongly that the statute does not apply to a deposit of money, and a tortious conversion by the depositee. Johnston v. Humphreys, 4 Serg. & Rawle, 394. At an early period in England, on a bill filed by the executors of Heath, C. J., against his prothonotary for an account of fees received by him to the testator's use, the application of the statute was denied. Heath v. Heney, 1 Cas. Ch. 20.

The notion upon which these cases proceeded may now be considered as entirely exploded; and the authorities in support and illustration of the opposite doctrine so clear, that great certainty and safety now prevails in this branch of equitable jurisprudence. Van Hook v. Whitlock, 3 Paige, 409; Bertine v. Varian, 1 Ed. Ch. Rep. 343; Smith v. Clay, 3 Bro. C. C. 639, note; Bond v. Hopkins, 1 Sch. & Lef. 413; 10 Ves. 466, 467; Elmendorf v. Taylor, 10 Wheat. 152, 168; Thomas v. Brockenborough, 10 Wheat. 146, 149, 150; Roosevelt v. Mark, 6 John. Ch. Rep. 266; Hinton v. Fox, 3 Litt. 380; Breckenridge v. Churchill, 3 J. J. Marsh. 15; Hodge v. Owings, 5 Monroe, 91, 93; Lewis v. Marshall, 5 Pet. 470; Banks v. Judah, 8 Conn. Rep. 145. And see Lorton v. Gore, 1 Dow & Clark, 190.

Thus a bill, concurrent with the action of account, by an adult, filed for an account of rents and profits received while he was an infant, was holden to be barred by the lapse of six years. Lockey v. Lockey, Prec. Ch. 518; Bertine v. Varian, 1 Ed. Ch. Rep. 343; Stackhouse v. Barnston, 10 Ves. 453; and Reade v. Reade, 5 Ves. 744, S. P. And see Green v. Johnson, 3 Gill & John. 389. So of a bill for waste against tenant for life, who has sold the timber, and so is liable in assumpsit. Hony v. Hony, 1 Sim. & Stu. 568. So a bill by a tenant in common, for an account against his co-tenant (Prince v. Heylin, 1 Atk. 493), and this too, though there be a trust; and for this reason, the last case was once doubted. 1 Atk. 493. So on a bill filed to recover money collected by an agent, though held in trust; and the court said every bailment might as well be considered a trust as this. Sturt v. Mellish, 2 Atk. 610. So on a bill filed by a stockholder against the company for a dividend (Kane v. Bloodgood, 7 John. Ch. Rep. 90), or to set aside a sale, voidable as having been made by a majority of the corporate stockholders to themselves. Banks v. Judah, 8 Conn. Rep. 145. So of a set-off of a personal mortgage against a bill filed by a distributee for an account of the intestate's estate. Watkins v. Harwood, 2 Gill & John. 307. So on a bill filed to charge the estate of a deceased partner with a debt. Fisher's Ex'rs v. Tucker's Representatives, 1 M'Cord's Ch. Rep. 169. So on a bill filed to obtain relief against usury (Hodge v. Owings, 5 Monroe, 91, 93; Breckenridge v. Churchill, 3 J. J. Marsh. 11, 15), or to rectify a deed for fraud or mistake as to the quantity of land. Haddix's Heirs v. Davison, 3 Monroe, 39, 41; Poague v. Allen, 3 J. J. Marsh. 421, 422. So of a bill against an executor, to account and pay a debt (Webster v. Webster, 10 Ves. 93; More v. White, 6 John. Ch. Rep. 366, 372); or for an account of tithes (Collins v. Archer, 1 Russ. & Mylne, 284); or by a legatee for an account, and to pay debts and legacies, in which case on accounting before the master the legatee was allowed to object the statute bar against the debt, though the executor refused (Shewen v. Vanderhorst, 1 Russ. & Mylne, 347); or against one to whom another's goods have come, and who is bound to deliver or account for them. Van Rhyn v. Vincent's Ex'rs, 1 M'Cord's Ch. Rep. 310. A bill to enforce an oral contract to convey land, the vendee not having had possession, was held barred in five years, the Kentucky limitation to an action of

assumpsit. M'Millin v. M'Millin, 7 Monroe, 560, 567. And see 4 Monroe, 193. And five years adverse possession by the purchaser of a slave from the mortgagor, without notice, will bar the mortgagee's bill. Young v. Wiseman, 7 Monroe, 271, 272. So where the bill is brought for discovery only, the statute will be a bar. Van Rhyn v. Vincent, 1 M'Cord's Ch. Rep. 310, 313; Lansing v. Starr, 2 John. Ch. Rep. 150. But if the action at law were brought before the bill of discovery is filed, the plea to the bill must aver that the statute was pleaded to the action. M'Gregor v. The East India Co., 2 Sim. 452. So the statute is a bar wherever an action on the case will lie for the subject of the bill. Roosevelt v. Mark, 6 John. Ch. Rep. 266. So to a bill to compel the stockholders of a dissolved corporation to pay its debts, &c., pursuant to its statute charter; for debt or assumpsit is a concurrent remedy. Van Hook v. Whitlock, 3 Paige, 409. So where assumpsit will lie (as, *semb.* it will), for money paid by one in behalf of another on a joint adventure between them. Kingsland v. Roberts, 2 Paige, 193, per Walworth, C., at 194. So where one of two joint owners takes the goods, and agrees to account to the other for them. Murray v. Coster, 20 John. Rep. 576. So of a bill filed by an heir, to reclaim a slave belonging to his father, who intrusted the slave to another. His father's administrator refused to sue, whereby the heir was put to his bill both against the administrator and bailee; but held that the statute applied. Thomas v. White, 3 Litt. 177, 183, 184. So of a bill filed to recover a legacy in New York, against an executor, there being a statute of that state giving an action, as we saw by the cases and statutes cited *supra*; in addition to which see Decouche v. Savatier, 3 John. Ch. Rep. 216, 217; and Coster v. Murray, 5 John. Ch. Rep. 522, where Kent, C., overlooked the question on the statute remedy. But he questions his former decision and dicta, for that reason, in Kane v. Bloodgood, 7 John. Ch. Rep. 125 to 127. He is sustained in that distinction by Wisner v. Barnet, 4 Wash. C. C. Rep. 639, 640; and by Souzer v. De Meyer, 2 Paige, 574. But we must except a legacy charged on land. Peletreau v. Rathbone, 18 John. Rep. 428. Whether the legal limitation of remedies for legacies and distributive shares applies under the statute provisions of New Jersey, Washington, J., doubted. Wisner v. Barnet, 4 Wash. C. C. Rep. 639 to 641. For this doctrine in Massachusetts, see Burditt v. Grew, 8 Pick. 108; and in Pennsylvania, the opinion of Huston, J., in App v. Driesbach, 2 Rawle, 301 to 303. The statute limitation applies to a bill filed by a client against his attorney, to recover money which the latter has collected for the former. Goodrich v. Pendleton, 3 John. Ch. Rep. 384; Hawley v. Cramer, 4 Cowen's Rep. 717. So to a bill filed against the assignee of a mortgagee, to redeem a negro slave mortgaged to secure money borrowed, the mortgagee having sold the slave absolutely to the defendant, who purchased *bona fide*, and held the slave adversely for more than three years, the North Carolina Statute of Limitations (Bell v. Beeman, 3 Murph. Rep. 273, 277); and this though equity had exclusive jurisdiction. The court adopted the statute from analogy. Whether the statute applied to a bill by partners, *inter se*, for an account, the cases seemed to leave a little doubtful, with a strong tendency, however, to the affirmative (Bridges v. Mitchell, Gilb. Eq. Rep. 224, 225; Hollingshead's Case, 1 P. Wms. 742; Ray v. Bogart, 2 John. Cas. 432; Gover v. Hall, 3 Harr. & John. 43; M'Nair v. Ragland, 3 Murph. 139; Codman v. Rodgers, 10 Pick. 112), till some recent decisions, which have settled the question in favor of the bar, upon the obvious principle that the bill is concurrent with an action of account. Atwater v. Fowler, 1 Edw. Ch. Rep. 417. And see per Walworth, C., in Kingsland v. Roberts, 2 Paige, 193, 194; Lansdale v. Brashear, 3 Monroe, 330, 333; Patterson v. Brown, 6 Monroe, 11, 12, 13. By the two latter cases, however, the statute does not run, till after dissolution of the partnership. These adopted the statute from analogy. The statute applies to a bill of revivor, by the administrator of one partner against the other; though not if the matter proceed to a decree before the latter bill was filed. Hollingshead's Case, 1 P. Wms. 742. The statute will be allowed on a bill for partition. Straughan v. Wright, 4 Rand. 493; Lyles v. Lyles, Harp. Ch. Rep. 288.

So far the cases have gone mainly upon the concurrent remedy. But as remarked at the head of this section, the application of the statute upon analogical grounds, has long been equally familiar to courts of equity. 3 Monroe, 31. A leading illustration of this will be found in the usual bill for enforcing an equitable title to land. If at law, the statute would have operated against an action to recover land, it shall prevail against a *bill* for that purpose. Upon this principle, in Kentucky, twenty years' adverse possession bars an equitable claim arising upon *an entry of land* (a kind of equitable contract for land), under the Kentucky law of titles. Miller's Heirs and Devisees v. M'Intyre, 6 Pet. 61; Lansdale v. Brashear, 3 Monroe, 331; Lewis v. Marshall, 5

Pet. 470; Shepherd's Heirs v. Young, 1 Monroe, 203, 205, and Broxdale v. Speed, cited at the last page; Wilson's Heirs v. Bodley, 2 Litt. Rep. 55; Floyd's Heirs v. Johnson's Heirs, Id. 109; Reed v. Bullock, Litt. Sel. Cas. 510, 512, 513, &c. The time runs in these cases from the issuing of the adverse grant. Mills' Heirs v. Bodley, 4 Monroe, 249. See other cases under this Kentucky law *supra*. The above Kentucky cases and others may be regarded as establishing the general position that adverse possession is equally a bar to an equitable, as of a legal claim for land. Per Marshall, C. J., in Hunt v. Wickliffe, 2 Pet. 201, 212; Peyton v. Stith, 5 Pet. 485. In pursuance of this principle, an issue of *devisavit vel non* will not be granted after an adverse possession of twenty years. Tucker v. Sanger, M'Clel. 434, 438.

So, from analogy, bills respecting personal property are barred, though the remedy be not concurrent at law. We have seen an instance of this in Bell v. Beeman (*supra*), where the statute was applied in favor of the purchaser from a chattel mortgagee, against the mortgagor's bill to redeem. So an account for rents and profits of land, claimed under an equitable title, will not be carried back more than six years, in analogy to the action at law for mesne profits (per Lord Camden, in Smith v. Clay, 3 Bro. C. C. 640, note; Reade v. Reade, 5 Ves. 749, 750; Stackhouse v. Barnston, 10 Ves. 469); and will sometimes, under special circumstances, be restrained to the time of filing the bill. Pickett v. Loggon, 14 Vesey, 215, 243, 244; per Lord Hardwicke, in Dormer v. Fortescue, 3 Atk. 130; Pettiward v. Prescott, 7 Vesey, 547; Rosevelt v. Post, 1 Edw. Ch. Rep. 579, 582, and the cases there cited. So a bill of revivor cannot be brought after a delay of six years. Hollingshead's Case, 1 Wms. 742. See also 2 Sch. & Lefr. 632.

The statute limiting the time of a writ of error has been applied, on the same principle, to the analogous proceedings by bill of review. Smith v. Clay, Ambl. 645; S. C., 3 Bro. C. C. 639, note; Norris v. Le Neve, 3 Atk. 26, 38; Edwards v. Carroll, 2 Bro. P. C. by Toml. 98; Litton v. Litton, 4 Bro. C. C. 441; Thomas v. Brockenborough, 10 Wheat. 146, 149, 450. And see Sherrington v. Smith, 2 Bro. P. C., by Toml. 62; Earl of Castlehaven v. Underhill, 2 Ch. Rep. 46; Filton v. Earl of Macclesfield, 1 Vern. 287, and Green's Heirs v. Breckenridge's Heirs, 4 Monroe, 541. And it was declared a grave question in Barrington v. O'Brien (1 Ball & Beat. 173), whether a supplemental bill to enforce a decree would not be barred by an unexplained delay of twenty years, in analogy to the Irish Statute of Limitations in respect to judgments. Twenty years will bar a bill for a rehearing as well as a bill of review (said by Lord Camden, C., in Smith v. Clay, Ambl. 649). In analogy to the limitation of a writ of error, the Supreme Court of New York refused to set aside a judgment for irregularity, after ten years (Soulden v. Cook, 4 Wend. 217), and after five years refused to let the plaintiff enter a vacatur of his own judgment. Barheydt v. Adams, 1 Wend. 161. And see Klinefelter's Lessee v. Carey, 3 Gill & John. 349, 353.

But there is no limitation of time against showing a judicial proceeding to be void for want of jurisdiction. It will not be valid, though acted under for twenty years. Holyoke v. Haskins, 9 Pick. 259, 263, 264.

With regard to the presumptive bar in the cases above enumerated, under the last head, and, indeed in all cases, it may be enlarged or avoided by the same disabilities in the claimant which are admissible at law; as infancy, coverture, insanity, imprisonment, absence, the person not being *in esse*, or the interest contingent, &c. Miller's Heirs and Devisees v. McIntyre, 6 Pet. 61; Lockey v. Lockey, Prec. Ch. 518; per Lord Hardwicke, in Dormer v. Fortescue, 3 Atk. 130; Rowland v. Best, 2 M'Cord's Ch. Rep. 317, 320; Pugh's Heirs v. Bell's Heirs, 1 J. J. Marsh, 403. And see Newburgh v. Bickerstaffe, 1 Vern. 296, and Yallop v. Holworthy, 1 Eq. Cas. Abr. 7 pl. 10.

Other answers to the presumptive bar are allowed in chancery which are not receivable at law; at least they are allowable where the remedy is not concurrent with that at law. Accordingly, it is held that time does not run against fraud or concealment, until a discovery of such fraud or concealment by the claimant (Bertine v. Varian, 1 Edw. Ch. Rep. 343; South Sea Co. v. Wymondsell, 3 P. Wms. 143; Prevost v. Gratz, 6 Wheat. 497, 498, per Story, J.; Wamburzee v. Kennedy, 4 Dessauss. 480; Payne v. Hathaway, 3 Verm. Rep. 212; Crane v. Prather, 4 J. J. Marsh. 77; Haddix's Heirs v. Davison, 3 Monroe, 41; Pugh's Heirs v. Bell's Heirs, 1 J. J. Marsh. 398, 401; Roche v. O'Brien, 1 Ball & Beat. 330; Dunbar v. Tredennick, 2 Ball & Beat. 304; Blennerhasset v. Day, 2 Ball & Beat. 129; per Lord Redesdale, in Hovenden v. Annesley, 2 Sch. & Lefr. 634; per Lord Manners, in Medlicott v. O'Donel, 1 Ball & Beat. 166; per Lord King, in Western v. Cartwright, Sel. Cas. Ch. 36; Whatton v. Toone, 5 Madd. Rep. 54, 55; per Colcock, J., in Botifeur's Sureties v. Weyman, 1 M'Cord Ch. Rep. 161; Jones v. Conoway, 4

Yeates, 100, 111; Hamilton v. Shepperd, 3 Murph. 115; Thomas v. White, 3 Litt. 183; Pyle v. Beckwith, 1 J. J. Marsh. 445; Breckenridge v. Churchill, 3 J. J. Marsh. 15); at least not till the claimant have the full means of discovery. Farnam v. Brooks, 9 Pick. 212.

Nor does time run against the remedy for a mistake until that be discovered. Crane v. Prather, 4 J. J. Marsh. 77; Bertine v. Varian, 1 Edw. Ch. Rep. 343. And accordingly, removal of trust property, so as to keep the *cestui que trust* ignorant of its place, was held to be an excuse for delay. Rankin v. Bradford, 1 Leigh, 163. And in one case, where the party was likely otherwise to lose his remedy by bill of review, by the Statute of Limitations, on account of a mistake of the practice in commencing the suit, the chancellor allowed such mistake as an answer to the delay. Webb v. Pell, 1 Paige, 564.

So it does not run against the remedy for undue influence, till this influence has ceased. Alden v. Gregory, 2 Eden, 280; Roche v. O'Brien, 1 Ball & Beat. 330; Hatch v. Hatch, 9 Vesey, 292; per Lord Manners, in Medlicott v. O'Donel, 1 Ball & Beat. 166; M'Cants v. Bee, 1 M'Cord's Ch. Rep. 391. But where the bargain is obtained by undue advantage of pecuniary difficulty, and the injured party knows this, the time runs from the completion of the transaction. This is on the principle that the law cannot in policy allow distressed pecuniary circumstances to excuse delay; for then there would sometimes be no limitation. Hovenden v. Ld. Annesley, 2 Sch. & Lef. 607, 639; Medlicott v. O'Donel, 1 Ball & Beat. 156; Western v. Cartwright, Sel. Cas. Ch. 34; Earl of Deloraine v. Browne, 3 Bro. C. C. 633; Hickes v. Cooke, 4 Dow, 16. See also Bicknell v. Gough, 3 Atk. 538; and Ld. Redesdale's observations on that case, 2 Sch. & Lef. 635; Moroney v. O'Dea, 1 Ball & Beat. 609; likewise 2 Ball & Beat. 118, and Winchecomb v. Hall, 1 Ch. Rep. 40. But see M'Cants v. Bee, 1 M'Cord's Ch. Rep. 391.

Yet pecuniary distress is allowed to excuse delay where the transaction is the purchase of a reversionary interest. This is an exception to the general rule. See Gowland v. De Faria, 17 Ves. 20, 25; Roche v. O'Brien, 1 Ball & Beat. 330; Dunbar v. Tredennick, 2 Ball & Beat. 204. But see Earl of Deloraine v. Browne, 3 Bro. C. C. 633; Moth v. Atwood, 5 Ves. 845; and Oliver v. Court, 8 Price, 127, 170. But the claimant is not here excused upon the ground that the interest has not come into his possession; for that is only an excuse at law, where the remedy depends on a present right of possession. That ground will not prevent the filing of a bill to avoid the sale. See Andrew v. Wrigley, 4 Bro. C. C. 125. Also per Sir J. Leach, V. C., 5 Madd. Rep. 55. So where an executor wrongfully and in collusion with the purchaser, sells a term for years, which is specifically bequeathed, even though the interests of the legatee be reversionary, he must come to set aside the sale, within the time. Andrew v. Wrigley, 4 Bro. C. C. 125, 138; Bonney v. Ridgard, 1 Cox's C. C. 145, 147 to 149; S. C., 2 Bro. C. C. 130; Elliott v. Merriman, Barnardist. Ch. Rep. 78.

Where the bill was filed by the remainderman for waste, being in nature of an assumpsit (as for the waste of timber cut, for which assumpsit would lie), an acknowledgment (as an accounting with the remainderman within six years for waste) was held to take the case out of the statute, the same as if the action had been for timber sold, at law. Hony v. Hony, 1 Sim. & Stu. 568.

Whatever the ground of avoidance be, whether infancy, fraud, concealment or mistake, the party complainant must state it distinctly in his bill. It is not enough to state in a general way, that he was not in a situation to call the defendant to an account, &c. Miller's Heirs and Devisees v. M'Intyre, 6 Pet. 61; Bertine v. Varian, 1 Edw. Ch. Rep. 343.

The suit shall not be deemed commenced so as to avoid the running of time as to any one of the defendants, till subpœna served. Miller's Heirs and Devisees v. M'Intyre, 6 Pet. 61. But a suit commenced by one creditor for himself and others, prevents the running of the statute as to all. Sterndale v. Hankinson, 1 Sim. 393.

21. We have seen (*supra*) within what time a *cestui que* trust, &c., must come to set aside a purchase made by his trustee. It is proper to note, briefly, the cases in which chancery will set aside such purchases. It acts with a view to prevent a breach of confidence; and cut off all temptation to abuse by any person who is engaged or intrusted with the sale of property for another, either by the party or the law. The trustee is supposed to have acquired in the course of his agency a peculiar knowledge of the property, by concealing which from purchasers, he may, if allowed, make advantage to himself. His duty being to get the highest price by a disclosure of all circumstances which shall tend to obtain such price in the market, chancery has

therefore cut off all power in himself to buy, either in his own name or in that of any other; and without inquiring into the fact of actual abuse, will, on the owner coming in reasonable time, set aside the sale. 8 Ves. 348, 349; Mealor v. Kimble, 2 Murph. 272.

This rule extends to all trustees holding the legal estate, who are made such trustees by the act of the party for the purpose of selling the trust property, whether the trust were created by deed, assignment, will or otherwise. Whelpdale v. Cookson, 1 Ves. sen. 9, more fully reported 5 Vesey, 682; Whichcote v. Lawrence, 3 Ves. 740; Campbell v. Walker, 5 Ves. 678; S. C., 13 Ves. 600; Lyster v. Lyster, 6 Ves. 631; Davoue v. Fanning, 2 John. Ch. Rep 252; Holt v. Holt, 1 Cas. Ch. 190; Keech v. Sanford, 2 Eq. Cas. Abr. 741; Ex parte Grace, 1 B. & P. 376; Fox v. Macreth, 2 Bro. C. C. 400, and cited 6 Ves. 627, and 9 Id. 246; per Lord Hardwicke, in Ayliffe v. Murray, 2 Atk. 59; Ex parte Reynolds, 5 Ves. 707; Randall v. Errington, 10 Ves. 423; Morse v. Royal, 12 Ves. 355; Lowther v. Lowther, 13 Ves. 95; Munroe v. Allaire, 2 Cain. Cas. Err. 183; Green v. Winter, 1 John. Ch. Rep. 26; Hawley v. Mancius, 7 John. Ch. Rep. 174; Holdridge v. Gillespie, 2 John. Ch. Rep. 30; Mathews v. Dragaud, 3 Dessauss. Eq. Rep. 25; per Woodward, J., and Colden, Senator, in Gallatian v. Cunningham, 8 Cowen's Rep. 361, 372, 377; Bergen v. Bennett, 1 Cain. Cas. Err. 1, 19, 20, per Kent, J.; Farnam v. Brooks, 9 Pick. 212; De Caters v. Le Ray De Chaumont, 3 Paige, 178. So it extends to his factor or attorney employed to sell, or deal in the articles sold. Jackson ex dem. M'Carty v. Van Dalfsen, 5 John. Rep. 43; Hall v. Hallett, 1 Cox's Ch. Cas. 140; Hawley v. Cramer, 4 Cowen's Rep. 717, 736; Napoleon's Civil Code, art. 1506; per Woodworth, J., in Gallatian v. Cunningham, 8 Cowen's Rep. 361, 373. So sometimes to the relation of attorney and client in respect to other business. Per Lord Eldon, in Morse v. Royal, 12 Ves. 371; Wells v. Middleton, Walmsley v. Booth, and Sanderson v. Closse, cited by Lord Eldon in Morse v. Royal, 12 Ves. 372, and the first again cited and approved in Ormond v. Hutchinson, 13 Ves. 51; Harris v. Tremenheere, 15 Ves. 34; Wendell v. Van Rensselaer, 1 John. Ch. Rep. 344; Kenney v. Brown, 3 Ridgw. P. C. (Ireland), 462, 523. So to attorneys, advocates and judges, as to any matter in litigation by or before them (3 Ridgw. Ir. P. C. 501, 522; Miles v. Ervin, 1 M'Cord's Ch. Rep. 524); to solicitor and client (Champion v. Rigby, 1 Russ. & Mylne, 539; S. C., 1 Tamlyn 421); to agents employed to sell or buy the thing in dispute (Ex parte Lacey, 6 Ves. 625; Parkist v. Alexander, 1 John. Ch. Rep. 394; per Woodworth, J., in Gallatian v. Cunningham, 8 Cowen's Rep. 361, 373; Ormond v. Hutchinson, 13 Ves. 47; Beaumont v. Boulthee, 5 Ves. 485; S. C., 7 Ves. 599; per Lord Manners, in Medlicott v. O'Donel, 1 Ball & Beat. 164; Farnam v. Brooks, 9 Pick. 212. So to surveyors (Oliver v. Court, 8 Price, 127); to stewards (Lord Lesley v. Rhoades, 2 Sim. & Stu. 41, 49, 50; Farnam v. Brooks, 9 Pick. 212); to auctioneers (per Woodworth, J., in Gallatian v. Cunningham, 8 Cowen's Rep. 361, 373); to the attorneys, agents, surveyors and auctioneers of trustees (Oliver v. Court, 8 Price, 127; per Woodworth, J., and Colden, Senator, in Gallatian v. Cunningham, 8 Cowen's Rep. 361, 373, 377. So to all trustees appointed by law; as the commissioners and assignees of a bankrupt (Ex parte Tanner, Atwood and Owen v. Toulkes, 6 Ves. 63, n *b*; Ex parte Lacey, 6 Ves. 625; Ex parte Hughes & Lyon, 6 Ves. 617; Ex parte James, 8 Ves. 337; Ex parte Bennett, 10 Ves. 385; per Woodworth, J., in Gallatian v. Cunningham, 8 Cowen's Rep. 161); a trustee appointed by chancery to make sale. Richardson v. Jones, 3 Gill & John. 163; De Caters v. Le Ray De Chaumont, 3 Paige, 178. So to executors and administrators (8 Ves. 346, 6 Ves. 628; Lessee of Moody v. Van Dyke, 4 Binn. 43; Dodson v. Simpson, 2 Rand. 294; Graff v. Castleman, 5 Rand. 195; Van Horne v. Fonda, 5 John. Ch. Rep. 388; Everston v. Tappen, 5 John. Ch. Rep. 497; Fellows v. Fellows, 4 Cowen's Rep. 682; Gordon v. Finlay, 3 Hawks, 239; Lovell v. Briggs, 2 N. H. Rep. 218; Scott v. Burch's Adm'r, 6 Harr. & John. 67; Jenison v. Hapgood, 7 Pick. 1). *One of two joint devisees*, tenants in common, both holding under an imperfect title, buys in the true title. This enures to the benefit of both. Van Horne v. Fonda, 5 John. Ch. Rep. 388. So the rule extends to the agents, solicitors and other assistants of executors and administrators. Currier v. Green, 2 N. H. Rep. 225; Oliver v. Court, 8 Price, 127, 164; Ex parte James, 8 Ves. 337; Owen v. Foulkes, 6 Ves. 630, note *b*; Ex parte Hughes, 6 Ves. 617; Ex parte Bennett, 10 Ves. 385; York Buildings Co. v. Mackenzie, 8 Bro. P. C. by Toml. app. 42, 67; Whitcomb v. Minchin, 5 Madd. Rep. 91; per Woodworth, J., in Gallatian v. Cunningham, 8 Cowen's Rep. 361, 373. So to creditors of a bankrupt. 8 Ves. 350; Ex parte Hughes, 6 Ves. 617. So to sheriffs and other officers as to property sold by them on execution (Lessee of Lazarus v. Bryson, 3 Binn. 54; 2 Rev. Stat. N. Y. 370, § 41); to a common agent of

the court in Scotland, answering to our solicitor (York Buildings Co. v. Mackenzie, 8 Bro. P. C. by Toml. app. 42). Whether an attorney for the plaintiff in an execution, can purchase under it for his own benefit. *Quere.* Howell v. Baker, 4 John. Ch. Rep. 118. General guardians of minors are within the rule the same as other trustees. Napoleon's Civil Code, art. 1596. And see Ferriss v. Bush, 1 Edw. Ch. Rep. 572. So guardians *ad litem.* Per Woodworth, J., and Colden, Senator, in Gallatian v. Cunningham, 8 Cowen's Rep. 361, 372, 373, 377; per Lord Eldon, in Morse v. Royal, 12 Ves. 371.

Courts have occasionally gone far in presuming frauds from other relations of a miscellaneous character. They have set aside a conveyance from an aged father to his children, in consideration that they should support him; but who abandoned him. Whelan v. Whelan, 3 Cowen's Rep. 537. And *vid.* M'Diarmid v. M'Diarmid, 3 Bligh (N. S.), 374. So, to his son's widow, that she should live with and aid him; but who left him. Jenkins v. Jenkins, 3 Monroe, 327, 329. So, of a conveyance from an ignorant young man to his uncle (a pettifogger) upon inadequate consideration (Hall v. Perkins, 3 Wend. 626); and from an aged solitary female to her collateral relations (Gore v. Summersall, 5 Monroe, 505); and in another case to a Methodist preacher (as a consideration for his spiritual services), he having wrought her into a state of enthusiasm. Norton v. Relly, 2 Eden, 286.

The rule is held not to extend to public officers or trustees holding stock for general distribution or sale on certain terms, with a view to create a moneyed corporation. In such a case they may distribute to themselves, among others, in their discretion, unless restrained by statute. Haight v. Day, 1 John. Ch. Rep. 18; Walker v. Devereux, 4 Paige, 229.

So, in private dealings, a pledgee for a debt, with power to sell on default of payment, may himself become the purchaser. Hendricks v. Robinson, 2 John. Ch. Rep. 283, 310, 311. So mortgagees may purchase the equity of redemption from the mortgagor (per Lord Redesdale in in Hickes v. Cooke, 4 Dow's P. C. 28), or, it seems, under a power of sale granted by the mortgage to himself (Bergen v. Bennett, 1 Cain. Cas. Err. 1, 19, 20); a right since expressly conferred by statute in New York. 2 R. S. 546, § 7. So, a creditor pledgee may purchase the subject of pledge from the pledgor (Chambers v. Waters, 3 Sim. 42); and a creditor may purchase on execution. Stratford v. Twynam, Jac. 418.

There is also another large exception to the rule. There is no doubt that the trustee, agent, &c., may, in all cases, openly and in his own name, purchase from his *cestui que trust* or principal, &c., provided it appear that he has made full and fair disclosures of his knowledge, and takes no improper advantage. Randall v. Errington, 10 Ves. 422; 1 Wils. C. C. 1; Ld. Lesley v. Rhoades, 2 Sim. & Stu. Rep. 49, 50; Bolton v. Gardner, 3 Paige, 273; Lovell v. Briggs, 2 N. H. Rep. 218. The rule is not that the trustee cannot buy from his *cestui que trust;* but that he shall not buy from himself. Per Ld. Eldon, in Ex parte Lacey, 6 Ves. 625, in Downes v. Grazebrook, 3 Meriv. 208, and in Cane v. Ld. Allen, 2 Dow's P. C. 289, 294; Farnam v. Brooks, 9 Pick. 225; Davidson v. Gardner, Sugd. Law of Vend. 425, 426; Parkes v. White, 11 Ves. 209, 225; Clancy's Rights of Husband & Wife, 355, 356; Roper's Law of Husb. & Wife, 262; per Kent, Ch., in Davoue v. Fanning, 2 John. Ch. Rep. 266, 267, citing and commenting on Munroe v. Allaire, 2 Cain. Cas. Err. 183, 193; Hendricks v. Robinson, 2 John. Ch. Rep. 311, per Kent, Ch.; M'Cants v. Bee, 1 M'Cord's Ch. Rep. 389. It will also be seen by several of these authorities, that the trustee or agent, against whom jealousy arises, must in general be one having power to sell or deal in the subject matter of what is confided to him. If he be constituted for other purposes, he does not come within the prohibition.

As to all this class of purchases and contracts by trustees, &c., valid at law, but liable to be opened in equity, terms are always imposed so as to save the advances of the trustee, &c., and there is no doubt that fairness originally, accompanied with other circumstances (and an unexplained delay is a very important one), will lead the court to withhold its interference, though the lapse of time be short of twenty years; and in some cases much short of that time. On this head, of course, no time can be fixed. The judicial dicta are very general, that the party must come within a reasonable time, but vary greatly as to the precise period; opening a space for a wide discretion. 5 Ves. 280; 1 Jac. & Walk. 59; 2 Sch. & Lef. 672; Gregory v. Gregory, Coop. Ch. Cas. 201; Whatton v. Toone, 5 Mad. Rep. 54; Norris v. Le Neve, 3 Atk. 26, 38; Price v. Byrn, cited 5 Ves. 681; Morse v. Royal, 12 Ves. 355; Western v. Cartwright, Sel. Ch. Cas. 34; Medlicott v. O'Donel, 1 Ball & Beat. 156; Chalmer v. Bradley, 1 Jac. & Walk. 51; Oliver v.

Court, 8 Price, 127, 167, 168; Prevost v. Gratz, 6 Wheat. 481; Hall v. Noyes, cited 3 Ves. 748; Bergen v. Bennett, 1 Cain. Cas. Err. 1; Butler v. Haskell, 4 Dessaus. Eq. Rep. 651.

Various circumstances also; viz: the existence of any of the legal incapacities, infancy, coverture, &c., and ignorance, as that the trustee, &c., was the real purchaser, the fact that the *cestuis que trust* were a numerous body of men, as creditors, or a religious sect, and the like, are adducible to repel the presumption, or extend the time beyond the statute of limitation. Bunce v. Wolcott, 2 Conn. Rep. 27; Chalmer v. Bradley, 1 Jac. & Walk. 51, 62, per Sir T. Plumer, M. R.; Morse v. Royal, 12 Ves. 355, 374 *et seq.*; Randall v. Errington, 10 Ves. 423; Whatton v. Toone, 5 Mad. Rep. 54; Whichcote v. Lawrence, 3 Ves. 470, 752; Anon. Case in Exch. cited by Richards, *arg.* 6 Ves. 632; York Buildings Comp. v. Mackenzie, 8 Bro. P. C. by Toml. 42; Attorney-General v. Ld. Dudley, Coop. C. C. 146; Hughes v. Wynne, 1 Turn. & Russ. 307; Purcell v. M'Namara, 14 Ves. 91; Pickett v. Loggon, 14 Ves. 214; Hatch v. Hatch, 9 Ves. 292; Murray v. Palmer, 2 Sch. & Lef. 474; Hardwick v. Mynd, 1 Anstr. 109; Kidney v. Coussmaker, 12 Ves. 136.

We have also noticed the effect of delay in respect to purchasing the expectant interests of reversioners. The contingent interest of heirs, apparent and presumptive, comes within the same reason. It is proper to say that in respect to these and the like purchases and transactions, if the party complaining comes in reasonable time, and the bargain appears to have been disadvantageous, it will be set aside without regard to the age of the complainant, on the condition of refunding the defendant; unless indeed the sale be at public auction. Then it shall stand. Shelly v. Nash, 3 Mad. Rep. 232, 235, 236; Gowland v. De Faria, 17 Ves. 20; Headen v. Rosher, 1 M'Clell. & You. 89; per Lord Eldon, in Davis v. The Duke of Marlborough, 2 Swanst. 129, 147, 151 (Am. ed.); Marsack v. Reeves, 6 Mad. Rep. 108; Evans v. Cheshire, Belt's Supplem. to Ves. 300, 306, *et seq.*; Bowes v. Heape, 3 Ves. & Bea. 117. It lies with the purchaser to show a full consideration; otherwise it will be presumed to have been inadequate. Hincksman v. Smith, 3 Russ. 433.

In these last cases, too, ignorance and fraud as well as continued distress, will enlarge the limitation of time (Roche v. O'Brien, 1 Ball & Beat. 330); and so, it is presumed of other excuses applicable in like cases. These, however, being out of the way, time runs from the completion of the contract, or from the time when all legitimate excuse ceases. Medlicott v. O'Donel, 1 Ball & Beat, 156; Whalley v. Whalley, 3 Bligh, 1, 12; per Lord Manners in Roche v. O'Brien, 1 Ball & Beat. 343; Earl of Deloraine v. Browne, 3 Bro. C. C. 633.

22. Certain other equitable and legal rights are also presumed to have been waived by neglect for a long time; and especially if the lapse of time be accompanied with other acts showing an intention to waive them. Among these are rights of appropriation. Persons claiming under a grantee of the crown certain mud lands covered with navigable water, granted for the evident purpose of having them reclaimed from the sea, and this being a consideration of the grant, apparent on its face, they were holden to have waived their rights by non-user, the ground not having been appropriated by them for a great number of years. See Attorney-General v. Richards, 2 Anstr. 603, in connection with Parmeter v. The Att. Gen., the same case, on appeal, 1 Dow's P. C. 316.

But where the estate and manor of Ravenscroft was granted, reserving to the grantor and his heirs "the Wych houses, salt works and brine pits, and a piece of land adjoining thereto, &c., and all springs, veins and mines, of brine, salt or salt rock," &c., with liberty to open new pits; and free ingress, &c., though the grantee had long held the estate, and it had passed to others by grants not noticing the reservation; and the owner of the soil had enjoyed, and the pits been filled up, and the ground smoothed; yet held that mere non-user or non-appropriation would not warrant the presumption of a waiver; and this from the nature of the reservation; for the possession was not adverse; it was consistent with the reservation; and there had been no resistance to the working of the mines under the reservation. Mines are often reserved to be worked for the occasion, lying unwrought for generations. They are often kept and indeed acquired with the express view of being suffered to repose until other mines are exhausted. But the master of the Rolls admitted there were many cases of a different character, where, from a non-exercise of the right, an inference of abandonment would arise. Seaman v. Vawdrey, 16 Ves. 380, 391, 392. And in Adair v. Shaftoe (cited 19 Ves. 156), a similar reservation of a coal mine was sustained, though there was a non-user for two centuries; and the owner of the soil had erected machinery to work it. In Ten Broeck v. Livingston (1 John. Ch. Rep.

357), there was the reservation in the grant, of a right to cut timber and grazing in the woods of the premises granted; and the chancellor says such rights are like a right of common (p. 362), and may be lost by negligence and disuse. And see 3 Leon. 202, case 254. But the reservation of a mill right to flow another's land was held not barred by a delay of thirty-two years to build the dam. Butz v. Ihre, 1 Rawle, 218.

23. Rights of pre-emption and election must be exercised within a reasonable time, though no limitation be fixed by the instrument granting them. But this must evidently depend on circumstances. Time and opportunity must be given to inquire and gain competent knowledge, in order to act judiciously, and due information should not be withheld by the party complaining of the delay. Sometimes, under a will, a definite rule as to time in the abstract. Much must always depend on the nature of the property, the changes it has undergone from the lapse of time, the conduct of the one who is to make his election, as whether it be dilatory, fraudulent or prompt and fair; whether the subject of election be vested or reversionary; whether the property may not have been passed to *bona fide* purchasers, by persons claiming adverse to the right of election; and above all, whether the party entitled to elect have not taken such steps as would be construed to determine his election. So the conduct of the opposite party is to be considered; for he may go so far as to have waived the right to compel an election. The cases present too much circumstantial variety, and call for too large an exercise of discretion, to warrant the laying down of general rules. Huckstep v. Mathews, 1 Vern. 362; Orby v. Trigg, 9 Mod. 2; Pusey v. Desbouverie, 3 P. Wms. 315; Wake v. Wake, 3 Bro. C. C. 255; S. C., 1 Ves. jun. 335; Whistler v. Webster, 2 Ves. jun. 367, 371; Rumbold v. Rumbold, 3 Ves. jun. 65; Beaulieu v. Lord Cardigan, Ambl. 533; S. C., on appeal, 3 Bro. P. C., by Toml. 277; the decision on appeal questioned in Butricke v. Broadhurst, 1 Ves. jun. 172; Edwards v. Morgan, M'Clel. 541; Stratford v. Powell, 1 Ball & Beat. 1; Tucker v. Sanger, M'Clel. 424, 439; Earl of Northumberland v. Marquis of Granby, 1 Eden, 489; Duke of Northumberland v. Lord Egremont, Ambl. 627; Ardesoif v. Bennet, Dick, 463; Tibbits v. Tibbits, 19 Ves. 656; per Lord Hardwicke, in Tompkins v. Ladbroke, 2 Ves. sen. 593; in Pawlet v. Delaval, 2 Ves. sen. 668; and in Harvey v. Ashley, 3 Atk. 616; Butricke v. Broadhurst, 1 Ves. jun. 171; S. C., 3 Bro. C. C. 88; Pettiward v. Prescott, 7 Ves. 541; Cull v. Showell, Ambl. 727; Yate v. Mosely, 5 Ves. 480; Nelson v. Carrington, 4 Munf. 332. See Watts' Ex'rs and Heirs v. Waddle, 6 Pet. 389, 393 to 396.

These cases in point of time range from a year and a half to fifty years, taking in all manner of circumstances.

24. As to a waiver of a right of dower by delay, see per Richardson, C. J., in Barnard v. Edwards, 4 N. H. Rep. 109; Boyle v. Rowand, 3 Dessauss. Eq. Rep. 555, 556, and note; Warfield v. Castlemain, 5 Monroe, 518; and Wells v. O'Beal, 2 Gill & John. 468.

25. An equitable right to a provision by settlement has, in some instances, been lost by the laches of the party, under peculiar circumstances. Johnson v. Johnson, 1 Jac. & Walk. 472, 479; Parker v. Phillips, 1 Ves. sen. 530.

26. So an equitable title to an estate under a devise may be waived by delay and strong circumstances, even short of twenty years. Delay merely, will not avail short of the twenty years. Pearce v. Newlyn, 3 Mad. Rep. 186; Davie v. Beardsham, 1 Cas. Ch. 39; S. C., 3 Ch. Rep. 4; Mutloe v. Smith, 3 Anstr. 709. So of an issue of *devisavit vel non.* Tucker v. Sanger, M'Clel. 24.

27. So delay is a strong circumstance in equity against granting a decree for specific performance. The salutary power of chancery to decree a specific performance of agreements to convey land, whether the bill be filed by the vendor or vendee, is often called into exercise; and is so familiar, that no cases or illustrations are necessary to show its general character. These contracts are either indefinite in terms as to time, *i. e.* A. agrees to sell real estate to B., and B. agrees to pay without mentioning the time when these things are to be done; or (which is more usual) a day, and sometimes a place is fixed. And it is well known that, where the covenants are concurrent or conditional, these must be adhered to with great strictness, at law, or all remedy is gone. Time is there considered of the essence of the contract, and, if the day passes, the party failing is remediless. The law demands of him a positive, an active performance, or doing his utmost, and a refusal by the other party, at the day fixed, and with all the fullness and exactness of a condition precedent. And this though the adverse party remain merely passive. Nor, if the immediate opportunity be let slip, will any subsequent circumstances of silence, o[f]

continuing possession, or even entire performance, restore one particle of vigor to the dead body of the original contract. It is true that where, with the express or implied assent of the other party, the matter contemplated by the original contract is performed, or indeed if it be partly performed with his assent, or performed in a different manner, this may be looked to as creating a new and distinct contract, and giving rise to a new remedy at law; but the original contract is gone forever. The English cases distinguishing between dependent, concurrent and independent covenants, and between covenants and conditions, are well collected and arranged in Platt on Covenants, 70 to 170. The American cases are numerous. Frazier v. Cushman, 12 Mass. Rep. 277; Baker v. Legrand, 1 Litt. Sel. Cas. 253; Hagedon v. Laine, 1 Marsh. 514; Gardner v. Corson, 15 Mass. Rep. 500; Green v. Reynolds, 2 John. Rep. 207; Cunningham v. Morrel, 10 John. Rep. 203; Green v. Gardner, 10 John. Rep. 266; Asberry v. Macklin, 3 Monroe, 9, 10; Morford v. Mastin, 6 Monroe, 612, 615; City Bank v. Smith, 3 Gill. & John. 281; Gazely v. Price, 16 John. Rep. 267; Hardin v. Kretsinger, 17 John. Rep. 293; Rob v. Montgomery, 20 John. Rep. 15; Miller v. Drake, 1 Cain. Rep. 45; West v. Emmons, 5 John. Rep. 179, 180, 181, per Van Ness, J.; Porter v. Rose, 12 John. Rep. 209, 212; Judson v. Wass, 11 John. Rep. 525; Hudson v. Swift, 20 John. Rep. 24; Parker v. Parmele, 20 John. Rep. 130; M'Gaunten v. Wilber, 1 Cowen's Rep. 257; Chapman v. Lathrop, 6 Cowen's Rep. 110; Clarkson v. Carter, 3 Cowen's Rep. 84; Topping v. Root, 5 Cowen's Rep. 404; Johnson v. Reed, 9 Mass. Rep. 78; Dana v. King, 2 Pick. 155; Hunt v. Livermore, 5 Pick. 395; Couch v. Ingersoll, 2 Pick. 292; Bank of Columbia v. Hagner, 1 Pet. S. C. Rep. 455; Rounds v. Baxter, 4 Greenl. 454; Stanley v. Stanley, 2 N. H. Rep. 364, 366; Watkins v. Hodges, 6 Har. & John. 38; Bailey v. Clay, 4 Rand. 346; Brockenbrough v. Ward's Adm'r, 4 Rand. 352; Robertson v. Robertson, 3 Rand. 68; Davis v. Crawford, 2 Rep. Const. Court. 401; Harrison v. Taylor, 3 Marsh. Rep. 168; Marshall v. Craig, 1 Bibb, 379; Stuteville v. Miles, 2 Marsh. Rep. 425; Elliot v. Carneal, 2 Marsh. Rep. 308; Van Benthuysen v. Crapser, 8 John. Rep. 257; Alexander's Ex'rs v. Mann, 6 Monroe, 361; Morford v. Mastin, 6 Monroe, 612, 615; Howland v. Leach, 10 Pick. 151; Passmore's Heirs v. Moore, 1 J. J. Marsh. 591, 592; Porter v. Stewart, 2 Aik. 417; Dakin v. Williams, 11 Wendell, 67; Johnson v. Wygant, Id. 48.

The quotations, in which I have confined myself mostly to questions between vendor and vendee, will fully show that, where performance on one side, or an offer to perform and a refusal, is a condition precedent to a right of demand against the other, the law adheres exactly to the day and all other circumstances.

With regard to cases in which the mutual stipulations are not dependent one upon the other, but a performance may be exacted without any previous steps by the party who demands it, the power of a court of chancery to decree performance has always been conceded. But, as to cases of condition precedent, in Benedict v. Lynch (1 John. Ch. Cas. 375), the late learned Chancellor of New York, after great examination, insists that, where the party in default can show no good excuse, and the opposite party does not acquiesce in the default, a specific performance will not be decreed against him. He says this is an acknowledged rule in courts of equity. He examines the cases and dicta on which the opposite doctrine is placed, and denies that any one of them exhibits a mere unmixed case of delay to perform the condition. On the other hand, he insists that some other circumstance must have entered into the matter, &c. That courts of equity have, of late, discountenanced the least neglect, he refers to several cases. The case he was himself considering was one of unreasonable delay, under an agreement containing an express nullifying clause.

But whatever may be finally held, when a case of naked delay shall present itself, it is certain that the smallest excuse for passing the day—one may almost say the merest evasion—will be seized on by a court of equity to keep the contract alive. In the authorities cited by the chancellor and others, the vendor's title not being complete so that he can convey at the day, or the purchaser receiving an abstract after the day, without then objecting to the delay—or, indeed, omitting to clamor for an abstract before it is too late for the vendor to furnish it at the day—or treating about the matter after the day—will be deemed in the one case an excuse for the vendor, and in the other an acquiescence in his delay; that is to say, the vendor's own fault of having no title will excuse him in the first place, and his stupidity or forgetfulness in the other. Omerod v. Hardman, 5 Ves. jun. 722; Coffin v. Cooper, 14 Ves. 205; Pincke v. Curteis, 4 Bro. C. C. 329; Smith v. Burnum, 2 Anstr. 527; Seton v. Slade, 7 Ves. 265; Guest v. Homfray, 5 Ves. 818; Stourton v. Meers, cited and stated, 2 P. Wms. 631; Sheffield v. Mulgrave, 2 Ves. jun. 526;

Jones v. Price, 3 Anstr. 924; Hertford v. Boore, 5 Ves. 719; Milward v. Thanet, 5 Ves. 720, note *b*; Hoggart v. Scott, 1 Russ. & Mylne, 293. So, if the estate be described as in good repair, and is not so, but requires several months after the day to repair and make it agree with the description. Dyer v. Hargrave, 10 Ves. 505. And a learned writer advises that, where a title cannot be made at the day, the vendor should file a bill as the means of prolonging the time, or creating farther delay until a title may be completed (Sugd. Law of Vend. 282, Phila. ed. 1820), and he cites 6 Ves. jun, 655, and 10 Ves. jun. 315. In Seymour v. Delancey (6 John. Ch. Rep. 222, 234), Chancellor Kent sought again to bring back the chancery doctrine to legal strictness, and expresses a determination not to allow a specific performance where the vendor is not able to convey at the day. 6 John. Ch. Rep. 234. He certainly labored against a great weight of authority; and, when the case came to the Court of Errors, they repudiated his opinion. Seymour v. Delancey, 3 Cowen's Rep. 445, 519, 535. The cases and dicta against him were there cited, and see Tyree v. Williams, 3 Bibb, 365; De Camp v. Feay, 2 Serg. & Rawle, 5; Nelson v. Carrington, 4 Munf. 332; and Gibbs v. Champion, 3 Hamm. 335. These cases, with those cited in 3 Cowen (*supra*), seem to settle the question in England, New York, Virginia, Pennsylvania, Kentucky, South Carolina and Ohio. And it is also treated as well settled in the courts of the United States. Bank of Columbia v. Hagner, 1 Pet. S. C. Rep. 466, 467, per Thompson, J.

In Kentucky, a strong disposition has been manifested to withhold a decree, where the delay is negligent, unless it be occasioned by the state of the title; and even then if by stipulation the time of performance be made material. Per Boyle, Ch. J., in Cotton v. Ward, 3 Monroe, 313. Yet the same judge holds that negligence shall be no excuse where the contract is partly executed, as by delivering possession. Id. But in a case immediately following, neglect to convey at the day was overlooked, although the title was good, and the contract executory; the court holding it enough that the vendor manifestly continued willing to convey; and had not trifled with his vendee. Mason v. Chambers, 3 Monroe, 318, 322. And where the negligence is accounted for, and there is a part execution, a decree may be had, if the conveyance be promptly tendered, even after an action at law for the breach is commenced, and a verdict obtained. Cook's Adm'r v. Hendricks, 4 Monroe, 500, 501. And see Hoggart v. Scott, 1 Russ. & Mylne, 293. Otherwise, if there be supine neglect, and the application to a court of equity be delayed till after damages at law assessed. Edwards v. Handley, Hardin, 602; Oldham v. Woods, 2 Monroe, 48; per Bibb, C. J., in Cook's Adm'r v. Hendricks, 4 Monroe, 500.

In a subsequent case, a labored argument of Bibb, C. J., and a quotation of authorities, results in the conclusion that time alone, unconnected with other circumstances, is never an objection, unless the delay be very great. Kercheval v. Swope, 6 Monroe, 363, 365 to 368. Part execution (a payment), is again much relied on in this case. Id. 368. This doctrine of delay was again considered at large in Doss v. Cooper (2 J. J. Marsh. 409, 410 to 413); where it is insisted that the least delay must be excused; and a very strict account rendered, or a decree will not follow. See also Caldwell's Heirs v. White, 4 Monroe, 561, 567. In the still subsequent case of Craig v. Martin (3 J. J. Marsh, 50, 54), the same doctrine is recognized; but relief against a judgment for damages at law refused, the conduct of the plaintiff having been fair. Great stress is again laid in this case, on a part execution, as overcoming delay.

In a recent case in Maryland, the Court of Appeals admit the doctrine that the non-performance of a condition precedent may be relieved against, where the default admits of compensation; as between vendor and vendee; but they deny relief in the particular case, as not being one of this description. It was a case of lottery prizes, there being due depending on a demand within a certain time. City Bank of Baltimore v. Smith, 265, 280, 281.

And in all cases, though of a defect of title, the conduct of the vendor should appear to have been free from fraud as to the defect; and, especially where a long time, *e. g.* twenty years, shall have run without title, a decree will be refused, unless the vendor clear himself from all suspicion of fraud. Williams v. Mattocks, 3 Verm. Rep. 189.

On the whole, it cannot be disguised, that most of our courts of chancery will not consider the day material, where no injury arises from the delay. Though this may not have been directly decided in England, yet every case which allows time beyond the day to complete the title, &c., most certainly involves that proposition; which has been thus indirectly decided a thousand times; and it has been as often declared in dicta. Cases decide it, chancellors, judges at law, elementary writers, all recognize it. The very complaint we hear at law, that "the power is at-

tended with dreadful effects in the delay thereby occasioned," (per Mansfield, C. J., in Wilde v. Fort, interrupting Shepherd and Best, serg'ts, *arg.*, 4 Taunt. 341), confirms it.

But what is directly material to the head we are considering, it is certain that inexcusable delay is a circumstance, among others, to weigh against a specific execution; though how soon mere naked laches shall foreclose the party, has not been held. The nature of the property, as whether real or personal, land or rents, reversionary or in possession; also its change of value in the course of the delay, or the purchaser's purpose being defeated by delay, taking and continuing in possession, treating and negotiation kept on foot after the day, silent acquiescence, proceeding at law, taking any steps; forbearance to declare an intention of breaking off, trifling, insincerity and fraud, matter of excuse for the delay, &c., all run through the cases; and show this to be another of those subjects which rest in a very large discretion, and from which no general rules can be gathered as to delay in the abstract. Watts v. Waddle, 6 Pet. 389; Miller v. Bear, 3 Paige, 466; per Lord Alvanley, in Milward v. Thanet, 5 Ves. 720, note *b*; per Lord Manners, in Moore v. Blake, 1 Ball & Beat. 68, 69; Guest v. Homfray, 5 Ves. 818; Harrington v. Wheeler, 4 Ves. 686; Spurrier v. Hancock, 4 Ves. 667; Alley v. Deschamps, 13 Ves. 225; Heaphy v. Hill, 2 Sim. & Stu. 29; Mackreth v. Marlar, 1 Cox's C. C. 259; Lloyd v. Collett, 4 Bro. C. C. 469; S. C., 4 Ves. 689, note *b*; Fordyce v. Ford, 4 Bro. C. C. 497, 498; Omerod v. Hardman, 5 Ves. 722; Barbour v. Whitlock, 4 Monroe, 195 to 199; Milward v. Earl of Thanet, 5 Ves. 720, note *b*; Hayes v. Caryll, 1 Bro. P. C. by Toml. 126; Coward v. Odingsale, 2 Eq. Cas. Abr. 688, pl. 5; Bell v. Howard, 9 Mod. 302; Newman v. Rogers, 4 Bro. C. C. 391; Wingfield v. Whaley, 1 Bro. P. C. by Toml. 200; Moore v. Blake, 1 Ball & Beat. 62; Popham v. Eyre, Lofft, 786; per Lord Redesdale, in Crofton v. Ormsly, 2 Sch. & Lef. 603, 604, and the cases there mentioned by way of illustration; Marquis of Hertford v. Boore, 5 Ves. 719; Waters v. Travis, 9 John. Rep. 450; Butler v. O'Hear, 1 Dessauss. Eq. Rep. 398, per the chancellor; Osborne v. Bremar, 1 Dessauss. Eq. Rep. 486; Brashier v. Gratz, 6 Wheat. 528; Hepburn v. Auld, 5 Cranch, 262, 276; Tyree v. Williams, 3 Bibb, 365; Bank of Columbia v. Hagner, 1 Pet. S. C. Rep. 465, 466, per Thompson, J., citing Sugd. Law of Vend. 275, with approbation; Gibbs v. Cook, 4 Bibb, 535; Benedict v. Lynch, 1 John. Ch. Rep. 375; Seymour v. Delancey, 6 John. Ch. Rep. 222, 234; S. C., on appeal, 3 Cowen's Rep. 445, 519, 535; De Camp v. Feay, 5 Serg. & Rawle, 323; Pratt v. Carroll, 8 Cranch, 471; Hatch v. Cobb, 4 John. Ch. Rep. 559; Matter of Shoemaker, 1 Rawle, 89; Walker v. Walker, 16 Serg. & Rawle, 379; M'Neil v. M'Gee, 5 Mason, 244; Pope v. Lemaster, 5 Litt. Rep. 78; Bates v. Todd's Heirs, 4 Litt. Rep. 178; Mason v. Chambers, 3 Monroe, 322; Doss v. Cooper, 2 J. J. Marsh. 412, 413; Craig v. Martin, 3 J. J. Marsh. 53, 54, 55; Hoggart v. Scott, 1 Russ. & Mylne, 293.

This doctrine of delay, in an independent promise to convey, was, in one case, carried very far at law. Though the plaintiff had a right, without any express limitation of time, to demand a deed, on tendering his bond and mortgage, yet a delay of four years was held such evidence of waiver as to bar his action of assumpsit, the Supreme Court saying they would follow the rule in chancery. Ballard v. Walker, 3 John. Cas. 60.

28. Courts of equity will in like manner relieve a lessee, or his assignee, under a lease containing a covenant for renewal on certain conditions, although he may not literally have complied within the time specified, but a good reason for the omission must be given. Ross v. Worsop, 1 Bro. P. C. by Toml. 281; Rawstorne v. Bentley, 4 Bro. C. C. 415; Bayley v. Corporation of Leominster, 3 Bro. P. C. 529; Eaton v. Lyon, 3 Vesey, 690; Maxwell v. Ward, M'Clel. 458, 464; Baynham v. Guy's Hospital, 3 Vesey, 295. And the party must be very prompt to apply for a renewal. The least unexplained delay will work a forfeiture of the right. Eaton v. Lyon, 3 Vesey, 690, 693, 695, 696; Maxwell v. Ward, M'Clel. 458, 467, 468. Even ignorance of his rights, to which the opposite party is in no way auxiliary, is not an excuse. Maxwell v. Ward, M'Clel. 458, 464. See the Irish cases on this head. Davis v. Oliver, 1 Ridgw. P. C. 1; Sentleger v. Chartres, Id. 122; O'Neil v. Morris, Id. 170; Kane v. Hamilton, Id. 180; Bateman v. Murray, Id. 187; Boyle v. Lysaght, Id. 384; S. C., Vern. & Scriven's Rep. 135; Magrath v. Muskerry, 1 Rigdw. P. C. 469; S. C., Vernon & Scriven's Rep. 166; Freeman v. Boyle, 2 Ridgw. P. C. 69; Duchess Dowager of Chandos v. Brownlow, Id. 345; Palmer v. Hamilton, Id. 535; Earl of Inchiquin v. Burnell, 3 Ridgw. P. C. 376.

29. It has been strongly intimated, though not directly decided, that delay by a landlord for twenty years, to enter for a forfeiture of his tenant's right, by the non-fulfillment of a condition,

shall, under the Statute of Limitations, operate as a bar to his right of entry. Per Lord Kenyon, C. J., and Ashurst, J., in Doe dem. Tarrant v. Hellier, 3 T. R. 172, 173. That long delay would be a powerful argument for a waiver of the right, in connection with other circumstances; and that it would in time, *per se*, be full evidence of a waiver, there can be no doubt (Doe dem. Tarrant v. Hellier, 3 T. R. 162; Malone v. Malone, 1 Ball & Beat. 32, note *a*; and a distinct act, or even a declaration directly incompatible with the idea of insisting on the forfeiture, done or made after, and with knowledge that it is incurred, will be adopted as a waiver. Milfax v. Baker, 1 Lev. 26; Malone v. Malone, 1 Ball & Beat. 32, note *a*. But, for this subject at large, see Vol. II.

30. So, on the other hand, a re-entry for breach of condition, regular and formal at the common law, may be presumed from the lapse of time during which the lessor has possessed. This has been done after fourteen years. Jackson ex dem. Goose v. Demarest, 2 Cain. Rep. 382; Jackson ex dem. Smith v. Stewart, 6 John. Rep. 34. But it was denied that nine years' possession would warrant the presumption. Jackson ex dem. Donally v. Walsh, 3 John. Rep. 226. And in a subsequent case, it is declared that any time short of fourteen years is not enough. Jackson ex dem. Myers v. Ellsworth, 20 John. Rep. 180. After one lease given for eighty-one years to one, and then a second and third lease by the reversioner to another, the original lessee being out of possession, leaving the latter lessees or their assignees in possession, who paid rent for a long time, a surrender or assignment of the first was presumed. Westropp's Lessee v. Moore, 2 Fox & Smith, 363.

31. The lapse of time or delay by legatees and distributees, to call on executors or administrators, will not bar a claim against them to distribute the general residue of an estate remaining in their hands; for they are mere trustees (Stackpole v. Stackpole, 4 Dow, 209); though extraordinary acts of acquiescence, concurring with a delay of forty years, was once holden to work that effect. Huet v. Fletcher, 1 Atk. 467. Yet, if they allow the estate to be distributed, though erroneously, and acquiesce with full knowledge and the means of enforcing their rights for a long time, the executor or administrator is discharged. Bolling v. Bolling, 5 Munf. 334; Hudson v. Hudson's Ex'r, 3 Rand. 117; Rayner v. Pearsall, 3 John. Ch. Cas. 578; Pickering v. Stamford, 2 Vesey, jun., 272, 581, 583; S. C., 4 Bro. C. C. 214, 219, 220. And see 17 Ves. 165, and Newton v. Ayscough, 19 Ves. 534. And this especially where no great private or public inconvenience is to arise. But in cases of such acquiescence, the decree will be confined to the *corpus* merely, and not extended to the annual produce or interest, or other accruing benefit. See 2 Ves. 585.

32. The same principle seems to apply to creditors who have stood by and seen the debtor's estate distributed; and such laches will preclude their bill for an account not only against the personal representatives, but as against the legatees or distributees; and especially after great lapse of time. It will be presumed that their debts are paid or released. But such and the like presumptions may be repelled by circumstances. Hercy v. Dinwoody, 4 Bro. C. C. 257; S. C., 2 Ves. jun. 86; Hardwick v. Mynd, 1 Anst. 109. And see Newton v. Ayscough, 19 Ves. 534. The objection becomes conclusive against the creditors where, after a legacy has been purchased by a third person, they delay proceeding against the purchaser for an unreasonable time. Cholmondeley v. Orford, Sugd. Law of Vend. 524, 525 (Am. ed. of 1820); Elliott v. Merriman, 2 Atk. 41.

33. The delay of infants or minors, after coming of age, to demand their legacies or distributive shares from executors or administrators who have, during the minority of the claimants, made payments to or delivered their legacies or shares to wrong persons, though by mistake, must be very great to bar their claim for a payment or delivery to themselves. A payment to the infant or his father, or a foreign guardian, during minority, will generally be holden null, unless the sum be very small, or the will direct payment to the infant. Lee v. Brown, 4 Vesey, 362; Genet's Children v. Tallmadge, 1 John. Ch. Rep. 3; Holloway v. Collins, 1 Cas. Ch. 245; Strickland v. Hudson, 3 Ch. Rep. 88; Dagley v. Tolferry, 1 P. Wms. 285; S. C., 1 Eq. Cas. Abr. 300, pl. 2; S. C., Gilb. Eq. Rep. 103; Philips v. Paget, 2 Atk. 80; Cooper v. Thornton, 3 Bro. C. C. 96, 186; Morrell v. Bickey, 3 John. Ch. Rep. 153; Williams v. Storrs, 6 Id. 353; Hill v. Chapman, 2 Bro. C. C. 612; Bilson v. Saunders, Bunb. 240. The two cases of Holloway v. Collins, and Bilson v. Saunders, are overruled by the others. A guardian should be appointed for that purpose, if the security given by the general guardian be insufficient. Genet's Children v. Tallmadge, 1 John. Ch. Rep. 3. Though now in New York, a legacy of less than fifty dollars

may be paid to the father. 2 R. S. 91. In general, where a wrong payment has been made, and the delay after the infant coming of age, has not been accompanied with plain acts of recognition, or very long acquiescence, the executor or administrator must pay to the infant a second time. Fifteen years of mere delay was holden not enough to create a presumptive bar. Dagley v. Tolferry, 1 P. Wms. 285; Philips v. Paget, 2 Atk. 80; Lee v. Brown, 4 Ves. 362.

So far as these cases relate to the claims of legatees and distributees against executors and administrators, for an account and payment, their application we have seen (*supra*), in this note, has been denied, or at least much qualified in those states where a statute gives a concurrent remedy to the courts of law; and it would probably be so in many cases with regard to creditors.

34. Acquiescence by a *cestui que trust*, in a breach of trust committed by his trustee, will, unless excused and accounted for, preclude him from complaint, the same as an active concurrence in the breach. Per Lord Eldon, in Walker v. Symonds, 3 Swanst. 64. Thus, where there were B. and several other *cestuis que trust* of land, and M. and F., the trustees, in violation of their duty, sold the land and joined in a receipt for the purchase money, but F. actually received the money, and with the acquiescence of B., held it for ten years, and till he died insolvent; held, that B. had, by such acquiescence, discharged M. from his original liability for the money. Brice v. Stokes, 11 Ves. 319.

But the mere silence of a body of creditors under a misapplication of a trust fund, provided for their benefit, would not be so readily construed against them (Hardwick v. Mynd, 1 Anst. 109; Kidney v. Coussmaker, 12 Ves. 136, 138); unless, indeed, they seek to go beyond the trustees, and make a purchaser liable for the misapplication. Elliott v. Merriman, 2 Atk. 41.

35. Delay by the *cestui que trust* in calling on one who purchased from a trustee, under such circumstances as renders the purchaser bound to see the purchase money applied for the benefit of the *cestui que trust*, will also discharge the purchaser. The cases in which this obligation may be said to arise, will be seen in Mr. Rand's ed. of Pow. on Mortgage, Vol. 1, ch. 9, p. 14, *et seq.* These cases are much abridged in number, if not abolished, in New York, where there is no fraud. 1 R. S. 730, § 66.

The shortest period of delay, by the *cestui que trust*, in this last class of cases, which has been particularly allowed as a bar, is not short of twenty-two years. Cusse v. Ash, Rep. temp. Finch, 316. But Mr. Mathews thinks there is no doubt that an unexplained delay of twenty years would be a full answer to the claim. Math. Pr. Ev. 433.

36. Several miscellaneous cases as to account, go on the same principle. Even a suit and decree for an account, cannot be continued or carried into effect after a great length of time. Pearson v. Belchier, 4 Ves. 627. So of a decree and order of reference to fix an occupation rent. Lord Shipbrooke v. Lord Hinchinbrooke, 13 Ves. 387, 396. So the Court of Common Pleas, after great delay, refused to exercise, or even to entertain a motion to exercise, a summary power given to them by statute, of appointing a new assignee of an insolvent debtor, with a view to compelling an account of a previous assignee. Ex parte Heathfield, 8 Taunt. 403. Chancery will not interfere with stale and complicated accounts (Sturt v. Mellish, 2 Atk. 610); and a lumping and irregular sale by a sheriff, will not be set aside after a great lapse of time. Mohawk Bank v. Atwater, 2 Paige, 54.

So a settlement of accounts with trustees or between other persons, whether such settlement be actual or constructive, will not, in general, be totally unraveled after great delay. But the complainant may surcharge and falsify; and if there be fraud, the whole of any account, though settled, may be thrown open at an indefinite period. Skinner v. Skinner, 1 J. J. Marsh. 594; Irvine v. Robertson, 3 Rand. 549; Gregory's Ex'rs v. Forrester, 1 M'Cord's Ch. Rep. 331, 332; Randolph's Ex'r v. Randolph's Ex'rs, 1 Hen. & Munf. 180; Murray v. Toland, 3 John. Ch. Rep. 569, 574, 575; per Lord Hardwicke, in Roberts v. Cuffin, 2 Atk. 113; Brownell v. Brownell, 2 Bro. C. C. 62; Western v. Cartwright, Sel. Cas. Ch. 34; Vernon v. Vawdry, 2 Atk. 119; S. C., Barnard. Ch. Rep. 280; Sewell v. Bridge, 1 Ves. sen. 297; Pratt v. Weyman, 1 M'Cord's Ch. Rep. 156. And see Watson v. Toone, 6 Mad. Ch. Rep. 153.

Accounts between merchants, though excepted in the Statute of Limitations, would never be investigated by courts of chancery, where the dealings in question had been long discontinued; and it is now settled in those courts that after six years' total discontinuance, they come within the statute. Sherman v. Sherman, 2 Vern. 276; Bridges v. Mitchell, Gilb. Eq. Rep. 225; Martin

v. Heathcote, 2 Eden, 169; Barber v. Barber, 18 Ves. 286. But see Lansdale v. Brashear, 3 Monroe, 330; and Patterson v. Brown, 6 Id. 10, 11, *contra.*

The statute may be pleaded to a bill to prevent setting up outstanding terms. Jermy v. Best, 1 Sim. 373.

But six years was denied to be a bar of an attorney's lien for his bill of costs. Higgins v. Scott, 2 Barnw. & Adolph. 113.

The statute has no application, in the state of Maine, to claims in the Court of Probate. Heald v. Heald, 5 Greenl. 387.

37. Other cases show the force of delay and acquiescence. These will sanction the inclosure of common appurtenant (Tufton v. Wentworth, 5 Vin. Abr. 8, pl. 32), subvert the rights of *femes covert* to their separate estate (Burke v. Crosbie, 1 Ball & Beat. 489), work a forfeiture of their estate in land conveyed by their husbands (Swanton v. Raven, 3 Atk. 105), explain away objections to conveyances originally obtained upon improper influence (Brown v. Carter, 5 Ves. 862. See also Tweddell v. Tweddell, 1 Turn. 1), and render annuities valid even where the consideration is disputed, or the ceremonies required by the annuity acts have been inaccurately performed. Symmons v. Mortimer, 5 T. R. 139; Ex parte Maxwell, 2 East, 85. See also Poole v. v. Cabanes, 8 T. R. 328; also a case referred to by Lord Erskine, 12 Ves. 378, and per Park, J., 1 Bing. 240. It seems agreed, however, that a total non-compliance with any of the direct and positive provisions of the statute, such as admit neither of explanation nor excuse, or if any inequitable advantage was taken of the grantor, the lapse of time will not avail. Van Bramm v. Isaacs, 1 Bos. & Pull. 451; Ex parte Sir R. Mackreth, 2 East, 563; Drake v. Rogers, 2 Brod. & Bing. 19; Williamson v. Goold, 1 Bing. 234; Cabton v. Porter, 2 Bing. 370

38. Ignorance of the right presumed to have been released or waived by delay, is, sometimes, though cautiously, received as an answer to the presumption in courts of equity. Per Lord Commissioner Gilbert, Sel. Ch. Cas. 11; Cowper v. Cowper, 2 P. Wms. 730; per Sir W. Grant, in Choldmondeley v. Clinton, 2 Meriv. 262; per Sir T. Plumer, in S. C., 2 Jac. & Walk. 142; Storrs v. Barker, 6 John. Ch. Rep. 166. But it will be seen by the two last cases that a mistake of the right is no answer, even in equity, to the Statute of Limitations.

39. It will be perceived on examining the cases upon several of the above heads, and especially the latter heads, that no certain time is given within which the presumptive bar, release, waiver or abandonment, shall arise; and that the only criteria, or fatal laches, are the nature of the demand, and the inconvenience, public or private, of allowing it to be enforced against the opposite party at a remote period. Thus, in matters of election and specific execution, great promptness and diligence are demanded. Creditors or next of kin, permitting an erroneous distribution, stand upon much the same ground. But where no striking argument of inconvenience arises, the courts are warranted in allowing a time corresponding to the Statute of Limitations; six years as to personal, and twenty years as to real estate.

It has been suggested by Chancellor Kent, that twenty years unexcused delay would, at common law, bar the prosecution for a divorce on the ground of adultery (Williamson v. Williamson, 1 John. Ch. Rep. 488, 492, 493); and after twenty years, *semb.* an execution cannot be set aside by the party, so as to affect the *bona fide* purchaser under it. Jackson ex dem. Livingston v. Delancy, 13 John. Rep. 537. The limitation of the right to revoke the probate of a will in *common form*, seems to be thirty years. Brown v. Gibson, 1 Nott & M'Cord, 326.

40. As to the maxim, *nullum tempus occurrit reipublicæ*, see the following cases: Lindsey v. Miller, 6 Pet. 666; Birch v. Alexander, 1 Wash. Virg. Rep. 34; Den v. Herring, 1 Murph. 414; Bagley v. Wallace, 16 Serg. & Rawle, 285; United States v. Hoar, 2 Mason, 311; Johnston v. Irwin, 3 Serg. & Rawle, 291; The People v. The Supervisors of Columbia, 10 Wend. 363; Kemp v. The Commonwealth, 1 Hen. & Munf. 85; Allston's Lessee v. Saunders, 1 Bay, 26; Stoughton v. Baker, 4 Mass. Rep. 528, per Parsons, C. J.; Vooght v. Winch, 2 Barn. & Ald. 662; Carter v. Murcott, 4 Burr. 2163; per Lord Ellenborough, 7 East, 199.

41. The opinion of Lord Camden, in Smith v. Clay (Ambl. 645; S. C., 3 Bro. C. C. 630, note), may be read with great advantage, as embodying the principles on which courts of equity deal with stale demands, or act in analogy to the Statute of Limitations.

42. As to the manner in which the statute, or lapse of time, may be introduced as a bar in a court of equity, in general the defendant cannot demur, though the delay appear on the face of the bill. Mitf. Plead. (3d ed.) pp. 172, 173, 174; Frazer v. Moor, Mos. 54; Hercy v. Dinwoody,

4 Bro. C. C. 268; 2 Ves. jun. 87, 91; S. C. and S. P., Earl of Deloraine v. Browne, 3 Bro. C. C. 633, 646; Gregory v. Molesworth, 2 Ves. sen. 109; M'Dowl v. Charles, 6 John. Ch. Rep. 132; Payne v. Hathaway, 3 Verm. Rep. 212. On the other hand, several cases seem to have recognized a demurrer as applicable. Palmer v. Whettenhal, 1 Cas. Ch. 184; Hovenden v. Ld. Annesley, 2 Sch. & Lef. 637, 638; Beckford v. Close, cited in 3 Bro. C. C. 644; per M. R. in Hardy v. Reeves, 4 Ves. jun. 476, 479; 2 Sch. & Lef. 638. And see Ex'rs of Livingston v. Livingston, 4 John. Ch. Rep. 294, 295, 297.

In general, the delay must, of course, be pleaded; for the complainant will not, if he can avoid it, show a full and unqualified case of delay on the face of his bill. Saunders v. Hord, 1 Ch. Rep. 184; Hollingshead's Case, 1 P. Wms. 742; Goodrich v. Pendleton, 3 John. Ch. Rep. 384; Bell v. Beeman, 3 Murph. Rep. 273, 277. That is to say, where the statute is a positive bar in equity, it should be interposed by way of a plea or answer; *e. g.* where the remedy is concurrent at law; or by way of answer where the statute comes in not *proprio jure*, but by analogy; *e. g.* where equity has exclusive jurisdiction. Bell v. Beeman, 3 Murph. Rep. 273; Deloraine v. Browne, 3 Bro. C. C. 646, per Lord Thurlow. And it would seem, from the latter case, that it may sometimes be insisisted on at the hearing as matter of evidence, without being mentioned in the answer. But where the time comes in by way of presumption, as it often does, payment must be sworn to by the answer. Livingston v. Livingston, 4 John. Ch. Rep. 287. See the peculiar mode of pleading the statute to a specialty in Maryland. Carroll v. Waring, 3 Gill & John. 491.

Though formerly held that a plea of the statute by one defendant enures to the benefit of all the others (Clason v. Morris, 10 John. Rep. 524), yet the better opinion would seem to be the other way. McCormick v. Gibson, 3 Gill & John. 12; where the strength of the former case is considered, and the case itself denied to be law.

Where it is interposed by answer, the defendant is bound to negative, particularly, all circumstances alleged in the bill calculated to avoid the statute; and if it come in by plea, this must be supported by such an answer. Kane v. Bloodgood, 7 John. Ch. Rep. 90, 129 to 136; S. C. on appeal, 8 Cowen's Rep. 360; Goodrich v. Pendleton, 3 John. Ch. Rep. 384, 391; Mitf. Pl. (3d ed.) 218, 220, 223, 236, 237; Coop. Eq. Pl. 227, 228; Gilb. For. Rom. 58; Van Heythuysen's Eq. Draftsman, 443; Price v. Price, 1 Vern. 185; Baille v. Sibbald, 15 Ves. 185; South Sea Company v. Wymondsell, 3 P. Wms. 143; Walter v. Glanville, 3 Bro. P. C. 206 (Toml. ed.); Anon., 3 Atk. 70; Galway v. Earl of Barrymore, 1 Dick. 163; Hildyard v. Cressy, 3 Atk. 303; Jones v. Pengree, 6 Ves. 580; Bailey v. Adams, 6 Ves. 586; Pope v. Bush, 1 Anstr. 59; Edmunson v. Hartley, 1 Anstr. 97.

It is well understood that at law the statute must always be pleaded, with the few exceptions where it may come in under the general issue. Delay, though appearing on the face of the plaintiff's pleadings, is never the subject of a demurrer; and the better authority now is, that even a replication of fraud or concealment, by which the plaintiff was delayed in his remedy, will not be received to enlarge the time. Troup v. Smith, 20 John. Rep. 33, 47, 48; Hamilton v. Shepperd, 2 Murph. Rep. 115; Callis v. Waddy, 2 Munf. 511; Maddock v. Bond, 1 Ridgw., Lapp & Sch. Ir. T. R. 339. *But see* First Mass. T. P. Corporation v. Field, 3 Mass. Rep. 201; Homer v. Fish, 1 Pick. 435; Jones v. Conoway, 4 Yeates, 109; and Pyle v. Beckwith, 1 J. J. Marsh. 445, *contra.* And the same rule applies where the statute comes into a Court of Equity *proprio jure.* Hamilton v. Shepperd, 3 Murph. Rep. 115, 118; Bell v. Beeman, 3 Murph. Rep. 273, 278.

43. The state of New York has recently adopted a limitation for all suits in equity as well as at law. Where its jurisdiction is concurrent with the common-law courts, the legal limitation is extended to all equity suits brought subsequent to the passing of the act, except in cases of fraud, where the bill may be filed within six years after its discovery. In all other cases the limitation is to ten years after the cause of the bill accrued; subject to be enlarged in each case by the existence of the same disabilities and accidents as exist at law, viz: infancy, coverture, absence beyond sea, death, &c. 2 R. S. 301, 302, art. 6. In their report of this statute, the revisors profess in the main to follow the law of courts of equity as it has already been adopted by those courts. They refer to 20 John. Rep. 585; 2 Ball & Beat. 129; 2 Sch. & Lef. 636; 1 Bro. P. C. 455, and the cases collected in 20 John. Rep. 38. The ten years limitation, of course, embraces several cases not before limited at all, and others to which a different period had been fixed in analogy to the legal limitation.

ceptance, is produced from the hands of the acceptor subsequently to its becoming due, the presumption is, that the acceptor has paid it.(1)

Of reputed ownership.

Where a person has been the absolute owner of property, and he continues in possession of it till the time of his bankruptcy, he will be *prima facie* presumed to have had the reputed ownership of it, unless he has made the change of property notorious; but if he has never been the ab-

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In order to determine the extent of the limitation, as whether it shall be six or twenty years on the one hand, or ten years on the other, this statute opens a wide field of inquiry on the question, in what cases the jurisdiction of chancery and law shall be deemed concurrent for the purposes of the statute limitation on that head, and when not, with a view to the limitation of such suits belonging exclusively to the equity side. And again, the cases must be resorted to, in order to determine what shall constitute such a fraud as shall enlarge the time in both cases. These questions being answered, another seems to be settled: The language of these statutes, *mutatis mutandis*, is the same as those which limit actions in a court of law. It follows, that the time of the complainant can be enlarged by no considerations, except those specifically enumerated; fraud undiscovered, infancy, coverture, insanity, duress, absence, &c. Troup v. Smith, 20 John. Rep. 33, 47; Callis v. Waddy, 2 Munf. 511; Leonard v. Pitney, 5 Wend. 30; Hamilton v. Shepperd, 2 Murph. Rep. 115, 118; Bell v. Beeman, 3 Murp. Rep. 273, 278. Neither promises, acknowledgments, nor the most solemn acts, can keep the subject matter of the bill alive. It is a very strong statute, leaving it quite questionable whether *aliquis potest renunciare juri pro se introducto*, unless this be done by an act of record in the suit itself. See Maddock v. Bond, 1 Ridgw., L. & S. Ir. T. R. 332. At any rate, all the thousand other acts, relations and contingencies by which equities have heretofore been kept alive, as may be seen by the cases we have above attempted to review, are rescinded at a blow. This is, indeed, cutting the gordian knot. What those equities may be worth which are thus placed "with the years beyond the flood," is no longer the inquiry. Lord Camden said, that "in all these questions which turn on the limitation of time, the right is never taken into consideration: for the statute was made to bar right, and not give remedy in dubious cases. The rule, *ut sit finis litium*, operates against cases of right rather than in cases of wrong." Ambl. 647. For the first time, with us, a quieting statute has passed, extending over all the regions of equitable jurisprudence. Heaven grant that the repose which it confers may not prove the calm of despotism.

(1) Gibbon v. Featherstonhaugh, 1 Stark. R. 225; Pfiel v. Vanbatenberg, 2 Camp. 439. See Bembridge v. Osborn, 1 Stark. R. 374. As to the presumption of payment arising from the production of a check, see Boswell v. Smith, 6 C. & P. 60; Pearce v. Davis, 1 Mo. & R. 365; Egg v. Barnett, 3 Esp. 196; Lloyd v. Sandiland, Gow, 16, explained by Alderson, B., in Mountford v. Harper, 16 M. & W. 825, 827. That the payment of money does not, in general, raise the presumption of a loan, see Welsh v. Seabone, 1 Stark. R. 474; Carey v. Gerrish, 4 Esp. 9; Holden v. Hartsink, 4 Esp. 46. As to a presumption of gift to a relative, see Hick v. Keats, 4 B. & C. 71. See further on the presumption of payment, Cooper v. Turner, 2 Stark. R. 207; 4 Taunt. 293. On the presumption of the satisfaction of judgments, warrants to confess judgment, decrees, recognizances, annuities, portions, legacies, liens for purchase money, quit rents, see Mathews on Presumptions, ch. 19 & 20; Willaume v. Gorges, 1 Camp. 217; Hulke v. Pickering, 2 B. & C. 555. On the subject of the payment of bonds, see the statute 3 & 4 Wm. IV, c. 42. Before that statute, payment might have been presumed within twenty years, if circumstances concurred to fortify the presumption arising from lapse of time, as a settlement of accounts. Colsel v. Budd, 1 Camp. 27; Oswold v. Leigh, 1 T. R. 270. The production by the assured of a policy with an adjustment, and the name of the defendant struck off, does not prove payment. Adams v. Sanders, M. & M. 373.

solute owner, it will be necessary to establish the fact of a reputed ownership, by other means than proof of possession.(1)

Presumptions by the law of treason.

It has sometimes been laid down, that a conspiracy to levy war against the king, when proved, amounts, in presumption of law, to a compassing of the king's death; but, on the other hand, there are still higher and better authorities, both ancient and modern, for considering, that a jury are not bound to make such a presumption, unless they are satisfied that the conspiracy was of such a nature as, in its consequences, to occasion probable danger to the king's life.(2)

It would be impossible to enumerate within convenient limits, the various presumptions which have received judicial sanction.(3) The greater

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(1) Lingard v. Messiter, 1 B. & C. 312; Storer v. Hunter, 3 Id. 374.

(2) See the authorities collected in Phillipps' observations on Lord Russell's Case, in his abridgment of the State Trials; and Luder's Tracts on Treasons. The charge of Eyre, C. J., in Hardy's Case; his summing up in Horne Tooke's Case; the summing up of Lord Ellenborough, C. J., in Watson's Case, are in favor of treating the presumption as one of pure law.

(3) The following instances may be referred to by the reader. Presumption of mesne assignments, Earl d. Goodwin v. Baxter, 2 W. Bl. 1228; of recoveries, Goodtitle d. Bridges v. Chandos (Duke), 2 Burr. 1065; of enrollment of tithe award, Macdougal v. Purrier, 2 Dow. & Cl. 135; of probate of will, Doe d. Woodhouse v. Powell, 8 Q. B. 576; of receipt of notice of dishonor of bill, from promise to pay, Hicks v. Beaufort (Duke), 4 N. C. 229; Patterson v. Becher, 6 B. Moo. 319; Brownell v. Bonney, 1 Q. B. 39; Campbell v. Webster, 2 C. B. 258; or from other circumstances, Wilkins v. Jadis, 1 Mo. & R. 41; Curlewis v. Corfield, 1 Q. B. 814.

NOTE 194.—It would, therefore, seem that direct proof is of a higher degree than that which is merely circumstantial. Indeed, the exclusion of the latter, where it is obvious that the former exists, and it is not shown to be beyond the reach of the party, is a very common occurrence, as will be seen hereafter, under the rule that the best evidence of which the fact appears to be susceptible, must be produced. *Ante*, 614, text. The most striking illustration of the present rule in the text, will be found in the case of Williams v. The East India Company, stated *ante* in the text. The admission of secondary or circumstantial evidence by proof of a subscribing witness's handwriting, where he cannot be produced, is another instance. *Post*, of the text, with the notes. So the entries of third persons since deceased, either against their interest or in the line of their duty. *Post*, in the text, with the notes. And see what Parke, J., said of such an entry, in Patteshall v. Turford, 3 Barn. & Adolph. 890. Where direct evidence is attainable, circumstantial is of a secondary nature. 3 Stark. Ev. 515. Beside, the great excellence of indirect testimony is its freedom from suspicion; and no greater discredit can be thrown upon it than when direct evidence is withheld. Id. And see Hazzard v. Smith, 1 J. J. Marsh. 66, 68. A person who rests his case on the argument that certain circumstances which he adduces afford a presumption of the existence of a disputed fact, is not entitled to any attention whatever, if he cannot but be in a condition to give direct and positive evidence of the fact itself, supposing it to be true. 2 Ev. Poth. 340, No. 16, § 14.

On the different heads, viz: of presumptive or circumstantial evidence in criminal cases, see *ante*, notes 174 to 180, inclusive, *passim*.

It is not to be disguised that circumstantial, like all other proof, is sometimes fallible The case mentioned (2 Hal. P. C. 289), of the man condemned as the thief, though he had only received the horse from the real felon, who delivered him with a view to escape a pressing pursuit; and thus threw the *onus* on an innocent bailee, and himself escaped, is sometimes referred to as inculcating caution in respect to this species of evidence. Russ. on Cr. 1154, note *e*.

There was, too, a tract entitled "The Theory of Presumptive Proof," appended to the first

American edition of Phillipps (1816), the body of which contains some very sensible remarks. But it subjoins eleven startling cases, in which, apparently, the strongest circumstantial evidence, whereon, in some of them, convictions followed, and capital punishments were inflicted, had finally turned out to be delusive; the victims being in truth innocent. These cases were, for some time, rung through our criminal courts as seriously impugning the doctrine which sanctions such evidence. Weak juries were sometimes alarmed by them; and judges felt bound peremptorily to interpose, in order to maintain the best settled principles in the law of evidence. In a case of highway robbery (Gen. Sess. of New York, Sept. 1817, before the late Radcliff, J., then Mayor, and his associates), Gardiner, for the prisoners, proceeded to read and comment on these cases to the jury. The learned judge, in charging the jury, took occasion to explain the nature of their oath. It had been often said by counsel, he observed, that jurors, in rendering a verdict, *swear* that the prisoner is guilty or not guilty. The jury swear to no such thing: they declare, in rendering a verdict, the result of the conviction of their minds, from the evidence produced; having previously sworn to give a true verdict according to the evidence. He then observed that the cases read by the counsel for the prisoner were extreme cases; and such as do not exist, perhaps, in one case in a thousand. The plain practical rules of evidence, which had been established for ages, ought not to be shaken by any collection of cases in the works of theoretical writers. Such cases may be inserted for the purpose of inducing the greater caution in juries; but if employed for any other purpose, their application to the generality of cases depending on circumstantial evidence, is dangerous in the extreme. Perhaps the determination of one-half the cases tried in our courts, depends on the combination of circumstances; and to apply extreme cases in such determination, would be sapping some of the most salutary rules known to our law. All human testimony is fallible; but jurors, in their decisions, must rely on such testimony. Canton & Redding's Case, 2 C. H. Rec. 149, 151, 152.

The reporter very aptly illustrates the remark of the court; adding, in respect to the author of the book cited by Gardiner, "might he not, by ransacking the English annals, or the reports of adjudicated cases from the time of William the Conqueror, have selected eleven cases in which verdicts had been rendered on direct proof independent of circumstances; but in which the witness or witnesses swearing to the facts, were guilty of the foulest perjury? If so, might he not have written a *theory of positive proof;* and have produced these cases to show its fallibility, with as much propriety as the essay now under consideration? 2 C. H. Record. 151.

Indeed, there can be little doubt that a full catalogue of victims, even if confined to the perjured witnesses of English legal history, would result in much more frequent cases of fallibility on the side of direct evidence. The bloody perjuries of Oates, Bedloe and Dugdale have rendered them conspicuous in general history. Could the more obscure cases be collected, they would, no doubt, be multipled to a much greater extent than the learned author of the theory of presumptive proof could carry out the cases on his side of the question.

Honest mistake and fallibility, in direct and positive proof, also come in for their share of victims. But is a witness to be discredited because he *may be perjured*, or *may be deceived?* Is a hypothesis to be rejected because it *may be untrue?* The principle of veracity, the tenacity of memory, acuteness or accuracy of hearing and observation, the skill of professional witnesses, the usual connection between circumstances and hypothesis, the sagacity of jurors, or wisdom of juridical conclusion, may each in turn be wanting; yet they must be taken to be, as they in truth are, perfectly adequate to the general administration of justice. Oral or written language, though generally perspicuous, when employed on familiar or ordinary subjects, becomes inaccurate and obscure, in proportion as its objects are novel, or complex. Here is a defect by which the most luminous meaning may be, and often is, rendered not only dim and doubtful, but entirely perverted. It is not denied that the language of circumstances labors under a similar defect; but certainly not a greater; and, I think, we have seen that the same argument which goes to subvert the force of this kind of evidence would be equally effective against all oral evidence; and against our judicial institutions, if not against the English language itself.

So far, we have taken for granted that the eleven cases reported in the above-mentioned appendix do, if historically true, present a series of rash or erroneous deductions even from well established circumstances, which were fatal to innocence. A synopsis of those cases will, however, show that this is far from being the case.

I. The first (Jenning's Case) and the tenth (anonymous) were convictions founded on the foulest

fraud and perjury; the latter of a character so diabolical as to discredit its historical truth; and the third (Harris' Case) on the *conspiracy, fraud and direct perjury* of Morgan and the maid servant, in the proof and simulation of circumstances. These three cases may be set down as convictions procured by *fraud* and *perjury*.

II. Of the remaining *eight* cases, the *second* (anonymous), the *fifth* (Miles' Case), and *eleventh* (Stringer's Case), each present circumstances on which a common magistrate would hardly be authorized to commit for trial. The second of these resulted in an acquittal; in the fifth, the jury of neighbors who tried the man were so influenced by horrid rumors and alleged supernatural signs of guilt, that they were completely disqualified for seeing the utter inadequacy of the proof. The report substantially admits that the prisoner owed his death to the prejudice and superstition of his triors. The most material circumstance in the eleventh was made out by the *professional* error of a witness (a young surgeon), which was explained by better skill after the trial, and the man received a pardon.

III. The fourth (Crow's Case) was an honest mistake of personal identity. A great number of witnesses, the neighbors of Geddely, the real criminal, mistook the former for the latter. Such a mistake is not solitary. Hoag's Case, 5 C. H. Rec. 124.

IV. In the *seventh* (Bradford's Case), the inference was very little wide of the mark. He had, in truth, come into the room where the dead body lay, with intent to kill and rob the deceased; but another had preceded him in the horrid act. It was a mere accident that the entire inference was incorrect; and that the prisoner suffered for the *moral*, not the *legal* guilt of murder.

V. The eighth (Shaw's Case) is an instance of the fallibility of *direct testimony*, the *dying declarations* of the deceased, the prisoner's daughter. These were, as usual, properly received as competent (except, perhaps, her answer to the last question, which was leading). She charged her father with the murder; but was unable to explain that she meant by this, his crossing her purpose of marriage, and leading her to commit suicide. This direct testimony being out of the case, the prisoner must have been acquitted. And so if her letter had not been accidentally misplaced.

VI. In the ninth (Hawkins and Simpson's Case), the report admits that the guilt of the prisoners was palpable; and they were properly convicted. But it insists that the judge (Montague, B.) hastily inferred the falsehood of a circumstance set up in the proof of an *alibi*, upon the ground that ink taken from the same standish within the same minute of time would exhibit the same color. The judge suggested that, because the color of the ink in the body of the receipt and that in the signature differed, the inference was fair that the paper was not drawn and signed from the same standish at the same time. In that instance, it happened not to hold true of the reporter's notes; and hence it must be stricken from the catalogue of *legitimate* circumstances, although it were true of every other standish since the Norman invasion! Certainly no internal evidence is oftener relied on in books or in practice, as impeaching the verity of a document.

So far we have fraud, perjury, conspiracy, a prejudiced jury, professional error and mistake of witnesses, the misapprehension of direct testimony and its accidental non-correction; and an *alleged* want of adequate sagacity in Baron Montague. If the compiler meant to admonish us that caution is necessary under all these heads, it is very well. But if he meant to question either the force or safety of presumptive evidence as it is understood by our law, and acted upon in our courts, his success is quite questionable.

VII. The sixth case of the eleven (anonymous) is, however, certainly an instance where our courts would feel satisfied with a verdict of guilty, upon the presumptive evidence, although the prisoner was, in truth, innocent. By an accidental turn in the affair, inscrutable to human sagacity, the guilt belonged to another, while it was imputed, and all the circumstances pointed to the prisoner. The manner of his acquittal presented an equally striking anomaly. The case is altogether an extreme one, prodigiously interesting in all its features. It is briefly detailed in the appendix, and somewhat differently from other reports of what is evidently the same case. It is not without some degree of instruction; and we therefore give the following account of it, as republished from a London paper, which reached this country several years ago:

"The following singular case is at present the subject of dramatic representation at one of our minor theatres (the Coburgh). The narrative is extremely interesting, as exemplifying that circumstantial evidence, even when apparently the most conclusive, is not always to be relied upon

as infallible. It happened in the year 1672. The reader will find the account of it in the Gentleman's Magazine for 1762.

"In the reign of Queen Elizabeth, a person was arraigned before Sir James Dyer, Lord Chief Justice of the Court of Common Pleas, upon an indictment for the murder of a man, who dwelt in the same parish with the prisoner. The first witness against him deposed, that, on a certain day mentioned by the witness, in the morning, as he was going through a close, which he particularly described, at some distance from the path, he saw a person lying in a condition that denoted him to be either dead or drunk; that he went to the party, and found him actually dead, two wounds appearing on his breast, and his shirt and clothes much stained with blood; that the wounds appeared to the witness to have been given by the puncture of a fork, or some such instrument, and looking about, he discovered a fork lying near the corpse, which he took up, and observed it to be marked with the initial letters of the prisoner's name; the witness, at the same time, produced the fork in court, which the prisoner owned to be his, and waived asking the witness any questions.

"A second witness deposed, that, on the morning of the day on which the deceased was killed, the witness had arisen early with an intention to go to a neighboring market town, which he named; that as he was standing in the entry of his own dwelling-house, the street door being open, he saw the prisoner come by, dressed in a suit of clothes, the color and fashion of which the witness described; that he (the witness) was prevented from going to market, and that afterwards the first witness brought notice to the town, of the death and wounds of the deceased, and of the prisoner's fork being found near the corpse; that upon this report, the prisoner was apprehended, and carried before a justice of the peace, whom he named and pointed at, he being then present in the court; that he (the witness) followed the prisoner to the justice's house, and attended his examination, during which he observed the exchange of raiment which the prisoner had made since the time when the witness had first seen him in the morning; that at the time of such examination the prisoner was dressed in the same clothes which he had on at the time of the trial, and that on the witness charging him with having changed his clothes, he gave several shuffling answers, and would have denied it; that upon the witness having mentioned this circumstance of the change of dress, the justice granted a warrant to search the prisoner's house for the clothes described by the witness as having been put off since the morning; that the witness attended and assisted at the search, and that after nice inquiry for two hours and upwards, the very clothes which the witness had described were discovered concealed in a straw bed. He then produced the bloody clothes in court, which the prisoner owned to be his clothes, and to have been thrust into the straw bed with an intention to conceal them, on account of their being bloody.

"The prisoner also waived asking the second witness any question.

"A third witness deposed to his having heard the prisoner deliver certain menaces against the deceased, from whence the prosecutor intended to infer a proof of *malice prepense*. In answer to which, the prisoner proposed certain questions to the court, leading to a discovery of the occasion of the menacing expressions deposed to, and from the witness's answer to those questions, it appeared that the deceased had first menaced the prisoner.

"The prisoner being called upon to make his defence, addressed the following narration to the court, as containing all he knew concerning the manner and circumstances of the death of the deceased, viz: 'That he rented a close in the same parish with the deceased, and that the deceased rented another close adjoining to it; that the only way to his own close was through that of the deceased, and that on the day the murder in the indictment was said to be committed, he rose early in the morning, in order to go to work in his close, with his fork in his hand, and passing through the deceased's ground, he observed a man at some distance from the path, lying down as if dead or drunk; that he thought himself bound to see what condition the person was in, and upon getting up to him, he found him at the last extremity, with two wounds in his breast, from which a great deal of blood had issued; that in order to relieve him he raised him up, and with great difficulty set him in his lap; that he told the deceased he was greatly concerned at his unhappy fate, and the more so as there seemed to be too much reason to apprehend that he had been murdered; that he entreated the deceased to discover, if possible; the occasion of his misfortune, assuring him he would use his utmost endeavors to do justice to his sufferings; that the deceased seemed to be sensible of what he said, and in the midst of his agonies attempted,

as he thought, to speak to him, but being seized with a rattling in his throat, after a hard struggle, he gave a dreadful groan, and vomiting a great deal of blood, some of which fell on his (the prisoner's) clothes, he expired in his arms; that the shock he felt on account of the accident was not to be expressed, and the rather as it was well known that there had been a difference between the deceased and himself, on which account he might possibly be suspected of the murder; that he therefore thought it advisable to leave the deceased in the condition he was, and to take no farther notice of the matter; that, in the confusion he was in when he left the place, he took away the deceased's fork, and left his own in the room of it, by the side of the corpse; that being obliged to go to his work, he thought it best to shift his clothes, and that they might not be seen, he confessed that he had hid them in the place where they were found; that it was true he had denied before the justice that he had changed his clothes, being conscious that this was an ugly circumstance that might be urged against him, and being unwilling to be brought into trouble if he could help it; and concluded his story with a solemn declaration that he had related nothing but the truth, without adding or diminishing one tittle, as he should answer it to God Almighty.' Being then called on to produce his witnesses, the prisoner answered with a steady, composed countenance, and resolution of voice, '*He had no witness but God and his own conscience.*'

"The judge then proceeded to deliver his charge, in which he pathetically enlarged on the heinousness of the crime, and laid great stress on the force of the evidence, which, although circumstantial only, he declared he thought to be irresistible, and little inferior to the most positive proof; that the prisoner had indeed cooked up a very plausible story, but if such, or the like allegations, were to be admitted, in a case of this kind, no murderer would ever be brought to justice, such bloody deeds being generally perpetrated in the dark, and with the greatest secrecy; that the present case was exempted, in his opinion, from all possibility of doubt, and that they ought not to hesitate one moment about finding the prisoner guilty.

"The foreman begged of his Lordship, as this was a case of life and death, that the jury might be at liberty to withdraw, and upon this motion an officer was sworn to keep the jury.

"The trial came on the first in the morning, and the judge having sat till nine at night, expecting the return of the jury, at last sent an officer to inquire if they were agreed in their verdict, and to signify to them that his Lordship would wait no longer for them. Some of them returned for answer that eleven of their body had been of the same mind from the first, but that it was their misfortune to have a foreman that proved to be a singular instance of the most inveterate obstinacy, who having taken up a different opinion from them, was unalterably fixed in it. The messenger was no sooner returned, but the complaining members, alarmed at the thought of being kept under confinement all the night, and despairing of bringing their dissenting brother over to their own way of thinking, agreed to accede to his opinion, and having acquainted him with their resolution, they sent an officer to detain his worship a few minutes, and by their foreman brought in the prisoner not guilty. His Lordship could not help expressing the greatest surprise and indignation at this unexpected verdict; and after giving the jury a severe admonition, he refused to record their verdict, and sent them back again, with directions that they should be locked up all night without fire or candle. The whole blame was publicly laid on the foreman by the rest of the members, and they spent the night in loading him with reflections, and bewailing their unhappy fate in being associated with so hardened a wretch; but he remained quite inflexible, constantly declaring he would suffer death rather than change his opinion.

"As soon as his Lordship came into court, the next morning, he sent again to the jury, on which all the eleven members joined in requesting their foreman to go into the court, assuring him they would adhere to their former verdict, whatever was the consequence, and, on being reproached with their former inconstancy, they promised never to desert or recriminate upon their foreman any more. Upon these assurances, they proceeded into court, and again brought in the prisoner not guilty. The judge, unable to conceal his rage at a verdict, which appeared to him in the most iniquitous light, reproached them with the severest censures, and dismissed them with this cutting reflection, *that the blood of the deceased lay at their door.*

"The prisoner, on his part, fell on his knees, and with uplifted eyes and hands, thanked God for his deliverance, and addressing himself to the judge, cried out, '*You see, my Lord, that God and a good conscience are the best of witnesses.*'

"These circumstances made a deep impression on the mind of the judge, and, as soon as he was retired from the court, he entered into a discourse with the high sheriff upon what had passed, and particularly examined him as to his knowledge of this leader of the jury. The answer this gentleman gave his Lordship was, that he had been acquainted with him many years; that he had an estate of his own of about £50 per annum, and that he rented a very considerable farm besides; that he never knew him charged with an ill action, and that he was universally esteemed in his neighborhood.

"For further information his Lordship likewise sent for the minister of the parish, who gave the same favorable account of his parishioner, with this addition, that he was a constant churchman and a devout communicant.

"These accounts rather increased his Lordship's perplexity, from which he could think of no expedient to deliver himself, but by having a conference in private with the only person who could give him satisfaction. This he desired the sheriff to procure, who readily offered his services, and without delay brought about the desired interview.

"Upon the juryman's being introduced to the judge, his Lordship and he retired into a closet, where his Lordship opened his reasons for desiring that visit, making no scruple of acknowledging the uneasiness he was under, and conjuring his visitor frankly to discover his reasons for acquitting the prisoner. The juryman returned for an answer, that he had sufficient reasons to justify his conduct, and that he was neither afraid nor ashamed to reveal them, but that as he had hitherto locked them up in his own breast, and was under no compulsion to disclose them, he expected his Lordship would engage upon his honor, to keep what he was about to unfold as secret as he himself had done; which his Lordship having promised to do, the juryman then proceeded to give his Lordship the following account: That the deceased being titheman of the parish where he (the juryman) lived, he had, the morning of his decease, been in his (the juryman's) grounds amongst his corn, and had done him great injustice, by taking more than his due, and acting otherwise in a most arbitrary manner; that when he complained of this treatment, he had not only been abused with scurrilous language, but that the deceased had likewise struck at him several times with his fork, and had actually wounded him in two places, the scars of which wounds he then showed to his Lordship; that the deceased seeming bent on mischief, and he (the juryman) having no weapon to defend himself, had no other way to preserve his own life but by closing with the deceased, and wrenching the fork out of his hands, which having effected, the deceased attempted to recover the fork, and in the scuffle received the two wounds, which had occasioned his death; that he was inexpressibly concerned at the accident, and especially when the prisoner was taken up on the suspicion of the murder; that the former assizes being but just over, he was unwilling to surrender himself, and to confess the matter, because his farm and affairs would have been ruined by his lying in jail so long; that he was sure to have been acquitted on his trial, for that he had consulted the ablest lawyers upon the case, who had all agreed, that as the deceased had been the aggressor, he would only have been guilty of manslaughter at the most; that it was true he had suffered greatly in his own mind on the prisoner's account, but being well assured that imprisonment would be of less ill consequence to the prisoner than to himself, he had suffered the law to take its course; that in order to render the prisoner's confinement as easy to him as possible, he had given him every kind of assistance, and had wholly supported his family ever since; that in order to get him clear of the charge laid against him, he could think of no other expedient than that of procuring himself to be summoned on the jury, and sit at the head of them, which with great labor and expense he had accomplished, having all along determined in his own breast rather to die himself than suffer any harm to be done to the prisoner.

"His Lordship expressed great satisfaction at this account, and after thanking him for it, and making this further stipulation, that in case his Lordship should survive him, he might then be at liberty to relate this story, that it might be delivered down to posterity, the conference broke up.

"This juryman lived fifteen years afterwards. Chief Justice Dyer inquired after him every year, and happening to survive him, delivered the above relation."

We had occasion, *ante*, note 179, to cite the strong remarks of Livingston, J., in United States v. Jacobson, made (A. D. 1817) shortly after the "Theory of Presumptive Proof" had furnished *our* criminals, as was believed, with a ready magazine of defensive armor. Similar resorts were,

it seems, continued before the able successor of that lamented jurist. Such was the course in Jones' Case. United States C. C., April, 1824, 2 Wheel. Cr. Cas. 451. "A number of cases" (says Thompson, J., in his charge to the jury), "have been cited and read, to show you the dangerous tendency of this kind of proof. It is possible an innocent person may have suffered; but such cases (if any such there were) could be no objection to this kind of evidence. If jurors were to disregard it, there would be an end to the administration of law, and to government. It is the duty of the jury to weigh all the evidence for and against the prisoner; and fair and legal inferences are to be made from facts and circumstances. They are often more satisfactory and conclusive than the testimony of witnesses. Id. 461, 462. Again, per Washington, J. (in 1806), "circumstantial evidence is sufficient, and is often more persuasive than the positive evidence of a witness, who may be mistaken; whereas a concatenation, and a fitness of many circumstances, made out by different witnesses, can seldom be mistaken, or fail to elicit the truth." United States v. Johns, 1 Wash. C. C. Rep. 372. Per Riker, Recorder: "It is to be received with caution; nevertheless, circumstances are often so strong as to amount to satisfactory proof." People v. Smith, N. Y. Gen. Sess. (Jan. term, 1823), 1 Wheel. Cr. Cas. 131, 132. And per Park, J. (in Rex v. Thurtell, for the murder of Weare, Hartford assizes, Jan. 1824, Id. 462, note): "The eye of omniscience can alone see the truth in all cases; circumstantial evidence is there out of the question; but clothed, as we are, with the infirmities of human nature, how are we to get at the truth without a concatenation of circumstances? Though in human judicature, imperfect as it must necessarily be, it sometimes happens, perhaps in the course of one hundred years, that in a few solitary instances, owing to the minute and curious circumstances which sometimes envelope human transactions, error has been committed from a reliance on circumstantial evidence; yet this species of evidence, in the opinion of all those who are most conversant with the administration of justice, and most skilled in judicial proceedings, is much more satisfactory than the testimony of a single individual who swears that he has seen a fact committed."

The magnitude of the danger arising from the fraudulent simulation of circumstances, is greatly lessened by almost inevitable detection. To show this, Mr. Starkie has abridged three remarkable cases. One was where the deceased being strangled, his murderers, to make the case look like a suicide, ran his own sword through his body, and threw him into a ditch, laying his gloves, &c., on the bank; but there was no blood about the place, and the body was discolored and bruised. On drawing out the sword, no blood followed, and the neck was so flexible that the chin could be turned from one shoulder to the other. Another case, was where the murderers cut the throat of a female in bed; and it was distinguished from suicide, by the bloody mark of a *left* hand on the *left* hand of the deceased. Another, was where the deceased's pistol was found lying near him; but on examining the ball by which he had been killed, it was found to be too large for the calibre of his pistol. 3 Stark. Ev. 504, 505.

In People v. How, for the murder of Church (before the O. and T. Alleg. Co. Feb. 1824, Rochester, Circuit Judge, presiding, 1 Wheel. Cr. Cas. 412), it appeared by direct proof, that between 1 and 2 A. M. (30th December, 1823), he was called out of bed at his house by a person pretending to have a letter for him; and as he opened the door was shot dead on the spot. The circumstances from which the prosecution sought to infer that the prisoner was the murderer (the inmates of Church's house not being able to identify any one), were: 1. That the prisoner had not long before frequently complained that Church had defrauded him; 2. Had used threats against Church, to a number of people; and on one occasion had threatened to take his life; 3. Had endeavored to persuade a person to assist him in putting Church out of the way; 4. Had threatened to shoot him; 5. Was seen lurking a few evenings before the murder with his rifle, and endeavoring to conceal it; 6. Left the village of Angelica the same evening, and in time to have gone to Church's and have committed the murder; 7. Had something under his coat exhibiting the appearance of a rifle; 8. His suspicious conduct on the evening of the murder; 9. In the morning, the horse upon which he rode on the evening of the murder was found wet with sweat; 10. His false statements about the horse being sick; 11. The ball with which Church was shot matched one found in the prisoner's rifle box; 12. The lint and horse hair found adhering to the rifle; 13. The patch and tow wadding found in the house of the prisoner near where he lay, &c. On these circumstances, after an able defence, the prisoner was convicted and sentenced. He afterwards confessed his guilt, and was executed.

In these cases of homicide, the precaution of Lord Hale seems to be enough for laying the

foundation of circumstantial evidence: "I would never convict any person of murder or manslaughter unless the fact was proved to be done, or at least the body found dead." 2 Hal. P. C. 290. A departure from this important suggestion, which is now universally acted upon, was a capital error in Miles' Case, cited *supra*, from Phil. Ap. The body being afterwards found, it plainly appeared that the death was accidental, The judge should have stopped the prosecution. In the two illustrative cases stated by Hale (P. C. *ut supra*), one of the persons supposed to have been murdered, was sent on a long sea voyage, and the other had run away. The late remarkable case of Stephen and Jesse Boorn, in Vermont, was in truth of the latter character, though the prisoners actually confessed their imputed guilt. Bennington S. C., Sept. term, 1819, Pamph. Fay & Burt.

The rule that the body *must be found dead*, is adhered to with great strictness in the English courts. Where the father and mother of a bastard child threw it into the dock, and the body was never afterwards found, an acquittal was directed, because the flow of the tide *might have carried out the body* of the living infant. Case cited by Garrow. *arg.* in Hindmarsh's Case, 2 Leach, 571; S. C., Russ. on Cr. 682, note. Though it must be confessed that Hindmarsh's Case itself looks much like a departure from a strictness *absolutely safe*. There a sailor having been seen to throw his captain overboard, it was put to the jury, on the circumstances of a previous scuffle between them, a billet of wood on the deck, and stains of blood on the deck and the prisoner's clothes, whether he had not killed the deceased before he threw him overboard; and *so the dead body might be said to have been found* (*seen*) *by the witness*, within the rule. 2 Leach, 571; S. C., Russ. on Cr. 682.

See farther, on the subject of presumptive evidence in criminal cases generally, 1 Chit. Cr. Law, 563; 4 Bl. Comm. 358, 359.

It is not the nature of our legal reports to aid us much in practically collecting the amount of credibility, either as it is to be sought for in a single witness, in numbers concurring to establish the same fact, or in the relative weight of conflicting witnesses. In general, the utmost those reports can do, is to determine when the question of credibility fairly arises, suggest abstract rules for its determination, and leave their application to the jury, under the direction of the judges at the circuit. In the course of the cases, we may gather that the integrity, ability, number and consistency of witnesses, the conformity of their relations with experience, or with collateral circumstances, and the contrary of all these, &c., may in turn be resorted to as the criteria of credibility. Yet this is mainly for the purpose of the negative conclusion: "To determine the force, or even existence of these criteria, belongs not to the judges sitting over their paper case." Such grounds of decision are too metaphysical to admit of being accurately bodied forth in history, so as to exhibit their exact bearing upon the question; much more so the ingredients of which they may be formed, and the steps by which the supposed grounds may be reached or avoided; and still more so the means, the *modus operandi* by which these latter may have been elicited. The difficulties oftentimes inherent in the nature of the subject, can be obviated in no other way than by confining the examination to the view, the hearing, the manipulations, the tact of counsel, judge and jury, and leaving the latter to pronounce the irrevocable result.

Not that considerable certainty and system has not been introduced by the reports into this department of the law; and probably enough for all the ordinary purposes of investigation. It is therefore the business of the lawyer to consider the adjudged cases as far as they go; and beyond this he can still derive great aid from learned and experienced writers among the profession, some of whom have furnished much valuable instruction, by giving the result of their own observation.

We shall have occasion, under a future head, to speak of matters admissible in evidence as affecting the credit of witnesses; and upon which the jury *may act* as competent. And we shall here content ourselves with a few cases, showing where the weight and effect of oral testimony is settled by the law, where it must be left open for the consideration of the jury; and then proceed to some suggestions for determining the force and effect of evidence touching credibility, after it shall have reached them.

1. Where there is no difficulty in saying that a witness is unimpeached, the facts sworn to by him being uncontradicted, either directly or indirectly, by any other witness, and there is no intrinsic improbability in his relation, a jury cannot disregard his testimony on the ground, arbitrarily assumed, that they are satisfied, from his manner, he is biased in favor of the party calling

him. Newton v. Pope, 1 Cowen's Rep. 109. Were this otherwise, all certainty in the result, from oral testimony, must be given up. One credible witness is sufficient even to convict of a crime; and a useless repetition of witnesses is discountenanced by the law. The judge might, by the civil law, in his discretion, stop the multiplication of witnesses to the same matter. Wood's Civ. Law, 317, cites D. 22, 5, 1, 2; 2 Dom. b. 3, tit. 6, § 3, art. 14. And this is not an unusual exercise of discretion in our own courts. See Beekman v. Bemus, 7 Cowen's Rep. 29. The judge is constantly in the habit of directing a verdict of the jury, which is taken, and entered by the clerk as a matter of course; unless the jury object. Saville v. Lord Farnam, 2 Mann. & Ryl. 216. And see Nichols v. Goldsmith, 7 Wend. 160. And where a cause is thus stopped, and the party in consequence forbears to go on with his evidence, and the jury find against the judge's direction, a new trial will be granted, even though the direction was contrary to the weight of evidence. Dunham v. Baxter, 4 Mass. Rep. 79. Though this was once held otherwise, where the counsel stopped on the mere intimation of the judge. Beekman v. Bemus, *supra. Quere.* Again; per Gaselee, J.: "I was requested to nonsuit the plaintiff. I could not do so upon the plaintiff's case, though, in similar causes, I have occasionally done so after hearing the defendant's case; but when there is any doubt as to the facts, they must be found by the jury." Davis v. Russell, 5 Bing. 354. And per Marcy, J.: "Where the evidence in favor of the plaintiff is so slight, and that which supports the defence so strong, that had the jury found for the plaintiff the court would have felt itself called on to set aside their verdict, it will not send the cause back to the jury, because the judge ordered a nonsuit. Demyer v. Souzer, 6 Wend. 436, 438; Ward v. Vanduzer, 2 Hall's Rep. N. Y. S. C. 162, S. P.

On the other hand, if the fact depend entirely on the testimony of an uncorroborated witness, whose credibility is plainly impeached, the jury are equally bound to disregard his testimony. Where the plaintiff's sole uncorroborated witness (or, in this case, it seems even if he be slightly corroborated) has plainly been guilty of perjury (apparent now on his cross-examination) upon the present or a former trial of the same matter, his testimony must be wholly rejected. Dunlap v. Patterson, 5 Cowen's Rep. 243, 246. So, if his testimony be corruptly false in any particular, the whole must be rejected. State v. Jim, 1 Dev. 508.

And it has been so holden in several instances, where the moral credibility of the witness was plainly impeached; for the citizen has a right to demand that no issue should be decided against him without the testimony of at least one credible witness. Per Daggett, J, in Newell v. Wright, 8 Conn. Rep. 323. Thus where, by the witness's own confession, he was engaged with a gang of counterfeiters and in other criminal practices, and his general character was infamous; held, that a verdict founded on his testimony could not stand. Allen v. Young, 6 Monroe, 136. So if it appear he has been convicted of felony, by the record of his own admission. Per Colden, Mayor, in Orr's Case, 5 Cit. H. Rec. 181; per Radcliff, Mayor, in Brown and Ray's Cases, 2 Id. 38. And so, though he may have been pardoned (and thus rendered competent), he is not credible unless corroborated by others. Per Thompson, U. S. Judge, Circuit Court, April, 1824, in United States v. Jones, 2 Wheel. Cr. Cas. 451. Yet, though he were concerned in the very felony of which he testifies, if he be corroborated, the jury may believe him. Per Radcliff, Mayor, in Ferguson's Case, 1 C. H. Rec. 65; per Riker, Recorder, in M'Niff's Case, Id. 8, 10. Again; where the maker of a note, which was indorsed for his accommodation, being released, swore that the note was indorsed (and a receipt to that effect given by the indorsee) as collateral security, but in the derangement of his affairs, he had lost the receipt; Daggett, J., doubted here whether the fact could be taken as proved by a credible witness. But when, in addition, it appeared that he had repeatedly contradicted his now statement, in letters written by him and in conversation, and his character was besides slightly impeached, the court granted a new trial, although the verdict was in favor of the witness's credibility. Newell v. Wright, 8 Conn. Rep. 319, 324. And, in another case, per Story, J. (on a question whether goods were legally captured as prize or piratically taken by citizens of the United States), "If the cause stood solely upon the testimony of the witnesses who have been examined on behalf of the libelants" (those who claimed that the goods had been illegally taken), "we should have great hesitation in admitting the conclusions which have been drawn from it. The witnesses indeed speak directly and uniformly, either to the point of illegal equipment or illegal augmentation of force within our ports. But their testimony is much shaken by the manifest contradictions which it involves, and by declarations of facts, the falsity of which was entirely within their knowledge,

and has been completely established in proof. It has been said that if witnesses concur in proof of a material fact, they ought to be believed in respect to that fact, whatever may be the other contradictions in their testimony. That position may be true under circumstances: but it is a doctrine which can be received only under many qualifications, and with great caution. If the circumstances respecting which the testimony is discordant be immaterial and of such a nature that mistakes may easily exist, and be accounted for in a manner consistent with the utmost good faith and probability, there is much reason for indulging the belief that the discrepancies arise from the infirmity of the human mind, rather than from deliberate error. But where the party speaks to a fact in respect to which he cannot be presumed liable to mistake, as in relation to the country of his birth, or his being in a vessel on a particular voyage, or living in a particular place, if the fact turn out otherwise, it is extremely difficult to exempt him from the charge of deliberate falsehood; and courts of justice, under such circumstances, are bound, upon principles of law, and morality and justice, to apply the maxim, *falsus in uno, falsus in omnibus.*" The Santissima Trinidad, 7 Wheat. 283, 338, 339.

And so, though the discrepancy arise from any innocent cause, other than an infirmity of the mind—as the difference of observation, the nature of negative and positive testimony—the declarations of witnesses should be reconciled, if possible; and if the jury find against its obvious weight when tested by these principles, the verdict will be set aside. Thus, where three witnesses testified explicitly to a set of words spoken in a ball room, where there was a noise from dancing and the violin, and a controversy, followed by confusion about the same time, though eleven witnesses who were in the room testified that they did not hear any such words, and that, in their opinion, they should have heard them, if uttered—yet, the jury finding against the speaking, a new trial was granted. Johnson v. Scribner, 6 Conn. Rep. 185. The court held the affirmative testimony decisively entitled to the greater weight; and that the testimony of the eleven was reconcilable upon the ground of wanting opportunity or attention. Id.

The testimony of witnesses apparently inconsistent is always to be so construed as, if possible, to exempt them from the imputation of perjury. Affirmative testimony is, from its nature, generally of greater weight, and better entitled to weight than negative; and the want of means or opportunity in the witness of knowing the matters in controversy, his actual inattention, the absence of circumstances likely to excite his attention, or the existence of circumstances likely to divert it, are considerations which greatly diminish the effect of negative testimony. Johnson v. Scribner, 6 Conn. Rep. 185. And see Woodcock v. Bennet, 1 Cowen, 711. Yet negative may equal positive testimony, and put us to consider the credibility of witnesses on other grounds; as if two listen with equal attention, and yet contradict each other as to the fact of the words being spoken. Id. 188, 189, per Hosmer, C. J. So you may prove that a man was not at a particular place on a certain day, by showing that he was at another, so great a distance as to render it impossible to be at both. Dranguet v. Prudhomme, 3 Miller's Lou. Rep. 74.

So, where S. swore positively that an account was presented by him to L., who swore that he did not *recollect* or *believe* that it was, yet credit was given to S. The latter also swore that the defendant made a promise, on such a day, within the state. It being shown he was out of the state on that day, yet the testimony of S. was maintained as being a mere mistake of the time, which may well be; and the promise was also proved by another. Flood v. Thomas, 5 Mart. Lou. Rep. (N. S.) 560. A mistake in memory or judgment in one part does not discredit other parts of a witness's relation, farther than it may go to his general want of adequate power of conception or memory. Per Henderson, J., in State v. Jim, 1 Dev. 510.

So a wide distinction should be made between witnesses who have an opportunity of knowing a fact (as that a writing has not been altered) and those who express a mere opinion from its appearance. The testimony of one of the former is worth a dozen of the latter. Per Sutherland, J., in Malin v. Malin, 1 Wend. 623, 659. And the opinion or belief of a witness is sometimes to be entirely rejected, as founded on insufficient premises. Thus, where a witness said one tract of land bounded upon another, but grounded himself on a survey, the particulars of which he did not pretend to give, this shall be taken as mere general or vague belief or opinion. Jackson ex dem. The People v. Wendell, 5 Wend. 142. In a late case, where fifteen witnesses swore that a revolutionary soldier was alive and disbanded at the close of the war, and but one that he fell in battle during the war, the testimony of the latter being confirmed by various military documents, the balloting-book omitting his name, it being entered among the dead, where it was also men-

tioned that letters patent were delivered to his administrator, the same fact of his death appearing on muster rolls, pay rolls, &c., the jury found according to the testimony of the single witness thus confirmed; and the Supreme Court expressed their satisfaction with the verdict. Jackson ex dem. Fowler v. Loomis, 12 Wend. 27. In estimates of the expense of raising a number of young slaves in Louisiana, a majority of the witnesses placed it at thirty dollars per annum for each; and one at fifteen dollars, which the court adopted as probably the fairest estimate under the circumstances. They remark that "numeration is certainly the easiest mode by which judges can arrive at conclusions on matters of fact supported alone by the testimony of witnesses; but the law of evidence requires that their testimony should be weighed by probabilities, and its truth be rather ascertained in this manner than by counting numbers;" and the court governed themselves much by the known cheapness of the food and clothing in the climate of that state. Kemp v. Wamack, 2 Miller's Lou. Rep. 272.

2. Yet there is often no certain standard by which the credit of conflicting witnesses can be ascertained. Different courts and juries would entertain different opinions, and each must judge for themselves. The People v. Superior Court of the City of New York, 5 Wend. 126. In such a case, generally, the whole is referable to the jury, who determine the weight due to each. Doe ex dem. Jones v. Fulgham, 2 Murph. 364, 367, 368. And this, even though the discrepancy be between the plaintiff's own witnesses. Thus, upon a question of variance, on trying an indictment for forging a note not produced, one of the witnesses for the prosecution swore that it was subscribed *Henry* (as charged), and another, *H.* (variant); held, it should be put to the jury, who found the former witness correct. Per Ewing, Ch. J.. "An indictment does not fall because one witness differs from another in points more or less material, or even in some directly contradicts him." State v. Potts, 4 Halst. 26, 31. *A fortiori*, where the discrepancy is only partial. For, where the plaintiff called a witness who proved two several facts, one of which was for the plaintiff—but the other would have defeated him—he was allowed to call other witnesses to disprove the latter fact; and yet have the credit of his first witness go to the jury on the fact which he wished to maintain by him. Bradley v. Ricardo, 8 Bing. 57. So where the sole witness to the defendant's handwriting prevaricated, and swore negatively and affirmatively as to his knowledge. Beauchamp v. Cash, Dowl. & Ryl. N. P. Cas. 3.

And so, in general, jurors are the unfettered, illimitable and final judges, whenever a question of credibility fairly arises in respect to one or more witnesses, whether the latter be concurring or conflicting. Heister v. Lynch, 1 Yeates, 108; Fehl v. Goods, 2 Binn. 495; Winchell v. Latham, 6 Cowen's Rep. 682; Ackley v. Kellogg, 8 Cowen's Rep. 223; Sprague v. Mitchell, 2 Chit. Rep. 271; Fowler v. The Ætna Fire Ins. Comp. of New York, 7 Wend. 270; Bucklin v. Thompson, 1 J. J. Marsh. 223, 227; Jackson ex dem. Fowler v. Loomis, 12 Wend. 27.

Where the matter of credibility is thus left open for the consideration of the jury, no certain rule can be laid down for the conduct of their understanding. It is well settled that they cannot act on their own private knowledge of any fact; for then it could not be known whether the verdict be for or against the evidence. 3 Stark. Ev. 449; 3 Bl. Comm. 375. The contrary would put an end to the granting of new trials; and the very fact that a man be prepossessed, is good cause of challenge. If he know anything material, he ought to acquaint the court of this; and be sworn as a witness. Said in Smith ex dem. Dormer v. Parkhurst, Andr. 315, 321. He is to examine and appreciate the credibility of witnesses, according to his best knowledge and observation in the light of experience and the laws of human action. In this he many times has to do with various mental faculties, especially memory and attention; and various foibles, frailties and vices as contrasted with circumspection, candor and moral worth. Several writers have furnished us with valuable illustrations upon these heads, which cannot be too much studied. The powers of attention and memory, the two cardinal faculties of a witness's mind, are illustrated by our author in a quotation from the bishop of Landaff, applicable to certain slight discrepancies among the several evangelical writers, by which the credit of their histories is rather fortified than impaired; while Mr. Starkie (3 Stark. Ev. 468) has favored us with a like illustration from Paley's Evidences of Christianity. On the other hand, while, as we shall see hereafter, Mr. Evans gives full force to the general argument, he cautions us against its too common and indiscriminate application. To excite due caution against implicit reliance on the powers of memory, when exerted upon certain subjects, Mr. Starkie (Id. 462, note) tells us of a learned judge, who rose fresh from the evidence, and in summing up, recited a witness's testimony

against a prisoner, on a charge of forgery, as imputing to him the words "I *am* the drawer, the acceptor and the indorser of the bills;" whereas the true words were, "I *know* the drawer," &c. The error was corrected; but the learned author remarks, "had the witness made the same mistake, the consequences might have been fatal."

Reading the above note suggested an instance to the editor, which may not be without its use. One Caldwell being on his trial for perjury, in having denied the existence of a slightly material circumstance against one Baker, who was on his trial for murder, stood already contradicted by several witnesses, who swore to the circumstance, and to Caldwell's knowledge of it. The circumstance having transpired some fourteen or fifteen years before, gave room to suppose that he might have forgotten it. Had the jury believed this, as they most likely would have done, his acquittal was certain; and this the editor (who presided at the trial) thought must be the result. But Caldwell had recently been examined on a charge of participating in the murder, before three magistrates, and one of these, Mr. James Newton, deposed that, on that occasion, Caldwell had admitted his recollection of the circumstance. After the cause had been summed up by counsel, and just as the editor was rising to charge the jury, under the strong impression that such evidence would lead to an inference of corrupt suppression by Caldwell, another of the examining magistrates, Mr. Joseph A. Sweet, gratuitously came to the stand, and testified that Caldwell had denied his recollection before the magistrates in the same terms as at the trial. The third, Mr. Anson Thompson, being called, agreed in recollection with Mr. Sweet. The prisoner, as the editor was afterwards informed, had before this given himself up as the hopeless victim of misrecollection. But he was acquitted. Saratoga Oyer and Terminer, Nov. 1831, Cowen, C. Judge, presiding.

The anxiety of legal writers to admonish the judicial inquirer, of the occasional frailty or perversion of memory, will be found most laudable, if we advert to the immense tracts of investigation where oral testimony must be employed as the instrument; and that, too, in examining those very subjects where it is most liable to err; the least open to correction when mistaken, or detection when false. Verbal contracts, admissions, declarations, with their endless diversity of application; oral slander and perjury, which occupy so much time in our courts of justice, depend almost entirely upon the capacity of witnesses to remember words and phrases according to their just import.

Upon these heads, however, and every other subject of inquiry conducted by the lights of oral testimony, we ought not to suppress those unperverted principles implanted in our nature to regulate the degree of reliance upon this species of evidence. Otherwise, judicial sagacity would degenerate into distrust and incredulity. Confidence should generally be extended to human testimony. Rejection and qualification are exceptions. "The wise and beneficent Author of nature, who intended that we should be social creatures, and that we should receive the greatest and most important part of our knowledge, by the information of others, hath, for this purpose, implanted in our natures two principles that tally with each other. The first of these principles is a propensity to speak truth, and to use the signs of language so as to convey our real sentiments. This principle has a powerful operation even in the greatest liars; for where they lie once, they speak truth a hundred times. Truth is always uppermost, and is the natural issue of the mind. It requires no art or training, no inducement or temptation; but only that we yield to natural impulse. Lying, on the contrary, is doing violence to our nature; and is never practiced, even by the worst men, without some temptation. Speaking truth is like using our natural food, which we would do from appetite, although it answered no end; but lying is like taking physic, which is nauseous to the taste, and which no man takes but for some end which he cannot otherwise attain. There may, indeed, be temptations to falsehood, which would be too strong for the natural principles of veracity unaided by the principles of honor and virtue; but where there is no such temptation, we speak truth by instinct. By this instinct, a real connection is formed between our words and our thoughts; and thereby the former become fit to be signs of the latter, which they could not otherwise be. And although this connection is broken in every instance of lying and equivocation, yet these instances being comparatively few, the authority of human testimony is only weakened by them; but not destroyed.

Another original principle implanted in us by the Supreme Being, is a disposition to confide in the veracity of others; and to believe what they tell us. This is the counterpart to the former; and as that may be called the *principle of veracity*, we shall, for the want of a more proper name,

call this the *principle of credulity.* It is evident that, in matter of testimony, the balance of human judgment is by nature inclined to the side of belief; and turns to that side of itself, where there is nothing put into the opposite scale. If it were not so, no proposition that is uttered in discourse would be believed until it was examined and tried by reason; and most men would be unable to find reasons for believing the thousandth part of what is told them. Such distrust and incredulity would deprive us of the greatest benefits of society, and place us in a worse condition than that of savages. And, as in many instances, reason, in her greatest maturity, borrows aid from testimony: so in others, she mutually gives aid to it, and strengthens its authority. For as we find good reason to reject testimony in some cases, so in others we find good reason to rely upon it with perfect security even in our most important concerns. The character, the number, and the disinterestedness of witnesses, the impossibility of collusion, and the incredibility of their concurring in their testimony without collusion, may give an irresistible strength to testimony, compared to which its native and intrinsic authority is very inconsiderable." Dr. Reid's Inquiry into the Human Mind, § 24.

"All regard to testimony supposes the general proposition, that witnesses, not having any motives for asserting what is false or suppressing what is true, having had an adequate opportunity of observing the subject to which they depose, having actually observed it with adequate attention, and having a distinct and perfect memory with respect to it, relate what they have seen or heard, with accuracy and fidelity, and the veracity of testimony, given by persons fully answering this description, is received and acted upon as a sufficient test of moral and judicial certainty. If a person, wholly indifferent to the event of a cause, should depose that within the preceding hour, he had seen one of the parties with whom he was perfectly well acquainted, execute a release, the fact of such execution would be admitted as a certain truth.

"But in judicial inquiries, recourse must often necessarily be had to testimony, not completely answering the description which has been given, or with respect to which the application of that description may not be fully ascertained; and the scale of testimony descends from that high assurance, which is for all moral purposes equivalent to certainty, through every gradation of inferior testimony, to that which leaves the judgment completely in suspense, and from thence, through all the degrees between the slightest preponderance on the side of incredulity, to the extreme of self-convicted falsehood.

"If a perfect and absolute assurance that a witness completely answered the above description, were in every case to be regarded as an essential preliminary to the credence of his evidence, the incredulity would, in numerous instances, be in opposition to the actual truth of the thing related. Such an incredulity would be the effect and sign of imprudence, in the ordinary intercourse of life; in the administration of law, it would frequently occasion a failure of right, and consequently merit the appellation of injustice.

"Testimony therefore will, for either purpose, be in general regarded as accurate and true, unless there is reason, from its own inherent qualities, or from extrinsic circumstances, for forming an opposite conclusion, or at least, for suspending the judgment.

"If there is an adequate opportunity for arriving at certainty, or obtaining further information respecting the truth of evidence, upon which the judgment is divided, the mind will require the satisfaction of which the subject is susceptible, either in confirmation of the fact asserted, or in contradiction of it, and the satisfaction expected will be in proportion to the importance of the object, to the degree of doubt attending the testimony afforded, and the nature of the opportunities for dispelling, or diminishing it.

"But if there is no further opportunity of acquiring an absolute knowledge of the truth, consistent with the purpose for which opinion must become the motive of action, the mind must decide according to the extent of its ability, upon the testimony actually before it, comparing the general reason for admitting, with the particular reasons for rejecting it, and these, with other particular reasons in support of it, and forming the judgment according to the due preponderance, without permitting the effect of that preponderance to be destroyed by the inferior reasons, which, previous to the moment of decision, may appear to be opposed to it.

"This preponderance may admit of degrees, and the justness of the decision will depend upon the degree of preponderance, compared to the degree of importance attached to the decision.

"Where the rejection of a fact as false, which eventually may be true, might be attended with material detriment, but the reception of it as true, if eventually it might be false, would be per-

fectly insignificant, the conduct will not only be influenced by the existence of a slight preponderance in favor of the assertion, but in opposition to a slight, or according to the increasing magnitude of the object, even a great preponderance against it; or reversing the supposition, where the reception as true, of what may be eventually false, would be materially detrimental, but the rejection as false, of what might eventually be true, would be perfectly insignificant; the abstract degrees of preponderance in support of the fact, would be less regarded than the danger of the conclusion. In matters of mere speculation, the decision is immaterial in matters of practice essentially otherwise.

"To adopt the conclusion which is supported by the strongest evidence, is in matters of personal concern, the indication of wisdom and prudence; in deciding upon the fate or interest of others, to exert the strongest and most patient efforts of the mind, for the purpose of attaining a similar conclusion, is the indispensable attribute of justice.

"In the intercourse of life, and in the administration of justice, the general assent to the veracity of positive testimony will be a correct rule of conduct, which in most cases will be confirmed by subsequent observation and experience. But as this general rule is, in a great many particular cases, fallacious, as the application of it is frequently perverted by deception and error, it equally becomes the province of prudence, and of justice, to exert a proper and adequate caution for opposing and counteracting these exceptions, without permitting the excess of caution to defeat the benefit of the rule.

"In some cases the spirit of caution is adopted by the law itself, which adverting to general causes that are deemed to have a tendency unfavorable to the adequate manifestation of truth, prescribes rules of authenticity wholly excluding the admission of less authentic testimony, regulates the number of witnesses which shall be required for the establishment of a disputable fact, or excludes the testimony of those whose interest or wishes may have an influence upon their relation, in opposition to the natural operation of sincerity. By this exclusion truth is often frustrated, as in the general reception of evidence it is often disguised and perverted; but, in both cases, the general principle of conduct is to provide for the greatest promotion and preservation of it upon the whole. The degrees of precaution vary in different communities, according to the habits of the people, or the spirit and disposition of the individual law. But in all communities there is a limit to the principle of restriction, and where that ends, the principle of precaution must begin, confiding to the discretion and prudence of the judge, the exercise of that discrimination which can be no further regulated by the mandatory provision of the law; and it may not be unreasonable to observe, that where the latitude of the law is most extensive in the admission of evidence, it becomes requisite that the caution and circumspection of the judge shall be proportionately extensive in the reception of it; as being the only preservative against those abuses which, in a more rigid system, are prevented under similar circumstances by exclusion.

"The combining a proper confidence, then, with a proper caution at the time of writing the sentence, is the ground or object of judicial duty.

"In adverting to the description of a witness whose testimony was regarded as equivalent to moral certainty, I, in the first place, supposed him to be wholly indifferent to the event; but it very frequently occurs that those who are most interested in the event, have the most accurate knowledge of the subject. The testimony of these, it is the general policy of almost every system of jurisprudence to exclude. Others, intimately connected with the interested party and beyond the reach of exclusion, whilst they may be able materially to illustrate the subject of inquiry, cannot but entertain a wish upon the result; and even those who are originally indifferent, will, in most cases, have an inclination in support of the cause for which they are produced. This is peculiarly the case where the party or his attorney and the witnesses have traveled together to an assize, or are living together in an assize town; or even when the witnesses themselves are together, as is commonly the case, for some time previous to the trial; the cause in which they are to be examined becomes the natural and usual topic of their conversation; and the success of it, generally speaking, cannot be a matter of absolute indifference. Where the wishes are anxiously engaged in favor of an event, the opinions are seldom wholly uninfluenced. A philosopher sees in a stronger form of view the facts which favor his system; an advocate, though avowedly arguing not upon his own impressions, but upon the grounds most favorable to his client, becomes really impressed with the truth of the proposition which he is engaged to sustain; and a witness, under the circumstances above alluded to, sees the truth

through the medium of his wishes. It is the regular habit of the bar to exclude the witnesses from their consultations, in order to prevent their testimony being biased by the views which they might receive of the bearings of the cause; but the other conversations in which they are engaged present that object to their mind. Some practicers, to insure the success of their cause; interrogate the witnesses again and again, without any sinister motive, and merely with a wish to assist the accuracy of the examination. Others, more judicious, having once by careful investigation informed themselves of the truth, trust to the natural and unprepared effusion of it. It is very easy to lay down a general maxim, that a witness ought to divest himself even of involuntary wishes, that he ought, in the manner as well the substance of his narrative, to adhere to a succinct, impartial account of the truth; but still the infirmities of human nature will have their operation, and a witness, in the short period allotted to his examination, will, in many cases, with a mind unaffected by the slightest intention of a willful deviation from veracity, give an aspect to his relations derived from the previous influence of his wishes upon his opinion; and if this circumstance will occur, as in numerous instances it unquestionably will, with respect to persons who are duly sensible of the nature of their obligation, how much more extensive will be the influence of similar considerations, with respect to those who are indifferent to it? The inference which I wish to deduce from the preceding observations, is the propriety of receiving, with adequate circumspection, that part of the testimony which may probably be influenced by such considerations as have been alluded to, without unduly discrediting the substantial parts of the relation, which may be entirely free from any rational objection. I am perfectly aware of the general adoption of the maxim, that if the witness willfully deviates from truth in any particular, the whole credit of his testimony is destroyed, and shall have occasion more particularly to allude to it; but the true application of the maxim is only referable to those deviations which result from the actual depravity of the mind, and does not extend to its involuntary infirmities.

"To illustrate my general idea by the particular application of it: Two witnesses may give a correct narrative of the same event, so far as their moral veracity is concerned, yet leave a very different impression upon the minds of their hearers; the mere manner of narration with respect to looks, tones and gestures, will produce the difference. The friend of an injured party will describe, with feeling and interest, the subject of his complaint; his previous sentiments give the subject an exaggerated representation to his own mind, which he communicates to his hearers; the friend of his assailant sees, in a striking point of view, the provocation which to the other had appeared trivial and insignificant, and the conduct occasioned by it will appear in very mitigated colors; and from a mere indifference in the mode of his relation, will produce a precisely opposite impression; while an unconnected bystander will give a representation perfectly accordant with the others in its general substance, but presenting the correct medium between the excess of one and the extenuation of the other. His own narration will receive a degree of vivacity or sluggishness from his constitutional character, but will not be influenced by those considerations which actuate the others. Wherever, therefore, the judgment and opinion may be involuntarily and unconsciously affected by the habits or relations of the witness, a suspicion may be reasonably entertained of the justness of his narration, so far as the operation of these causes may be imputed to him, without invalidating the general credit in his veracity.

"To this observation may be added, the readiness which appears in adducing what is favorable to the party on whose behalf the witness feels an interest, and a reluctance in disclosing what is adverse to him. I admit the duty of a perfect equality and indifference, but I conceive the deviations from that duty are referable, in many cases, to the sources which I have already alluded to. A witness is placed in a situation to which he is utterly unaccustomed; he cannot possess the presence of mind and the composure of an indifferent spectator, or control at pleasure the tendencies of his disposition; the difference of his manner, with respect to the two parts of a subject, will properly exercise the discrimination of those who are to decide upon his testimony; they will endeavor to correct the effect of his partiality, but will not urge the charge of falsehood and prevarication, beyond the designed and willful dereliction of integrity. I trust that I have expressed myself with sufficient distinctness, to prevent its being supposed that I am becoming the advocate for intentional misrepresentation, or deliberate suppression; I wish only to inculcate the principle of preventing the natural infirmities of the character having a more extensive influence upon the credit of testimony, than they may reasonably be supposed to have upon its truth.

"There are some particular subjects, in which the suspicion of involuntary bias in a witness will be stronger than in others. It will evidently be least in plain matters of fact, as whether a carriage was on the right or left side of the road. It will be strongest when it relates to manner, as whether the driver, who is himself the witness, was conducting himself properly or otherwise. The evidence of conversation and expressions ought to be received with very considerable circumspection, so far as anything depends upon its circumstantial accuracy. It very rarely occurs that two persons will relate the same conversation in the same manner. The particular phraseology of the relator will always blend itself with the relation; and nothing is more common than for the impression of conversation to be influenced by the previous disposition of the parties to it or the hearers of it. The accounts which are published in the newspapers, of the proceedings in Parliament or courts of justice on the day preceding, vary considerably from each other, not merely in the taking a more or less comprehensive view of particular parts, but also in the substance of the statement relative to the same particulars, and even in the order of the speakers; and the general correctness of the representation is very seldom assented to by those who, from having been present, have an opportunity of confirming or contradicting it.

"Nothing is more natural than to apply what we hear according to what we wish, to construe an expression of civility as an offer of service—the recommendation of a customer as a promise for the payment of his account. The Statute of Frauds has interposed its authority, to prevent the effect of this misconception in several cases particularly enumerated. The principle of that statute may be judiciously applied to the effect of evidence, in several cases without the limit of its provisions, but subject to the mischief against which it was intended as a remedy; evidence of promises and acknowledgments is almost always given by persons who are in a situation which prevents their being absolutely indifferent respecting the effect, and who will, in many cases, unconsciously give a turn to the conversations which they relate, by no means accordant with the impressions which the speakers intended to convey. To receive the representations of these persons as literally correct, to consider the expressions which they relate as having the same authentic certainty as a written document, will therefore, in many cases, lead to a conclusion repugnant to the truth, and consequently the attention given to such evidence will, according to the just principles of ratiocination, be much less than that which is due to the plain affirmative or negative of an unequivocal matter of fact.

"There is one kind of testimony to which the preceding observation emphatically applies, and which is often subject to the additional imputation of an intentional want of fairness of conduct. I mean the acknowledgments which are obtained by persons connected with the law, on behalf of the parties for whom they are engaged. Such acknowledgments only deserve a full attention, when it appears that they were made with perfect freedom, and with perfect plainness. The disingenuous artifices which are made use of to entrap a person into expressions to be used in evidence against him—the eagerness to make a direct and positive application of an ambiguous expression—to strain into a promise or acknowledgment what was never intended to convey that impression to the mind—cannot be too narrowly watched or too strongly discountenanced. Nothing is more calculated to excite an unfavorable opinion, than to see an attorney stand up to support his falling cause by supplying all deficiencies of proof from some supposed conversation with the adverse party; and, according to the apt metaphor commonly applied to the subject, pinning the basket. A reputable attorney will be cautious of engaging in conversation with the adverse party except in the presence of his own professional adviser, and will be still more cautious in avoiding any unfair representation of it; but, however strongly the general respectability of the profession may inculcate the propriety of this practice, experience evinces that there are many particular exceptions; and the caution which is advisable with respect to crediting the testimony of persons, whose situation is, in some degree, a pledge for the propriety of their conduct, becomes requisite, in a still higher degree, with respect to the inferior officers of the law—a set of persons among whom there are many instances of probity of character and propriety of conduct, but who, in general, find their greatest interest in their adroitness to serve the parties by whom they are engaged. It would tend greatly to advance the credit of all evidence given of such acknowledgments, if they were immediately taken down in writing and communicated to the party making them; and, in case any dissent was expressed or explanation offered, that should be added to the minute; in short, it is desirable that an accurate memorial should be made of the transaction, and of the demeanor of the party, before the impression of the memory

could be perverted; and, what is still more important, before the testimony could be influenced by a view of its materiality, derived from the subsequent aspect of the cause. The preceding observations may be extended, in a remarkable degree, to the inferior retainers of police, who generally feel a strong interest in the conviction of persons charged with criminal offences, and are apt to suppose their own reputation for assiduity and activity connected with that event. It would conduce to the purity of justice in this respect, if no accounts of the declarations of prisoners to these persons were received upon a trial, which were not stated and reduced into writing upon the examination of the prisoner before the magistrate, and the prisoner's declaration respecting which, at that time, was also carefully recorded. The magistrates should likewise be very particular in stating, on the examination, the circumstances and manner in which the declaration was obtained, and not be satisfied with the common-place questions, of whether there were any threats or promises; since the legal objection is in terms often carefully avoided, while the spirit and principle of it have their full operation and effect. Courts of justice generally, with great propriety, direct a jury to lay out of their mind any representation of officers of police, respecting the alarm or agitation manifested by a person on being charged with any offence, a subject which is often very eagerly presented to them; correctly observing, that innocence may not be less agitated by an unexpected charge than criminality alarmed by detection. The evidence of persons who depose to their scientific knowledge of any matters in dispute, is, in many cases, subject to be influenced by their wishes in favor of the party adducing them. It has been the observation of a great advocate, now advanced to a high judicial situation, respecting the conflicting testimony of surveyors produced by the opposite parties, that these persons were only advocates upon oath. The course of practice certainly furnishes many instances of the truth and propriety of the observation; the proper correction of this inconvenience is, to apply the attention rather to the conviction which these advocates produce upon the mind, by the justice and consistency of their arguments, than to give their testimony the authority which is due to an indifferent relation of an obvious matter of fact.

"The above observations will sufficiently indicate the principle which I have endeavored to establish, in favor of a distinction between the caution which should be applied in the reception of evidence, from persons who may naturally be supposed to be not indifferent in the event of an inquiry, and the absolute discredit of their testimony.

"The opportunity of observation, the accuracy with which that observation has been conducted, and the fidelity of memory with which it is related, are also circumstances which should naturally form a material ingredient in the credit which it should receive. It is very certain, that the mind is often deceived by its impressions upon these subjects; and that upon examination and inquiry, its most firm opinions are found erroneous; for the truth of which position the most satisfactery test will be afforded, by referring each individual to the evidence of his own experience. The well-known anecdote of Sir Walter Raleigh, who suppressed the second volume of his History of the World, upon finding himself deceived in the nature of an occurrence, of which he had supposed that he had an accurate knowledge from his own observation, is a constant lesson as to the propriety of a minute examination into the accuracy which the mind of a person possesses respecting the subject of his relation; but it is a more important caution upon the necessity of distinguishing between misconception and misrepresentation; and against rejecting the general testimony, as unworthy of reception, from its want of veracity, when the only imputation to which it is justly subject, is a mistaken conception respecting some incidental particular. The discordancy of witnesses upon the same fact, is therefore very frequently ascribed to a mere difference of observation or memory. The immediate attention of one person being directed to one part of a subject, and another to another, a different impression is left upon their minds; each by the frame and course of his attention, will have a less lively idea, and a less retentive memory, and consequently will be, in a greater degree, subject to the influence of mistake, with respect to that part of the subject which has had the smaller portion of his regard, than with respect to the other, upon which his mind has been more immediately occupied. A greater or a less degree of attention will also be pointed to the subject itself, without reference to the distinction between the different parts of it, according to the mind being in other respects free or engaged, according to habit, inclination, or an infinite variety of other causes being calculated, or otherwise to create an interest in the occurrence. Hence will result a difference of narrative, which, so far as it is resolvable into this cause, will rather be an indication of veracity, than in-

duce a suspicion of falsehood. The distinction between the inconsistency that results from representations having no solid foundation in truth, and which therefore accompanies every part of a narrative, not included in the previous arrangement, and the variation which may be ascribed to a difference in the impressions of the mind respecting a real occurrence, often calls for the most judicious discrimination. But though a discordancy referable to the causes which have been mentioned, is certainly no indication of falsehood, it is sometimes too strongly relied upon as a manifestation of truth, and as demonstrating that there has been no previous concert; whereas, it is almost impossible for a previous concert to embrace every incidental circumstance, which may be introduced into the examination as a test of veracity. I conceive that this discrepancy is, in general, only a negative quality, leaving the testimony of which it forms a part, to stand or fall by its merits in other particulars. I have heard of a mode sometimes adopted (and the mention of which is not so much calculated to promote the practice, as to defeat it), of giving to a mere fabrication all the circumstances which will insure an apparent veracity, by the consistency of the relation, without giving it the appearance of a concerted narrative. It is said, that in order to prove an *alibi* (a defence the most conclusive, if true, but the most readily counterfeited), several associates of the prisoner meet together under circumstances in which they mean to state the prisoner to have been, the prisoner being represented by another person; nothing is more easy to fix, in concert, than the time to which the relation shall refer; and the actual occurrences at this rehearsal form the basis of the consistency upon the trial. The person of the prisoner, and the date of the event, are the only subjects misrepresented; and every other circumstance being founded upon truth; will equally stand the test of examination, as a relation of the most substantial veracity.

"I have already alluded to circumstances, with respect to which the impression of the mind is materially influenced by the previous disposition, referring particularly to the report of conversations. The observations which were then made will, in many cases, be applicable, where the cause alluded to has not any operation, and where the want of accuracy may result from causes wholly unconnected with any bias upon the testimony; of which the principal is the negative cause of a want of adequate attention or perception. How generally does it occur that we mistake, at that very instant, the meaning intended to be conveyed, by expressions directed immediately to ourselves, and of how many private animosities is this circumstance the cause? How great, then, is the caution which ought to be applied to the relation of particular expressions, to which the hearers, at the time of their occurrence, were in no wise interested to attend, or which, from their situation, they were liable to misconceive; and how slightly does an inaccuracy, or discordancy in this particular, affect the general credit of their testimony? An instance lately occurred of a person who deposed, that he heard a gentleman of high character and respectability, the second in a duel, which proved unhappily fatal, say to his principal, in returning from the field, *By God it does me good!* This was adduced as the indication of a mind peculiarly malignant. The testimony did not receive credit; but the gentleman alluded to, upon revolving in his mind what could have been the occasion of it, recollected having said, with reference to the state of his health, and some circumstances connected with the occurrence of the morning—*This will do me no good.* Without affirming the authenticity of this latter fact, nothing can be more manifest than the probability of the explanation, while, on the other hand, nothing could have been more improbable, than an intentional falsehood on the part of the witness. And if particular expressions are so liable to misconception, in the moment of their occurrence, it is clear that the danger of unintentional misrepresentation is greatly increased by the imperfection of the memory.

"Another subject upon which many instances of mistake occur, both in the course of private experience and of judicial inquiry, is the identity of persons. Mistakes upon this subject not unfrequently occur, with respect to persons with whom we are previously familiar, but with whom we had no immediate communication upon the occasion related. The mere impression of personal resemblance, in those of whom we had no previous knowledge, is evidently much more fallacious. Some years ago a person was tried at the Old Bailey for a robbery, and his person was positively deposed to; his defence consisted in proving, most indisputably, that at the particular time he was upon his trial, at that bar, upon a different charge. There are a great many modern instances of positive and sincere testimony upon criminal charges, with respect to the identity of persons, whose absence was manifested by the most convincing evidence. Upon these occasions, it appears most judicious to receive the evidence of identity with considerable

distrust, unless it is accompanied by circumstances incontestably applying to the particular person who is the object of inquiry already alluded to.

"According to the difference of habits and characters, the minds of individuals are directed with greater or less attention to subjects of different kinds, and their testimony respecting these is susceptible of correspondent variations of accuracy; and therefore minuteness of recollection, upon one particular of a transaction, is not repugnant to a considerable uncertainty in another. In some, a particular distinctness with respect to dates is contracted by an unusual forgetfulness with respect to names or persons. Others, again, have a very imperfect memory with respect to all these, but a minute recollection of circumstances. However fair it may be in an advocate to take advantage of the variations resulting from the particular character of the memory, the interests of truth require the judge to fix the effects of these discrepancies at their proper value, to distinguish between the accuracy and inaccuracy of the different parts of the narration, and to prevent an inaccuracy in circumstances being mistaken for a dereliction of veracity in the substance.

"It is the property of the memory, like the attention, to be in general more immediately engaged by particular parts of a subject, which present themselves naturally and spontaneously, whilst others are only brought into recollection by the effect of exertion, or may lie wholly dormant. It very seldom happens that all the circumstances of a transaction occur, with equal readiness, to the mind; and, therefore, the omitting to mention a circumstance in the first account, is by no means a convincing argument of its intentional suppression. In general, a witness comes into a court with the memory strongly bent upon those parts of a cause which have occurred to him as material. The revival of other circumstances is the result of a particular examination respecting them; and, according to the usual operations of the mind, they will unfold themselves gradually at first, with indistinctness, and afterwards with precision, unless this natural progress is prevented by an intimidating and acrimonious course of inquiry.

"It is to this ground of accuracy of observation and recollection, that the preference of positive to negative evidence is principally to be referred; for it is much more probable, that a person may not have observed an occurrence which actually did take place, or having observed it, may not have recollected it, than that another should imagine circumstances which had no foundation in existence; and it is only to this kind of negative, which is accounted for by the want of observation or recollection, that the preference properly applies; for, if the ground of denying the truth of an assertion is an actual positive observation in opposition to it, this testimony is, to all rational purposes, as much affirmative as that which it is opposed to. Thus, if a witness alleges a person to have been drunk at a given time, and another declares that he was not drunk; it is an affirmative declaration that he was sober, and the weight of credit must be decided according to other circumstances. A distinct account from the witness asserting the party not to be drunk, that he had been in a coach with him all night, and for several hours in the morning, up to the time in question, and that he had not tasted any intoxicating liquor, would be more convincing than the general declaration of a state of drunkenness. With respect to the permanent nature of a subject, negative evidence is as strong as affirmative, if the nature of the subject is such that the former is equally free from the suspicion of error with the latter. A person swearing that there is no bridge over the Thames, between London and Blackfriars, would be entitled to as much attention as another swearing that there is a bridge between London and Westminster; and the same observation, which is so palpable with respect to the instances alluded to, ought equally to prevail in other cases referable to the same principle.

"It sometimes occurs, that a witness, having a given fact proposed to him, will not swear positively to the non-existence of it; when the fact is of such a nature, that if true, it cannot be supposed but that he must have known and recollected it. Thus, if a witness was asked whether, since the commencement of the trial, he had told a person present that he was come to perjure himself; there can be no doubt but that he can with sincerity only answer yes, or no; but there are many cases in which it is equally evident, to those capable of forming an adequate judgment, that the recollection of the existence, or non-existence of a given fact, must be perfectly distinct; but in which the witness, from a superabundance of caution, expresses himself with doubt and hesitation; and in fact, I observe this kind of hesitation to be very general, in persons of confined habits of thinking, when examined upon such topics. They are then plied with a set of questions about, *If it had been so, must you not have recollected,* &c., &c., asked in a manner

which increases their embarrassment; but the answer to which is not so much an act of testimony as of reasoning. Where proof is actually given of a fact, that the witness could not but know and recollect, his expressing himself in terms of doubt and uncertainty, is to be regarded as an act of willful misrepresentation; on the other hand, if no such proof is given, and the testimony is, in other respects, unsuspicious, and the witness is not a person who, from his situation and understanding, cannot but be aware of the power of giving a direct affirmative, or negative; it should be taken as the result of his testimony, that the fact did not exist; or at all events, it should not be taken for granted that it did, from a witness declaring that he could not swear that *it was not so.*

"Evidence of reasoning is also referable to the same general topic. A witness's testimony of a fact may be positive, though the reason he expresses for it is false or absurd. I have heard a witness, when cross-examined as to his reason for knowing clothes which had been stolen from him, refer to a matter of general description, which of course was followed up with, *Had no other person ever clothes of that description?* The judge in his observations to the jury observed, that a witness, in assigning reasons for facts of which he must have a positive knowledge, as the identity of his own clothes, often gave the worst reason that could be imagined; but the absurdity of the reason ascribed, did not diminish the weight of the testimony of actual knowledge. But where the evidence necessarily resolves itself into matter of reasoning, the case is materially different, for there the failure of the reason prevents the subsistence of the conclusion which is founded upon it. To instance a case which occurred in the same court with the preceding, a witness swore that a person examined on the other side, was not fit to be believed upon his oath; and being asked his reason said, that he had never made a good fence since he came to his farm.

"Where a witness is examined as to his reason, intention, or opinion upon some past occasion, it will often happen that he states such reason as appears to him most plausible at the time of his examination. If the reason inquired for, relates to some positive fact out of the ordinary course of occurrences, the reason and motive can be, in most cases, remembered, with as much distinctness and accuracy as the fact; but I have known persons interrogated with some severity, as to their reason for not doing something, to which the nature of the thing supplies the answer, that no adequate motive occurred to induce them actually to do it; but the witness, perplexed, and confused by the question, will, in an indistinct and hesitating manner, give some answer which induces an unfavorable impression with respect to his veracity. This observation occurred to me in hearing a trial, where a witness who had made a shaft for the purpose of getting brine under the land of the defendant, made certain observations and experiments, to ascertain that he did not carry it under the land of the plaintiff, and these observations being such, as if true, were, from the nature of the subject, conclusive with respect to the inference deduced from them, he was interrogated as to his reasons for not doing various other things suggested to him at the trial. Sometimes an intention is inquired into, respecting an occurrence at a distant period, upon which, in all probability, there did not exist any intention at all; as where a person, who had forty years before engaged her son to serve another for a given time to learn a trade, was asked whether she did not intend that he should be an apprentice? To this, being as usual, desirous of getting to an end of her examination, she answered *yes:* whereas it was highly improbable that she should have any intention with respect to those distinctions between service and apprenticeship, which have been introduced into the settlement law; instead of merely designing that there should be a service and instruction upon the terms agreed upon, according to which terms the son would have acquired a settlement by service; yet from this answer, *yes*, a bench of justices was induced to decide the contract to be a defective apprenticeship.

"And here it may be proper to advert to a distinction, which has often occurred to me, and was referable to the preceding case, between the words used by, and proceeding from the witness as his own, and his giving an answer of *yes* or *no*, to the question proposed to him; the former being the indication of his own impressions and recollection upon the subject of inquiry, the latter being the result, the adoption, or rejection of an extrinsic suggestion. It is, therefore, an accurate representation of the testimony of a witness, to state that he had given a narrative in language apparently his own, when he had merely given an affirmative or negative answer to the language of another. Such a conversion of expressions can only be an adequate delineation of the testimony, upon the supposition of the witness having distinctly and fully comprehended the language presented to him, and of his assent or dissent to it, being a perfect representation of

the ideas previously existing in his mind. There is a peculiar danger of this kind of perversion, when a summary and *ex parte* representation, taken at one time, is introduced in evidence at another.

"The preceding observations have been chiefly referable to testimony upon mere matters of fact, but these are often blended with matters of judgment; and the latter are themselves, in many cases, the sole object of examination. The adequacy of the judgment must therefore be assented to before any confidence can be placed in the result of it; and this confidence will depend upon the apparent or acknowledged talent of the witness, and his opportunity of forming an adequate opinion, which latter circumstance will be materially influenced by the nature of the subject to which it is applied. In general, every person exercising an occupation, is supposed to be conversant with the subject of it, and his opinion is abided by, unless contradicted by others entitled to an equal confidence; or unless there are intrinsic circumstances for disputing it; *cuilibet in arte sua credendum est.*

"But upon the conflict of testimony, a judgment is often to be pronounced according to the apparent relative competence of the respective witnesses; this judgment ought not to be hastily referred to the fluency of their expressions, or the plausibility of their manner; since a patient attention will often perceive, that the most accurate knowledge is not always accompanied by the greatest facility of communicating it. The opportunity which results from the actual observation of a particular subject, is evidently more to be relied upon, supposing the judgment to be equal, than that which is founded upon relation, and much more than that which is referable to mere hypothesis. A consistency with undisputed facts is one of the most advantageous tests of the confidence which ought to be reposed in the decisions of the judgment, but it is often dangerous for those who are to decide, acting upon their own inadequate conceptions, hastily to deduce a charge of inconsistency, in opposition to the opinions of technical experience. Wherever such an inconsistency is supposed to exist, it should be fully pointed out, for the purpose of receiving such elucidation as the witness may be enabled to afford, without reserving it for matter of subsequent observation, which may probably be erroneous.

"The testimony of a witness, with respect to subjects upon which he has a peculiar knowledge, is sometimes received with satisfaction on account of his deposing to the existence of distinctions, or *criteria*, which are not perceptible to those by whom he is examined; and which, because they cannot discern, they will not suppose to exist; but this is an improper standard of judgment, for every person can, with instantaneous facility, discover the casual variations in subjects with which he is habitually familiar, and these in circumstances so minute that they would not be susceptible of communication to a common observer. The *Arab* or *Indian* will trace, through the forest or desert, the footsteps of which the members of cultivated society cannot discern the slightest impression. The mariner will describe the particulars of a vessel, which to the passenger appears a speck in the horizon; the lawyer and the physician, in the objects of their respective professions; the botanist in his plants; the chemist in the contents of his laboratory, will perceive a materiality in distinctions, of which, to those who are unaccustomed to their different pursuits, they cannot convey an intelligible description. The mind in weighing the capacity of an expert, with relation to the subject of his art, should not decide upon the apparent uncertainty of the new and adventitious object of its attention, but upon comparison with its own facility of observation, upon subjects with which it is most familiarly conversant. There are few subjects in which, independently of experience, or the conclusions of precise and accurate reasoning, there would be a greater apprehension of uncertainty, or a stronger suspicion of guess and conjecture, than the art of deciphering, yet it is an art which (at least in its lowest application, of a substitution of letters), depends upon principles as certain, and almost as easy of communication, as the lowest rules of arithmetic. The weakness of those who circumscribe the bounds of possibility and veracity by the limits of their own perception, is often illustrated by applying the fable of the horse, who was torn to pieces, for asserting in the torrid zone, that in other climates the men were white, and that passengers could travel over the surface of rivers."

There are also many cases in which witnesses speak from judgment and opinion, without reference to any technical knowledge; such, for instance, is evidence for character, and all other testimony amounting to a general conclusion upon particular facts; when this conclusion is accompanied by a narrative of facts from the same witness, the sufficiency of the conclusion is a matter perfectly distinct from the reality of the facts; an advocate who would impeach the

veracity of the facts, makes but little progress, by showing the weakness of the conclusion—and, on the other hand, the advocate who relies upon the facts, is not precluded from disputing the conclusion. This may be illustrated by the following case, which I have known to occur in practice: A person deposed to having entered into a service under circumstances which, in point of law, would amount to a general hiring, which is equivalent to a hiring for a year; but she also declared that she was not hired at all; the latter part of her testimony was evidently no more than the judgment of an ignorant witness, as to the legal import of the term *hiring*, to which she attached the idea of an engagement made in a certain manner, or for a certain time expressly mentioned; but it was contended, and successfully, in a court of quarter sessions, that it was impossible to pronounce in favor of the acquisition of a settlement upon this evidence, as the witness, upon whose testimony the whole depended, declared that there was not any hiring, and those who produced her and relied upon her evidence were bound to take the whole together.

In deciding upon the truth of evidence, much stress is laid upon the inherent probability of it, a criterion which, within its proper limits, is attended with great utility, but which like all other general *criteria*, may be carried too far; for where a testimony is direct and positive, where the circumstances to which it relates are palpable and not calculated to excite delusion, where the witness had a perfect opportunity of knowledge, where he has no motive to misrepresent, and still further, where the representation militates against the usual motives of conduct; where several witnesses of unimpeached integrity, free from all suspicion of collusion, speaking from detached and uncommunicated knowledge, concur in the attestation; where the fact contested concurs with other undisputed phenomena, not reconcilable with the supposition of its falsehood; the previous and insulated probability of the fact asserted, is a less powerful motive for the decision, than the positive conviction resulting from the force of the testimony; the rejection of which would be founded upon a much higher degree of improbability than that which it professes to correct. Such I conceive to be the summary of the argument, which is usually applied to a subject of a much superior nature to that of my present investigation, but the principles of which may be properly adapted to inferior objects of ordinary disputation. It is seldom that a case will occur, in which the improbability of falsehood will advance to that high degree of certainty which is involved in the preceding enumeration, but each of the circumstances alluded to will have their influence in forming a decision between the abstract improbability of the fact related, and the particular improbability of the immediate relation under all its circumstances being false. I have witnessed several cases which called for the practical application of this distinction. The one which at present occurs to me, is an action against a man for sowing the field of another with dock seeds; a fact which was positively sworn to by a casual observer, and confirmed, amongst other circumstances, by the growth of the docks in the course which he had taken; it was contended to be highly improbable that any man should be guilty of such malignant conduct; but it was answered that it was much more improbable that the witness, who had no connection with the one party, or animosity against the other, should gratuitously involve himself in perjury, in attesting the fact which was so corroborated.

A topic connected with the preceding observations, which relate to the subject of the testimony, as existing in the mind of the witness, and intended to be the object of his representation, is the correctness of the language used by the witness in conveying his sentiments, and of his conception of the question proposed to him. The degree of accuracy with which the language represents the sentiments, is a proper subject of inquiry before the terms made use of are construed with too little precision; and the incorrectness of language, or conception, should be carefully distinguished from misrepresentation or evasion; an observation which seems to be unnecessary from its obvious propriety, and the little danger which may be supposed to exist of a contrary practice. But the fact is otherwise, and a mutual misconception, either real or affected, is frequently the ground of cavil on the other side, or the screen for equivocation on the other. When the latter is the fact, it is very seldom successful; the equivocation is kept up for a second or two, and the exposure of it very properly throws a general discredit on the whole testimony of the witness; but the want of a patient and temperate attention may often permit this imputation to fall where it is not justly merited, and where a careful examination of the meaning intended to be expressed would completely remove it. What has been before observed, with respect to language as being the subject, may, in some degree, be applied to it as the medium of

evidence; but the error resulting from its inaccuracy or misconception is, from the difference of the occasion, much more easily susceptible of correction. Peculiar modes of speech, either personal or provincial, metaphorical language, a greater or smaller latitude in the acceptation of terms, the mutual substitution of definite and indefinite expressions, are some of the causes which contribute to the uncertainty at present under consideration. In some parts of the country it is, with persons in the inferior station of life, an ordinary mode of speech to say that they believe a fact, of which they have the most positive assurance. When this expression slips out on a judicial examination, we commonly hear the question, *Believe, are you not sure of it?* and an answer in the affirmative is followed up, with, *then why do you say you believe?* A question very proper, when there is a suspicion that the terms of the answer were intentionally evasive; but the corrective is frequently applied, when, in fact, the cause of complaint does not exist. Sometimes the mode of phraseology, which gives an exaggerated or extenuated representation of a subject, without any consciousness of an intention to deceive, originates from those views of a subject which are connected with a disposition respecting the event, and which have already been the subject of observation.

The same general observation, which has already been so often traced in its different applications, of a distinction between inaccuracy and misrepresentation, applies to the conviction subsisting in the mind from the representation of others, where the fact is regarded as certain, and is represented as existing, although the source of the witness's knowledge prevents its being a matter of legitimate evidence. I conceive that this inaccuracy often escapes undetected; the witness speaking in general terms of the existence of the fact, and there being no suspicion of his doing so, otherwise than from his own observation. Some facts we speak of as assuredly true without objection, of which our knowledge is almost necessarily derived from reputation, as for instance, the death of a person; the supposed notoriety of some other facts, induces us to think and speak of them with the same degree of assurance as of this, which, though an infraction of the legal rules of evidence, is no transgression of the moral obligation of veracity, although it is sometimes represented as such, in the course of a captious cross-examination.

The manner and deportment of witnesses is very commonly a principal ground of assent to, or dissent from their testimony; and is doubtless a very natural indication of the existence or the want of sincerity. That the disposition of the witness will have an influence on his manner, is undisputed; the adequate observation of it is, however, a matter requiring the most skillful and judicious discernment; and the detection of affected plausibility, and the assistance of constitutional timidity, are objects which respectively import, in an eminent degree, the proper administration of justice. A perfect judgment of the causes of a person's demeanor upon a particular occasion, can only be formed by those who have a previous knowledge of his general habits and character, and, in this respect, an intelligent jury is of great advantage; since being assembled from different parts of the country, some of them will, in most cases, have at least a general knowledge of the witnesses who appear before them. It would be greatly beyond the limits of my power to trace even a slight outline of this extensive subject; but a few detached observations, founded upon my impressions respecting it, may not be wholly irrelevant. In deciding upon the demeanor of a witness, considerable allowance is to be made for the unaccustomed situation in which he is placed, and the impressions which it may be calculated to make upon his mind. To some persons this public appearance is a matter of indifference, but by many it is regarded with an apprehension, productive of embarrassment and agitation, which to unskillful observers, may appear the result of insincerity. This embarrassment will sometimes attach itself in a peculiar degree, to those who are accustomed to appear before the public in a different situation, and who are therefore habitually anxious respecting the impression which they may induce. It is an anecdote of Garrick, that when examined as a witness respecting the nature of a free benefit, he was incapable of giving an intelligible testimony. In deciding upon the demeanor of witnesses, much attention is due to the mode of interrogation, and the popular opinion respecting the person who is engaged in it. An asperity in the particular conduct of the counsel or the judge, or even the reputation of it, with respect to the former, will necessarily produce an effect upon the sensations and deportment of the witness; and an apprehension of the ridicule which frequently affixes itself permanently to the character, is often a predominant sensation of the witness upon his examination. Good sense, when fully exercised, will correct these apprehensions, and satisfy the witness that violence and ridicule will be ineffectual, when opposed to the plain

and unaffected language of truth; but the dictates of good sense are often an insufficient preservative against constitutional timidity.

A resolution to appear undaunted, and repel the expected aggression of counsel by insolence, a foolish inclination to make a theatrical exhibition of wit and humor, exciting the horse-laugh of the by-standers, a moroseness and sullenness of temper, will give an unfavorable aspect to the manner of a witness, when there is no intentional want of veracity in the matter. The real absurdity of a witness's demeanor or mode of representation, will often diminish the proper impression of the facts for which it is necessary to resort to his testimony, and particularly in cases where there is a latitude of discretion, as in questions of damages; the judgment is often practically biased, by the sentiment of ridicule being a test of truth. A due regard to the principles of justice will, however, prevent the fair demands of a party from being affected by the sullenness or absurdity of the witnesses whom he is necessitated to adduce in support of it; and will lead the mind to a studious discrimination, between the fact which is the subject of inquiry, and the accidental circumstances which may accompany the relation of it.

"The judgment upon a witness's manner is not unfrequently framed by a contrast between a cool and steady narration, and a fluttering hesitation; this judgment may, however, often be fallacious, for a witness who has prepared his story, may have sufficiently arranged the particulars of it in his mind, while another who has an opportunity of contradicting it, if false, is surprised and confounded by the unexpected statement. In a case where I had an opportunity of knowing the real facts, I have seen a witness give a steady and collected representation of a supposed conversation in a perfectly simple and unaffected manner; the opposite witness, when suddenly interrogated as to the existence of such a conversation, began with, *Not that I recollect, I do not believe it upon my honor*, and a great many other exclamations, in such a confused, suspicious manner, that even those who, from their private knowledge, had the most indisputable confidence of the veracity with which he told them upon coming out of court, that there was not a syllable of truth in the conversation related, perfectly acquiesced in the propriety of a decision founded upon the opinion of his falsehood.

"That testimony is very open to suspicion, which is given by a person who is evidently meditating upon the materiality and tendency of his answer, before he will let it be given; or, on the other hand, who bolts out with precipitancy before he hears the question, an answer indicating a catechised preparation; the effect of either of these circumstances singly, is greatly increased by their combination in different parts of the same testimony. A *Welch* witness, who intends to give unfair testimony, always affects an ignorance of the *English* language; in consequence of which, the effect of cross-examination is not only weakened by the intervention of an interpreter, but the witness has time to collect and prepare his answers. But even that previous study of an answer, which has been mentioned, will have a different effect, according to the character, and situation, and habits of the person who is examined. I have, in an earlier part of this discussion, taken notice of circumstances calculated to influence the disposition, and which, though by no means justifying prevarication in any case, diminish the suspicion of a want of substantial veracity, which results from a want of propriety in incidental particulars. The suspicion of fabrication rises highest when the witness is one of those inferior retainers of the law, who are commonly attendant upon courts of judicature, who have a cunning acuteness in the observation of its proceedings, and who, from their occupation, are frequently in the habit of swearing to facts, in their own nature liable to misrepresentation, and placed beyond the reach of detection or contradiction.

"The general character of witnesses is also a circumstance which has naturally a considerable influence upon the credit of their testimony; and we shall have occasion to mention, in a subsequent section, certain cases in which the testimony of persons convicted of particular offences, is absolutely excluded, upon a legal presumption that those who have been capable of such acts, will not be influenced by any moral or religious obligation to adhere to the dictates of truth, when any circumstance may occur to influence their minds in opposition to it. I think it is by no means desirable to extend this principle of exclusion, for, in general cases, the rejection of any person as a witness does not operate to the prejudice of himself, but of the public or private interests which may be concerned in the disclosure of the facts of which he has a knowledge; and, even in the most depraved members of society, the natural influence of truth, and the temporal risks of perjury will be a security against the commission of gratuitous falsehood. But

wherever there is reasonable ground to suppose a bias in the mind, with respect to the effect of the testimony, a previous criminality of conduct will very justly excite suspicions of its veracity; and the mind will naturally refuse its assent to declarations made by those whose disposition in favor of the event cannot be supposed to be counteracted by a superior sense of obligation. I have already observed, that to assent to a given proposition, we require a preponderance of testimony in support of it; in questions, therefore, respecting the credit of a witness, the want of assent is not founded upon an assurance that his testimony is false, but from the want of an adequate assurance that it is true. Where it is distinctly ascertained that the witness is indifferent with respect to the event, or where it appears that his wishes would naturally induce in opposition to his testimony, the general inclination to veracity might be, in most cases, a sufficient assurance of the facts deposed to by a person even of the most exceptionable character; but the testimony will be properly open to suspicion, not only when a person of this description distinctly appears to have a collateral motive for desiring a decision in support of his testimony, but also whenever there is not a sufficient reason for presuming the contrary; for the inducements which may operate upon a mind susceptible of corrupt influence cannot easily be detected, although they may actually exist. It is the want of an adequate assurance that the testimony is true, which very properly occasions a great degree of caution to be applied to the testimony of accomplices in criminal prosecutions; and induces courts and juries to disregard such testimony, except so far as it is confirmed by circumstances affecting the parties accused, deposed to by witnesses of irreproachable character. There is not in these cases a positive suspicion, arising from the nature of the evidence itself, that it is actually false; but there is a manifest want of those principles of duty and obligation, which are the strongest assurance of its being true; the actual motive is almost always in favor of truth, if it is clear that the witness had some companion in his offence; and it has not, in any instance, occurred to me to suspect that evidence of this description, which I have had an opportunity of hearing, was fabricated; but there is no doubt that it frequently might be so, if a less jealous caution was exercised in its reception.

"It is an established rule, that witnesses examined with a view to discredit the testimony of others, cannot be admitted to depose to particular facts of criminality, but can only express their general opinion, whether the party is or is not entitled to be believed upon his oath; but the other side, who, to support the testimony, may inquire what are the reasons of disbelief, which sometimes, as in a case above adverted to, are ridiculous enough. If it is declined to inquire into these reasons, there is pretty considerable ground to presume a consciousness that the opinion is founded upon adequate motives. I have heard witnesses asked whether they had ever known the persons, against whose veracity they depose, give false evidence in a court of justice; and, upon their answering in the negative, it was intimated to the jury that the testimony to their discredit was absolutely frivolous; whereas, if the question had been, what were the reasons upon which the discredit was founded, a fraudulent conduct might have been shown, which indicated the want of moral and religious principle, and consequently affected the strongest ground of reliance upon testimony. When witnesses speak to the character of others, not only their own character, but their ability and opportunity to form an adequate judgment, are circumstances very proper to be taken into consideration.

"It is a rule of law, that witnesses cannot be asked any questions which tend to subject themselves to punishment, or, as it is usually expressed, to criminate themselves; but whether they may be asked if they have already received a punishment which does not disqualify their testimony, or whether they may be interrogated as to any circumstances of improper conduct, not immediately connected with the subject of their examination, and also, whether their refusal to answer inquiries upon these subjects can be observed upon as affecting the credit of their testimony, are questions of great importance, upon which there is a very considerable difference of opinion. Some judges are very strongly of opinion that these inquiries ought not to be allowed; but it has been understood to be the more prevalent opinion of the bench, as it certainly is very generally the opinion of the profession, that they are admissible and proper; and this latter opinion is clearly supported by the course of practice which has actually prevailed. Mr. Peake, in the second edition of his *Law of Evidence*, states the arguments in support of these opposite opinions in a very fair and perspicuous manner; and the right and propriety of the examination alluded to are maintained with considerable ability in a pamphlet entitled, *An Argument in favor of the Rights of Cross-Examination.* I have at all times felt a very considerable difficulty in the

consideration of this subject; but as a knowledge of a witness's habits and pursuits, his conduct and disposition, will naturally influence the regard which is paid to his assertions; I think that the preponderance of argument is in favor of the opinion, that an examination, by which these may be ascertained, cannot upon any general principles, be suppressed as irrelevant or improper; and that those arguments respecting a witness's conduct ought not to be rejected, which may tend to determine the regard that the mind, without reference to technical rules, or legal considerations, would pay to his testimony. At the same time, I think that this is a liberty which, like all others, will be best secured by a cautious vigilance in repressing its abuse, by a refusal of advocates to adopt the passions and prejudices of their clients, and to injure a witness by reproaches and insinuations that cannot reasonably be expected to influence the fair decision of the cause; and by the court showing a marked discountenance to the adoption of a different line of conduct, calculated only to occasion an unnecessary pain and injury to the witness, without promoting the rights or interests of the party.

"The situation of a witness in life is also a circumstance which frequently influences the regard that is paid to his testimony, especially with respect to matters of judgment and observation; and even with respect to mere veracity, it is not wholly indifferent; for although, in the abstract, the testimony of every person is to be regarded as true, and the sense of obligation may be equally strong in every condition of society, the temporal disadvantages arising from the detection of falsehood or prevarication, independent of the terrors of legal punishment, will frequently depend upon, or be connected with a person's rank and station; and therefore all considerations of credit, connected with the evidence itself, will be and constantly are materially influenced by this circumstance. The effect of a bias in favor of the event of a cause, resulting from the situation of a witness, will be more or less strong in proportion to his being more or less subject to temptation; the comparison between the relation itself and its probability will be made with greater minuteness, in proportion to the stake in society which is engaged in support of its veracity. The influence of situation is most strong in cases of conflicting testimony; for supposing other circumstances to be equal in every respect, there is no doubt but that a considerable diversity of situation would have considerable influence in directing the balance of credit; and to illustrate the position by an extreme instance, few persons would hesitate in regarding the narrative of a clergyman on the one side, with superior credit to that of a bailiff's follower on the other.

"The number of witnesses, and their concurrence in support of a given assertion, is also a subject of material importance in deciding upon the credit of their testimony; for the improbability of two witnesses concerned in the same falsehood, or being influenced by the same mistake, is much less than that of the falsehood or mistake of either of them individually; and the improbability increases in proportion with the number. But in the contrasting of contradictory testimony, the mere consideration of number is held subordinate to that of the indications of individual veracity, and, the maxim that *ponderantur, non numerantur testes*, is of very frequent practical application. Other circumstances being equal, the preponderance of numbers is certainly entitled to the advantage, and sometimes this preponderance will be sufficiently great to counterbalance an apparent superiority in other circumstances on the opposite side; and although nothing can be more remote from the subject in discussion than the application of the strict rules of mathematical equality or proportion, a fair attention to the principles of those rules is often of considerable importance. The degree of influence or indifference of the respective witnesses, their apparent veracity, their demeanor, their character, their situation, the probability of their relation, are circumstances, all of which are to be carefully and attentively brought into the account. The opportunity of confederacy, or the want of such opportunity, is a most important consideration in determining the effect of numbers. The concurrence in speaking of one observation of one detached fact, is of much inferior value to the concurrence of persons speaking from detached and separate observations, of different facts leading to the same conclusion. I have already had occasion to advert to the accordance or variation of witnesses speaking of the same occurrence, to the difference between that inconsistency which essentially fastens itself upon the substance of the relation, and that which may be fairly referable to different degrees of accuracy or minuteness, in the observation or memory of facts which have actually occurred; and to the unity and accordance, which being too strict and circumstantial, are inconsistent with that diversity of observation and expression that naturally occurs in the unprepared account of a real transaction, and afford an indication of concert and design. It is not an unfrequent observation, that if one of

the witnesses in support of a cause is not entitled to be credited, the discredit attaches to the cause, and extends to other witnesses apparently unexceptionable. This kind of objection is, I think, sometimes applied too generally, and without using that caution and discrimination which the principle of it essentially requires. In case the impeachment of the veracity of a particular witness results from circumstances that indicate management and fabrication in the cause itself; in case the perjury of the witness implies the subornation of the party, the whole system may be regarded as tainted and corrupt, unless there are any, in other respects, superior reasons for believing the contrary; and the mere absence of circumstances of suspicion, directly affecting the other witnesses, will not destroy the presumption of falsity that has attached itself to the cause. But if the imputation upon the particular witness is merely personal; if it results from considerations foreign to the immediate cause; if it is founded upon some collateral motive of his own, and no suspicion of subornation can be fairly entertained; the cause, in other respects, should be at liberty to stand or fall upon its general merits, without being affected by the peculiar objection; in the same manner as a series of reasoning, in itself perfect and complete, is not affected by the collateral addition of an untenable argument.

"The conflict of opposite witnesses is the grand source of forensic altercation. In adverting to the circumstances which influence the credit of witnesses individually or collectively, I have necessarily had occasion to mention their opposition. Without going through the particulars again, it will be sufficient generally to observe, that whatever principles of reasoning are correct and proper, when examining the veracity or accuracy of an individual witness or a number of witnesses uncontradicted, become more peculiarly important in determining the balance of credit, with respect to veracity, or the superior degree of accuracy, upon matters of judgment and observation, in cases of conflict and opposition. The general ground of credit, founded upon the presumption that a witness speaks with truth and accuracy, is destroyed when the respective assertions are in opposition to each other, and therefore cannot both be true. Whatever, therefore, may establish or diminish the confidence in a witness, whose testimony is uncontradicted, will determine the preference in cases of opposition; but the respective grounds of assent or discredit are sometimes so equally balanced, that the mind cannot, with satisfaction, pronounce a judgment between them; and all that can be recommended is a calm, patient, and anxious investigation. Where the possibility of mistake on the one side is contrasted with the imputation of perjury on the other, and there are no collateral circumstances to fix the determination, there can be no doubt but that a casual error is to be deemed more probable than a willful misrepresentation. When the judgment, after every exertion, is reduced to the necessity of deciding, that on the one side or the other, there has been an intentional falsehood, and no satisfactory reasons occur for fixing the superiority of credit; the last resource is to obliterate wholly the conflicting testimony, and to determine upon the want of a preponderance in proof, according to the rules which must have prevailed in the total absence of it. The result of an investigation of evidence will, after the most enlightened and painful research, be in many cases unfortunately at variance with the actual truth, but in proportion to the dangers of error inherent in the very frame and nature of the subject, should be care and anxiety exercised in the avoidance of such error as may proceed from an excess of confidence on the one hand or of caution on the other; and although that care and anxiety will often fail in their particular application, the perfection of human precaution will be attained, if they are so conducted that, according to the principles of reason and experience, they may be expected in general to succeed.

"It is said, that if a witness deposes falsely in any part of his testimony, the whole of it is to be rejected; and this is certainly correct so far as the falsehood supposes the guilt of perjury, the ground of credit being there destroyed; but if nothing can be imputed to the witness but error, inaccuracy or embarrassment; if there does not appear to be a real intention to deceive or misrepresent; neither the objection nor the reason for it applies. The argument is sometimes urged with considerable vehemence, that a party who relies upon the testimony of a witness, must take it all together, and cannot rely upon the one part and reject the other; whereas there is no inconsistency in asserting the general veracity of a narrative, and contending for the inaccuracy of some of its incidental particulars; much loss is a party to be driven from his reliance upon the matters of fact related by a witness, because he contends that the witness is ill-founded in his reasonings and inferences deduced from them, as I have endeavored to illustrate in a preceding part of the present section." 2 Ev. Poth. 236 to 266.

part of the rules of evidence is founded upon presumptions; and the subject of the present chapter receives illustration from nearly every other chapter of the present work.

It detracts nothing from the above remarks of Sir William D. Evans, to say they were suggested by several passages of the famous article *de testibus*, Lib. 22, in the Pandects; which, if the English reader be desirous to see at large, he may consult 2 Strahan's Dom. b. 3, tit. 6, § 3, and particularly art. 8, 9, 10, 11, 12 and 15, of the section cited. Mr. Evans is the first considerable contributor, in this kind, to our law of evidence; and seems happily to have selected the two departments where our usual books of authority were before quite deficient; we mean circumstantial evidence (in respect to which we have often cited him in previous notes), and the credibility of witnesses. These are perhaps the only departments in which free discussion, in a measure independent of judicial authority, could at this day be rendered practically useful. In these titles, while, with regard to some particulars, adjudged cases may have settled the law; yet others appear to be without the reach of such cases; thus rendering the private discussions of able and experienced professional gentlemen, not only acceptable, but necessary. Mr. Starkie, in his late Treatise on Evidence, entertained the same view of this subject as Mr. Evans; and beside introducing the remarks of the latter under a somewhat different dress and arrangement, has superadded several important suggestions and illustrations. Among others, he has enforced Mr. Evans' distinction between the credibility of witnesses holding different interests in society, by their different sense of temporal consequences. Although this argument be sufficiently obvious, and often practically adopted by jurors, it is satisfactory at least, to see it take the form of authority. The amount of the argument is, that while the moral obligation of an oath may be equally strong in different ranks, the temporal punishment of perjury, or the injury consequent upon mere detection or suspicion that the witness had violated or discolored the truth, would be looked to by different persons with very different degrees of apprehension. The cases put by Mr. Starkie are those of the solicitor or attorney compared with the common laborer. 3 Stark. Ev. 520, note. He very properly suggests, that where the witness is called to remove an imputation upon himself, the argument in favor of credibility might then be strongest for the witnesses of inferior rank. Id.

A difference of statement between the witness's testimony on the stand, and on previous occasions, his connection with the party by the ties of consanguinity, affinity, friendship, or in the way of trade, profession or membership of any description, are obvious suggestions in considering a conflict of testimony. So an interest in a similar question, or expectation of future gain, ill will towards the party, &c. See 3 Stark. Ev. 520, 521. Ill will not only against the party, but even the indorser of the party (Merrills v. Law, 9 Cowen, 95); or evidence that the party had bought the witness's real property, at his request (Cameron v. Montgomery, 13 Serg. & Rawle, 132), are instances to show what slight circumstances of suspicion may be sometimes inquired of from the witness to show the state of his mind. Indeed it will be seen by our quotations, that the circumstances bearing with greater or less weight upon questions of abstract or relative credibility, are so infinitely diversified as to defy enumeration. Two witnesses are brought upon the stand, the one to impeach and the other to sustain the general character of a third, the first having had cause for hostile feeling, and the other being free from the influence of any such motive, and indifferent in other respects, would speak with very different effect to the mind of a jury. How readily, in such a case, would jurors apply the above precautions of Mr. Evans against receiving with implicit confidence, the mere opinion of a prejudiced witness. See Newell v. Wright, 8 Conn. Rep. 322.

It is almost unnecessary to observe that the rules for trying the credibility of witnesses, hold equally in respect to the proof of circumstances, as where they speak directly to the fact in issue.

SECTION III.

Of the Relevancy of Presumptive Proofs; and of the Rule which Confines Evidence to the Points in Issue.

With respect to presumptions which are too remote to admit of any reasonable direction to a jury in regard to the issue which they have to try, a very nice exercise of discretion often devolves upon the judge.(1) It is his duty to confine the evidence to the points in issue, that the attention of juries may not be distracted, nor the public time needlessly consumed; but in deciding that the evidence of any particular circumstance is not receivable upon this ground, he must impliedly determine, that no presumption to be drawn from that circumstance ought properly to have an effect upon the minds of the jury.(2)

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(1) NOTE 195.—The court always protect the jury from irrelevant testimony, by excluding it, on objection, in the same manner as they shut out other incompetent proof. Hart v. Newland, 3 Hawks, 122, 123; Winlock v. Hardy, 4 Litt. 272; Sterling v. Luckett, 7 Mart. Lou. Rep. (N. S.) 198. But you are not bound to do this before the witness is sworn. If he be, therefore, precluded his oath for such a refusal, and not by reason of personal incompetency, it will be error. Force v. Smith, 1 Dana, 151.

If evidence be irrelevant at the time it is offered, it is not error to reject it because other evidence may afterwards be given, in connection with which it would become relevant. If it would be relevant, in conjunction with other facts, it should be proposed in connection with those facts, and an offer to follow the evidence proposed, with proof of those facts at a proper time. Weidler v. The Farmers' Bank of Lancaster, 11 Serg. & Rawle, 134. And counsel are bound, on the requisition of the court, to state particularly the substance of the evidence they propose to adduce; and if they refuse, or state evasively or in general terms merely, the proposed witnesses or other testimony may be rejected. Roy v. Targee, 7 Wend. 359. Thus, where in debt on recognizance, plea release and replication fraud, the plaintiff proposed to prove that the release was obtained by the promise of another to pay certain money, which had not been done, and claimed to avoid the release because thus obtained on a promise violated. The testimony being excluded, the plaintiff yet produced a witness, when the court demanded that the purpose of producing the witness should be stated in writing. The same facts were then offered again, with the addition that such procurement of the release was by the fraud, contrivance, false representation, &c., of the promisor. This offer was overruled, because the party did not offer to prove any *specific acts* of fraud beyond what he at first proposed. On error brought, the decision was sustained; and per Rogers, J.: "If this can be done, the decision of the court may at any time be avoided by the use of general terms; and which do not enable them to judge of the relevancy of the testimony, which is their exclusive province." He admitted that where a witness had refused to disclose what he knew, counsel might be indulged in a general statement. Commonwealth v. Brenneman, 1 Rawle, 311, 316, 317. And see, as to such discretion, per Nelson, J., in 7 Wend. 363. Yet, evidence proposed cannot be rejected because it is imaginable that something more may be necessary in connection. Thus, where the plaintiff, a black, in Louisiana, to prove her freedom, offered a deed of emancipation executed in Ohio; held, that this could not be rejected because "it was incumbent on her to prove the formalities (if any such there were) required by the laws of Ohio in emancipating slaves." Hawkins v. Van Wickle, 6 Mart. Lou. Rep. 418.

(2) In some instances, judges have drawn the line as to the length of time after a theft, which may render the possession of stolen goods relevant. Anon., 2 C. & P. 459. In Mann v. Lang (3 A. & E. 705), all the judges appear to have thought certain evidence admissible, though several of them appear to have considered the presumption arising from it of the weakest description.

NOTE 196.—That proof must not vary from the issue, will be more fully illustrated in the notes to the twelfth chapter. A few cases only, which do not range themselves in any particular order, shall here be given.

By replying to issue, the plaintiff admits the validity of the plea; and though it be bad, he cannot object to proof under it. Myer v. M'Lean, 1 John. Rep. 509.

Notice, instead of a special plea, of prescription to fish adjoining the *locus in quo*, and of using and occupying the shore for that purpose, will not warrant evidence of a prescription to erect huts on the shore for the purpose of fishing. Cortelyou v. Van Brunt, 2 John. Rep. 357.

Where notice of special matter (under the statute, 1 R. L. New York, 515, § 1), was given instead of a plea, held that the plaintiff might reply by evidence, and the defendant rejoin in evidence, any matter possibly admissible in pleading; *e. g.* on notice of *son assault*, the plaintiff might prove *molliter manus*, and the defendant rejoin in his proof any matter which, if the pleadings had been special, could have been pleaded. Collier v. Moulton, 7 John. Rep. 109.

In an action on a bond conditioned for the faithful performance of an agent, a replication that he had money which he refused to account for in 1822, and a rejoinder that he had not, does not admit proof that the agency ceased in 1816. The rejoinder should have in terms averred the termination of the agency at that time. Boston Hat Manufactory v. Messinger, 2 Pick. 223.

In an action on a contract to deliver goods, the plaintiff cannot show that, after they were delivered to him, the defendant fraudulently took them away, and substituted others. Such evidence is out of the issue. Gilpins v. Consequa, 1 Pet. C. C. Rep. 85, 88; S. C., 3 Wash. C. C. Rep. 184, 187.

Matter excusing performance is not admissible under a plea of covenants performed. Poague v. Richardson, Litt. Sel. Cas. 134, 135, 136; Holt v. Crume, Litt. Sel. Cas, 499, 500, S. P.

A fact not alleged on one side, though it be denied by the other, is not in issue, and need not be proved. Thus, in covenant, the plaintiff claimed $100 for fixing the defendant's mill so that it would saw so much, and averred that he had so fixed it. On oyer, the covenant was so that, *in the opinion of a good sawyer agreed on*, it would saw so much; and the defendant denied that, in the opinion of a good sawyer so agreed on, it would saw so much. Held sufficient to prove that it would in truth saw so much, for that satisfied the plaintiff's allegation; and the defendant had denied a fact not alleged. The question would have been different on demurrer or motion in arrest. Fry v. Whitingill, Litt. Sel. Cas. 181.

On an issue whether part of a testator's estate is in the hands of an executor, evidence that he is a creditor of his co-executor, and that he became so by transferring that part of the estate in question to his co-executor, is relevant and admissible. Galbreath v. Rife, 2 Rawle, 144.

Trespass *quare clausum fregit*. Plea, *liberum tenementum* of the defendant. Replication, a demise from the defendant to the plaintiff from April 23d, 1821, for one year, and thenceforward from year to year. Proof, that the plaintiff paid the defendant rent. Abbott, C. J.: "This shows a demise; but it may be very different from the one laid. It might be proof of a demise for twenty-one years, as well as of the demise laid. Phillips v. Mosely et al., 1 Carr. & Payne, 262.

In actions by bill in the King's Bench, the defendant may, under the general issue, give in evidence matter of defence which occurred between the issuing of the *latitat* and before declaration, and such matter (*e. g.* accord and satisfaction) is an answer to the action For the purposes of justice, the declaration is considered the commencement of the action. Worswick v. Beswick, 10 Barn. & Cress. 676. Note. This decision was in an action of trover; and seems to apply to those cases only where the matter is ordinarily admissible under the general issue; not where, from the nature of the action, it must be pleaded.

Circumstances of mere alleviation or aggravation are irrelevant upon the trial. They are totally immaterial to the verdict; because they do not prevent or conclude the jury's finding for or against the defendant. They may be made use of when the judgment is given, to increase or lessen the punishment. Circumstances which amount to a lawful excuse or justification are proper upon the trial, and can only be used there. Rex v. Shipley, 4 Doug. 73, 163, per Lord Mansfield, C. J.; Id. 177, 178, per Willes, J.

The cases do not agree upon the question whether irrelevant testimony being given on one side, for the assumed purpose of proving a fact, will warrant other testimony in reply to that so given, either to repel it directly, or touching the fact upon which it professes to bear. The result would seem to be, that it is discretionary with the court to hear or reject the evidence in reply.

In many cases, and indeed all, the expense of time must be useless; and may, by consent of parties be made endless, if the court have no power to interfere.

On a petition for freedom, the defendant gave in evidence, without objection, hearsay and reputation against the freedom of the petitioner. The latter then offered the same kind of evidence in favor of his freedom; to which the defendant objected. The court held the objection well taken; saying that improper evidence on one side will not justify its introduction on the other, if objected to. The first would have been rejected, had an objection been made. The doctrine contended for would lead to endless confusion, and destroy all the rules of evidence. Walkup v. Pratt, 5 Har. & John. 51, 56; Stringer v. Lessee of Young, 3 Peters' Rep. 336, 337, S. P.; Samuel v. Bond, Litt. Sel. Cas. 158, 159, S. P.

The plaintiffs in ejectment proved a grant of the tract claimed by them, and then that the defendants had made entries in respect to the tract, having notice of the plaintiffs' claim under the grant. Then the defendants offered to prove entries in respect to the same tract, made by third persons, since the grant, in order to show the general opinion that the land granted was vacant. Held inadmissible because irrelevant, as not affecting the grant; nor was it admissible to give irrelevant testimony, because it was an answer to other irrelevant testimony. Stringer v. Young, 3 Pet. Rep. 336, 337.

Yet, in several instances, such testimony being received, this was held no objection, on error, or motion for a new trial.

In assumpsit against several partners, one of them introduced a letter of his copartner to the plaintiff, which it was insisted made against him. In consequence of this, the plaintiff offered to show that the same copartner, in answer to certain interrogatories, had contradicted what he said in the letter. This was objected to by the defendant who produced the letter; but it was received. Held no error, as the defendant had himself laid the foundation for it. Riggs v. Lindsay, 7 Cranch, 500, 503, 504. So, though character be not in issue, if the party introduce evidence to support his character; held, that for that reason the other party might give evidence in reply. Grannis v. Branden, 5 Day, 260. Where the plaintiffs offered evidence of the credibility of one of their witnesses, the defendants were allowed to ask another, if the plaintiffs' witness had not been guilty of larceny. The testimony on both sides was illegal; but as the plaintiffs resorted to that mode in support of credibility, held, that they could not complain that it was rebutted in the same way. Prevost v. Simeon, 4 Miller's Lou. Rep. 472.

In trespass, the plaintiff proved that he bought at the defendant's store a pipe of French brandy, which being left with the defendant a few days, he took out forty gallons and substituted American brandy, in the presence of his partner. The partner called for the defendant contradicted this. He was asked by the plaintiff's counsel whether he or his partner had in any instance adulterated brandy or spirits. The defendant made no objection, and the witness answered, and the counsel then, on both sides, put many questions on the point. The next morning, the counsel for the plaintiff repeated the question as to particular cases, and inquired of sales to particular persons then in court. The defendant's counsel then objected, that the inquiry was not relevant; but the judge allowed the questions to be put, and required them to be answered. The court, on motion for a new trial, said there was no objection made to entering on the inquiry; and it might, therefore, under the circumstances, be pursued. Young v. Mason, 8 Pick. 551. And the court held, in terms, that though you call for a paper from the other side as evidence, and peruse it, you need not read it unless it be material, though the other side call on you to do so. Wilson v. Bowie, 1 Carr. & Payne, 8. If a witness be examined by both parties without objection, as to matter irrelevant, one party cannot object to a farther examination on the same subject. Id.; Young v. Mason, 8 Pick. 551. Again; on proof that one made a contract for another, though this was immaterial, yet held that it was not improper to rebut the proof by other testimony. Grafton Bank v. Woodward, 5 N. H. Rep. 301. What passed at a former trial in ejectment between other parties being given in evidence by one side, though doubtful whether it was admissible, the opposite party was allowed to show other evidence given on the same trial. Doe ex dem. Lloyd v. Passingham, 2 Carr. & Payne, 440. In false imprisonment on suspicion, Cranshaw, J., said, if the defendant could not primarily impeach the plaintiff's general character to mitigate damages, he might do it in reply to evidence in its support. Rogers v. Wilson, 1 Alab. Rep. 407, 410.

After a question has been repeatedly asked and answered, without objection, in the course of

a trial, it is too late to object to its admissibility, on the ground that the answer is, in itself, inadmissible. M'Kee v. Nelson, 4 Cowen's Rep. 355, 357. And evidence, though it be entirely out of the issue, if not objected to at the time, for variance, is no ground of objection afterwards. M'Micken v. Brown, 6 Mart. Lou. Rep. (N. S.) 85.

Both the cases in the text, and these which follow, it is presumed must be taken with the qualifications mentioned *ante*, in note 183, of these notes.

On trial of an indictment for shop-breaking and stealing from the shop, proof that part of the goods stolen was found in possession of the prisoner, is *prima facie* evidence that he is guilty of the whole charge. Commonwealth v. Millard, 1 Mass. Rep. 6. So in a case of common larceny, the jury may infer a stealing of the whole, from a possession of part. State v. Jenkins, 1 Tyl. 377, 379; Collins' Case, 4 C. H. Rec. 139, before Colden, Mayor, N. Y. Gen. Sessions, Oct. 1819; per Colden, mayor, in Ball's Case, 4 C. H. Rec. 118, S. P. This was denied of a burglary, at N. Y. Gen. Sessions, in People v. Frazier, 2 Wheel. Cr. Cas. 55; but, it is presumed, hastily.

The text, it will be perceived, here brings us to consider the state of the issue, and whether the proposed evidence bears upon it. This, says the text, *ante*, must be tested by considering the view with which it is offered; for evidence may be admissible in one point of view, though not in another. Per Lord Tenterden, C. J. in Taylor v. Willans, 2 Barn. & Adolph. 833, S. P. In the instance given by the text, of Rex v. Inhabitants of Northamptonshire, we have an indictment against a county for not repairing a public bridge. The plea of not guilty put in issue not only the question of repair, but if it had turned out that the bridge were the property of an individual, the county would have been under no duty, and had no right to repair. Acts of exclusive possession by individuals tend to determine this question, and the quality of their acts have a slight tendency the same way. It is a very little circumstance; but yet, having the least weight, it is admissible in connection with others proposed, or which may readily be conceived; and, in the general conflict of circumstances, may determine the question. Have the use of the public and individuals been equal? Has the public made repairs, and to what extent? and, on the other hand, what has been the extent of the individual repairs? for what time? and if the latter greatly exceed the former, still they may be of an equivocal character. If substantial, and such as the public would require, they might be construed as a gratuity from individuals in aid of the public, though partly for their private benefit. But if merely ornamental, there is less probability of that being so, though, after all, the difference may be very slight, perhaps barely perceptible. The general issue may thus, in many instances, present a very broad field of inquiry, and open an extensive range of circumstantial evidence.

In another case, which was an action for procuring a malicious indictment for perjury, those conducting the examination before the justice objected to the now plaintiff being holden to bail. The objection was obviated by presenting a letter, supposed to have been written by the lord chief justice, stating that it was a bailable case. The fact of so presenting this supposed letter was received as proof on the now trial, without proving its genuineness. This was excepted to. An affidavit of the now defendant's agent to prosecute for the perjury was also received, stating that he had interfered to discourage one C. from becoming bail for the now plaintiff. This was excepted to. The now defendant appeared, but was not sworn before the petty jury on the trial of the perjury, which circumstance was now left to the jury; and it was put to them to say whether this non-appearance, as a witness, arose from a consciousness that he had no evidence to give in support of the indictment, or from some other cause. This was also excepted to. The cause was tried in the Common Pleas. On error, by the defendant, the chief justice (Lord Tenterden) confirms the suggestion in the text, that "in deciding the question whether certain evidence be admissible or not, we must look at the object for which it is produced, and the point it is intended to establish; for it may be admissible for one purpose, and not for another." He then shows the drift of exhibiting his supposed letter, and the agent's affidavit. The latter was to prove that some measures were taken to prevent persons from becoming bail; and being made as the now defendant's agent in the course of his business, was receivable as an admission. The object of the letter was to show that the magistrate refused to take bail till the letter was produced; no matter whether the letter was genuine or not. The court also held that the question of motive in not appearing was properly left to the jury, the want of probable cause being a mixed question of law and fact, under the circumstances of this case. Taylor v. Willans, 2 Barn. & Adolph. 833.

Circumstances, not only minute, but remote in time and place, may be received as material. On trial of an indictment for murder committed by dirking, it appeared that a dirk without a cap had been found secreted near the place of the murder; and the cap of a dirk engraved J. H. was handed to a witness, by a negro, a mile and a half from the place; but how he came by it, no one could tell. The handle was engraved with the letters J. H.; and it appeared that, some sixteen or seventeen years before, a witness purchased a dirk, with this engraving, for James Hickman, the half-brother of the prisoner; that Hickman since died; and the prisoner had admitted that a dirk was the only part of H.'s property he had received. The witness, who heard him make this admission, saw a dirk in his hand with J. H. engraved on the handle; but could no farther identify it with the one now produced. The dirk found secreted was identified by the finder, from its general appearance, with the one now produced; and the cap produced by the negro apparently fitted the handle. The prisoner had, before the murder, lent a dirk, not now identified, which was returned to him before the murder was committed. There was no other proof that the prisoner had ever been at or near the place of the murder. These circumstances were allowed to go the jury as evidence that the dirk found belonged to the prisoner; and they were told that, if they had no doubt of its being his property, then the prisoner's dirk so found made one circumstance to be weighed with others. This was holden well on error. Mendum v. The Commonwealth, 6 Rand. 704, 711—713. Now it is obvious how perfectly slight and utterly inconclusive any one, or any two or three, of these circumstances must have been. Yet, all being combined, the result of the trial (a verdict of guilty) shows that the jury felt safe in acting upon them, as leaving no doubt. See per Hosmer, C. J., in State of Connecticut v. Watkins, 6 Conn. Rep. 53; S. C., *infra.*

"It is frequently difficult to ascertain, *a priori*, whether proof of a particular fact offered in evidence will or will not become material; and, in such cases, it is the usual practice of the court to give credit to the assertion of the counsel who tenders such evidence, that the fact will turn out to be material." 4 Stark. Ev. 381. Thus, a deed to the lessor of the plaintiff, or one under whom he claims, may be rejected as irrelevant, unless title first be shown in the grantor, or at least an offer made to follow it up with proof of his title. Winlock v. Hardy, 4 Litt. 272, 273. So of all deeds having no apparent connection with the matter in issue. Harris v. Paynes, 5 Litt. 105, 107, 108. Again; in an action on a covenant, to save from all judgments in favor of P. and B. against the owners of the steamboat H., recovered for the price of the boat, a record of judgment on notes against the covenantee in favor of P. and B., was held not relevant, *thus nakedly presented.* It should have been accompanied with proof *aliunde*, that the notes were given for the price of the boat by the owners. The judgment being founded on the mere naked proof of the record, for aught that appeared in the bill of exceptions, was reversed on error. Wilson's Adm'rs v. Bowen, 5 Monroe, 33. The court must be enabled, on error, to see the relevancy. To support a plea of title, the defendant offered in evidence the declarations of a former grantor, which were admitted, though the plaintiff objected and took a bill of exceptions. But it did not appear whether the declarations were relevant or not. Held, they were inadmissible; and the judgment was reversed. Clark v. Beach, 6 Conn. Rep. 142. Though a matter may possibly be relevant, yet the party must show how, otherwise it cannot be received; and the court will not on error reverse a judgment on account of its rejection, unless the relevancy appear affirmatively. Thus where, on a question of forging a bond in 1807, a person, not the alleged forger, said, speaking of the bond, some thirteen years after its date, "my pen has not forgot to write," which might by some possibility have been made relevant; yet, this not appearing affirmatively on the bill of exceptions, the court refused to hold it so. Rowt's Adm'r v. Kile's Adm'r, 1 Leigh's Rep. 216, 223, 224. And see Turner v. Fendall, *infra.* So, where a book of accounts of one party was offered against another to prove a debt, without other proof appearing, by the bill of exceptions, to have been proposed, verifying the book, held that the book was properly rejected. The People v. Genung, 11 Wend. 18, 21. See an instance of a connected statement in a bill of exceptions. Benham v. Cary, 11 Wend. 83.

It is different, however, where the proof tends, apparently in its own nature, to make out the case, though the residue be not offered; as where it lay with the plaintiff to show two facts: that certain posts and rails were erected; and that the defendant made the erection; and the plaintiff offered to show that they were erected. This being overruled, the judgment was, therefore, reversed. Bartlett v. Evarts, 8 Conn. Rep. 523. But see Weidler v. The Farmers' Bank of

Lancaster, *infra*. Where the copy of a deed appeared by the bill of exceptions to have been received, after objection, and the bill did not profess to detail the whole evidence, the court presumed that other evidence was given, making out a good title independent of the deed; and said the reception of the copy or evidence was, therefore, no cause of reversal, whether properly suffered or not. Hodges v. Crutcher, 1 J. J. Marsh. 504.

The practical mode of introducing connected or consecutive proofs at the trial, seems to have been pointed out with the greatest perspicuity by the Supreme Court of Pennsylvania. The defendants sold to the plaintiff a farm, under an execution against A., the title to which failed, and the plaintiff sued for the money advanced; and proposed to show that the deputy sheriff assured him that the title was good. This was overruled. On error, it was insisted on as proper: for perhaps the plaintiff *would have shown* that the deputy had authority from the defendants to make the representation; and that they knew it to be false. But the court, by Gibson, J., said, 1. The deputy was not, like an auctioneer, the agent of the parties, but of the law; and as such, had no authority to bind the defendants, by any representation, without their express authority. None was shown. "The evidence, therefore, as it was offered, presented facts which, isolated as they stand in the bill of exceptions, were altogether irrelevant. But the plaintiff contends that this may have been only a part of the chain of his evidence; and that what was deficient might afterwards have been supplied. If this were admitted, no court could, without error, ever reject evidence for irrelevancy, as there is no fact so entirely irrelevant as to be incapable of being connected with the question, however remotely, by the intervention of a chain of possible circumstances. But the question is, how did the matter stand as it was proposed to the court? If it was altogether irrelevant, the court might reject it, although it might not perhaps be error to admit it. If it would be relevant, when taken in connection with other facts, it ought to be proposed in connection with those facts; and an offer to follow the evidence proposed, with proof of those facts at the proper times. But the court is not bound to spend its time in an inquiry which, from the showing of the party, can produce no possible results. Dislocated circumstances may doubtless be given in evidence, particularly if there be no objection to the order of time; but the proposal of the evidence must contain in itself, by reference to something that has preceded it, or that is to follow, information of the manner in which it is to be legitimately operative." Weidler v. Farmers' Bank of Lancaster, 11 Serg. & Rawle, 139, 140.

We propose a few more cases, illustrative of the above reasoning. On trial of A. for the murder of H., whom he had hired to murder another, it was held pertinent to prove that H. had murdered the other, it being opened by the counsel for the prosecution that A. murdered H. to prevent his (A.'s) detection. Rex v. Clewes, 4 Carr. & Payne, 221. On a question whether a bidder had notice of an incumbrance, the auctioneer's proclamation of the incumbrance, before the bids began, is not admissible, *per se*. To make it so, proof must be given that it was so made that the bidder could not fail to hear it. Porter v. Liddle, 7 Mart. Lou. Rep. 23. In trover for flour, to prove that the plaintiff purchased it from a vendee of one for whom the defendant was wharfinger; and that such purchase of the plaintiff was with the fraudulent intent to deprive the defendant of his right to demand payment of his wharfage before the goods were delivered, it was offered to show that the vendee was insolvent; but the defendant's counsel admitting that the facts going to show the insolvency could not be brought home to the knowledge of the plaintiff, the court refused to receive the offered proof. Holiday v. Mann, 2 Carr. & Payne, 509.

These offers of counsel may, many times, without any imputation of unfairness, anticipate a greater number of circumstances, or more strength in the supposed proof of them, or in their combined effect, than the evidence ultimately presents; in consequence of which the case is heard upon proofs; and the question thus raised whether, on the whole, they shall be submitted to, or withdrawn from the jury, as competent or incompetent matter of consideration.

Thus, to charge C., an indorser, notice was left at his son's store, kept in a separate apartment of C.'s house; but their was no interior communication between them. C. usually transacted his business in another part of the town, but was often about his son's store; and notices or letters, when left at the store, had been sent by the bearer to, or delivered by the son at C.'s place of business, if seen or recollected by him. Now, this was held insufficient proof of notice to C., yet the evidence was received. Had it been followed out by C.'s admission that a notice, left at his son's, never failed of reaching him immediately, or that the notice was immediately dispatched by the son, or various other facts that may be conceived, the notice would have been

made out. But it stopped short, and the court, by Washington, J., very justly remarked, that "Presumptions, from evidence given in a cause, of the existence of particular facts are, in many, if not in all cases, mixed questions of law and fact. If the evidence be irrelevant to the fact insisted upon, or be such as cannot fairly warrant a jury in presuming it, the court is so far from being bound to instruct them that they are at liberty to presume it, that they would err in giving such instruction; for why give it when it is manifest that if the jury should find their verdict upon the fact so deduced, it would be the duty of the court to set it aside, and to direct a re-trial of the cause?" United States Bank v. Corcoran, 2 Peters' Rep. 121, 131, 133. The learned judge then adverts to the case of Ireland v. Kip (11 John. Rep. 231; S. C., 10 Id. 490); as one presenting much stronger circumstances; as strong as they could well be. In that case, the defendant had directed the letter carrier to leave all letters for him at a certain house in Frankfort street; the carrier called at the post-office three or four times every day, and took out and delivered accordingly all letters left there; and the defendant usually sent or called every day at that house for his letters. The refusal in the latter case to submit the evidence to the jury, most probably is referable to the strict rule, that the notice to indorsers, resident in the city where all the parties reside, must be personal, or something equivalent, as by leaving it at the indorser's dwelling-house, or place of business, if absent. Id. By relying on the settled rule in that particular case, the indorser might have been more negligent of calling at the place appointed for his letters in general. He had no reason to suppose the notice would be left there. See per Spencer, J., 11 John. Rep. 232, in S. C.

Where counsel propose a chain of evidence, the whole of which would be relevant, and the court receives the evidence as far as it goes, but it stops short of the proposition, the course then is, not to suffer counsel to argue upon it to the jury, but withdraw it entirely from their consideration. Thus, where the defendant insisted that the single bill on which he was sued was to have been discharged by the surplus avails of certain bonds received by the plaintiffs, but which they had lost through negligence, he proved the receipt of the bonds; but failed to show the agreement to apply. The court refused to allow any argument on this imperfect case, and withdrew it from the jury. Stewart v. The Huntingdon Bank, 11 Serg. & Rawle, 267.

In the last case, Tilghman, C. J., takes occasion to remark: "It has grown into a habit, within these few years, for counsel to propose a chain of evidence, the first links of which depend on those which follow, and would not be supported without them. Now, although gentlemen of honor (and such I take the counsel in this cause to be) would scorn to impose on the court, by pledging themselves for what they knew they could not perform, yet it may happen that there may be others who would make no scruple of liberal promises, provided they could smuggle into the jury box a piece of evidence which ought not to have got there. The court should therefore keep a wary eye on proceedings of this kind, and take care to instruct the jury to pay no regard to the evidence which they have heard, whenever the condition on which it was introduced is not complied with." Id. 270. In a simple case, like that he was considering, counsel may sometimes fall within the above censure. Oftentimes, however, in opening a chain of evidence, they are not so well instructed (nor can they be) as to know its precise extent.

None of these difficulties occur where the testimony is obviously irrelevant in any view. It is then the duty of the court to reject it at once; as where the plaintiff claimed the value of a slave killed by the defendant's slave, and offered to prove the looks of the latter while the former was in a dying condition. Sterling v. Luckett, 7 Mart. Lou. Rep. (N. S.) 198.

In trials for conspiracies and other offences, involving a great multitude of circumstances, a still more latitudinary course than any of the above, is sometimes necessarily taken; though it should be avoided, if practicable. Thus, on a trial of an indictment for a conspiracy to obtain merchandise, against five persons, letters were offered from one or two respecting the obtaining of merchandise generally; they containing no direct proof of a conspiracy, nor was any general conspiracy yet made out. These letters were received on the ground that they might become material in the course of the cause; although their materiality did not yet appear. An order inclosed in a letter was received on the same principle. But a part of the letter which related to a third person not named in the indictment, nor concerned in the matter, was not allowed to be read. In respect to letters received as evidence, but not appearing in the particular stage of the cause to be relevant, the court intimated that the jury could finally judge of the relevancy.

The Commonwealth v. Boyer et al., Reading, Penna., November Gen. Sess. 1823; 2 Wheel. Cr. Cas. 140, 143 to 146.

It is scarcely necessary to observe, that though a circumstance be proper as tending to show a particular fact, it is inadmissible, unless the fact itself be pertinent to the question in issue. Thus, where the sheriff levied money for F. on execution, and then levied on the same money in his own hands, on a *fi. fa.* against F.; being sued by F., the sheriff offered oral evidence to show that F. was insolvent, and had taken the insolvent debtor's oath; but though this might entitle persons other than the plaintiff to the money, it would not necessarily prevent this suit going on in F.'s name. It was therefore held inadmissible, not because the facts offered might not be material to show a right in third persons; but because that right existing, and being shown, it would not, upon anything appearing, affect the present case. Turner v. Fendall, 1 Cranch, 117, 119, 131, 132.

The plaintiff may sometimes, by his own course, exclude an inquiry which would otherwise be relevant. He cannot go to the jury on two inconsistent propositions. Thus, where the defendant gave evidence to impeach a note for want of consideration, and the plaintiff proved a pecuniary consideration, which the defendant answered by showing the plaintiff's declaration that the consideration was a special agreement; held, that the plaintiff was precluded from insisting on both; but must be confined to vindicate one of his propositions. Winchell v. Latham, 6 Cowen's Rep. 682, 686, 689. And see Beake's Ex'rs v. Birdsall, 1 Coxe, 12. And where the plaintiff proved the distinct confessions of the defendant at different times, one of which did, and the other did not support the declaration; held, that the plaintiff might adopt the first and reject the last confession. Hale v. Andrus, 6 Cowen's Rep. 225.

The proof may, of course, be relevant to one count of a declaration, and support it, though it fail as to another. Safford v. Stevens, 2 Wend. 158. But where the defendant was sued in assumpsit as a common carrier (the declaration including the money counts also), for corn taken forcibly away by the mob, who left some money with the defendant in pay, the plaintiffs having closed their case, and the defendant's counsel being stopped by the judge, who expressed an opinion in his favor, the plaintiffs' counsel would then have gone for the money, and proposed to prove its receipt by the defendant. But held too late, after the plaintiffs had closed their case (per Lord Kenyon, C. J.), Le Blanc, J., saying the judge might prevent going into a new case, in his discretion, at that stage of the cause. Edwards v. Sherratt, 1 East, 604, 611, 614.

It is proper also to observe, that, where the right exists, as it does in most common-law countries, to interpose in conjunction with the plea of the general issue, special pleas in bar, or (in some states) a special notice of the matter in bar; neither of these will, in any way, deprive the defendant of every latitude he would enjoy under the general issue. It follows that though, by reason of variance or any other cause, the evidence offered be not receivable as being specially introduced, it may yet come in under the general issue, if admissible according to the abstract nature of that plea. Levy v. Gadsby, 3 Cranch, 180, 186; Smith v. Gregory, 8 Cow. Rep. 114; Fulton Bank v. Stafford, 2 Wend. 483; Bradley v. Field, 3 Wend. 272.

Thus, in setting out usury in a note (Smith v. Gregory, Fulton Bank v. Stafford, and Levy v. Gadsby, *ut supra*), or an insolvent's discharge (Bradley v. Field, *ut supra*), a variance between the plea or notice and the case made in proof, has been held not to preclude its admission under the general issue.

It should also be remembered that under the head of relevancy, the question is not whether the evidence offered be the most convincing; but whether it tends at all to illustrate the question. Holt v. Crume, Litt. Sel. Cas. 499, 500.

Again; to make testimony relevant, it is not necessary that it should be essential. Though cumulative, and supererogatory, it may be received. Thus, in proving a sheriff's sale of land on execution, the conditions of sale need not be shown. Yet if they are shown, though objected to, this is not error; for the conditions are a part of the *res gestæ*. Arnold v. Gorr, 1 Rawle, 223, 225. Yet it may be rejected as unnecessary. The conversations leading to a written contract, which is fully in evidence, were held rejectionable for that reason. Gilpins v. Consequa, 1 Pet. C. C. Rep. 85, 87; S. C., 3 Wash. C. C. Rep. 184, 188, S. P.

The following cases will show more particularly how testimony may be admissible for one purpose, though not for another; although evidence of unliquidated damages be not admissible by way of defalcation (set-off) (Kachlin v. Mulhallon, 2 Dall. 237; S. C., 1 Yeates, 571; Cor-

nell v. Green, 10 Serg. & Rawle, 14; Gogel v. Jacoby, 5 Serg. & Rawle, 117); yet in another view it may be relevant; and acts of misfeasance or malfeasance may be given in evidence, if they are immediately connected with the plaintiff's cause of action; not as a set-off; but to defeat partially or wholly the plaintiff's claim by impeaching it; *e. g.*, in an action for work done, that it was done badly. Gogel v. Jacoby, 5 Serg. & Rawle, 117, 122. So in an action for the price of millstones, that the plaintiff warranted them to be good, whereas they were bad. Steigleman v. Jeffries, 1 Serg. & Rawle, 477, cited 5 Serg. & Rawle, 122. An account of sales being offered by the plaintiff, the truth of which was material, the defendant shall not be allowed to prove another account of the same sales, by the same person, unless he avows an intention to impeach the first. Gilpins v. Consequa, 1 Pet. C. C. Rep. 85, 89; S. C., 3 Wash. C. C. Rep. 184, 188, S. P. In assault and battery, a judgment obtained by the defendant against the plaintiff, is pertinent to show the amount of the defendant's property; but is inadmissible to show his oppressive conduct towards the plaintiff. Jacoby v. Guier, 6 Serg. & Rawle, 399. A sealed instrument, though void, may yet be received to show the terms of the contract, in an action of assumpsit, the parties having acted under the instrument. Gouverneur v. Elliott, 2 Hall's Rep. N. Y. S. C. 211.

We shall close this note with some additional sketches of modern cases, tending more fully to illustrate the question of relevancy, as depending on the particular object with which the testimony is introduced; or its connection or disconnection with other facts in a necessary chain of proof. See also *post*, notes 197 and 198.

First, of cases wherein it will be received. On the question whether G.'s property was sufficient to satisfy a judgment and execution, previous incumbrances on the same property are within the issue, and may be inquired of. Norris v. Badger, 6 Cowen's Rep. 449. That a father had presented slaves to some of his daughters on their marriages, was held admissible to show his intent on the delivering a slave to one of his daughters on a subsequent marriage. Smith v. Montgomery's Adm'rs, 5 Monroe, 502, 503. On trial of an indictment for a conspiracy in the abduction and forcible marriage of S. to H., the defendants made a point that she was willing; and the commonwealth was allowed to prove in reply, that some months subsequent to the marriage, the defendant H. and his brother-in-law, forcibly took and carried her away after she had been released from the custody of H. on *habeas corpus;* and that she resisted, escaped, was retaken, carried twenty miles, confined and abused. This was objected to as irrelevant; but admitted, although subsequent to the alleged offence, as going to refute the pretence of willingness. Respublica v. Hevice, before the Supreme Court of Pennsylvania, 1796, 3 Wheel. Cr. Cas. 505, 507, 508. Where the defence of a prisoner is insanity, evidence of insanity before the offence committed is proper, without first proving insanity at the time of its commission. Vance v. The Commonwealth, 2 Virg. Cas. 132. The language a person speaks is pertinent in determining his identity; and where the plaintiff in trover for a negro, described her as being Ango, and speaking the Angola dialect, the defendant was allowed to prove that she spoke the Caromantee also, as one circumstance against her being of the Angola breed, though not conclusive, because she might speak both languages. Martin v. Maverick, 1 M'Cord, 24. On an issue whether a demand was made of possession, evidence was held admissible for the defendant, that the plaintiff said he had agreed with the defendant to let matters stand till the event of another lawsuit was known. Holt v. Crume, Litt. Sel. Cas. 499, 500. It is relevant, in a question of domicil, to prove the party's conduct, going to manifest his intention, both before and after he has changed his local residence. Richmond v. Vassalborough, 5 Greenl. Rep. 396. On trial of an indictment for knowingly receiving stolen goods, a general understanding between the thief and receiver, that the one should steal and the other receive, is admissible in evidence as to receiving the particular goods. M'Niff's Case, before Radcliff, Mayor, 1 C. H. Rec. 8. A prisoner, in his examination before a magistrate, is not bound to answer any question; but if he submits to answer, and answer falsely, the people may produce evidence to disprove the answer; and it will then be strongly against the prisoner. Goldsby's Case, before Radcliff, Mayor, 1 C. H. Rec. 81; Ball's Case, before Colden, Mayor, 4 C. H. Rec. 157. Testimony arising after, is admissible to explain facts occurring before the commencement of the action. M'Leod v. Johnston, Anth. N. P. Rep. 16. On a charge for violating a police law (*e. g.* for delivering flour on board a vessel without inspection), the question is one of intention; and Kent, C. J., received testimony that the party accused, being sick, ordered his clerk to have the flour in question inspected, which he omitted by mistake. But neglect may be so

gross as to amount to a criminal intent. Sturges v. Maitland, Anth. N. P. Rep. 153. When the question is, whether a sale was *bona fide* or not, the whole conduct of the party whose acts are assailed, before and after as well as at the time of the contract, may be inquired into. Reels v. Knight, 8 Mart. Lou. Rep. (N. S.) 267. In an action for taking judgment in a cause in violation of a contract and settlement between the parties, either party may show his original rights in respect to the subject of the suit; for so it would better appear whether they were settled. Truett v. Chapin, 4 Hawks, 178. Where the question is to which of two credit was given, the record of a pending suit against the other in favor of the plaintiff, is evidence for the defendant. Head v. Taylor, Litt. Sel. Cas. 257, 261, 262. To repel the plaintiff's evidence that he had never obtained any receipt for money, which the defendant had received to pay over for him to his creditor, evidence that he demanded a receipt of the creditor and received a paper as and for a receipt, was held admissible, though the witness knew not what the paper was. Marvin v. Keeler, 5 Conn. Rep. 271. To repel proof that a letter directed to A. was mailed, it is relevant to show that A. never received it. Litchfield v. Farmington, 7 Conn. Rep. 100. On a justification in trespass for shooting a dog, that he attacked the defendant, and was accustomed to attack people; the plaintiff gave in evidence, without objection, the quiet habits of the dog. Clerk v. Webster, 1 Carr. & Payne, 104. And proving that the defendant was in a situation wherein he might, and probably did commit the alleged trespass, it is relevant to prove that he was in that situation from another motive, *e. g.*, in order to arrest an offender. Prindle v. Glover, 4 Conn. Rep. 266. Where the question was whether work was performed by the defendant for the plaintiffs according to a written agreement, couched in general terms, *e. g.* to make a drawbridge and its apparatus for the passage of vessels, evidence that these were constructed under the eye and direction of the plaintiffs' agent, was held admissible. Hartford Bridge Company v. Granger, 4 Conn. Rep. 142. On an issue awarded to try whether a bond and warrant for $460, and a judgment, execution and sale thereon in favor of a son, within a few months after he came of age, against his insolvent father, were not fraudulent as to creditors, the latter offered to prove that, at the sheriff's sale, the son claimed several articles levied on as his own; thus to infer that he had been paid for his services, for which it was insisted by him the bond was given, by the property so claimed. Held relevant and admissible. Reitenback v. Reitenback, 1 Rawle, 362. On the question of sanity at the time of executing the legal instrument, evidence of the state of the mind before and after, is admissible. Grant v. Thompson, 4 Conn. Rep. 203. On issue upon a forcible entry and detainer, the defendant, having entered peaceably, said to the relator, "it will not be well for you if you ever come upon the premises again, by day or by night." Held that this was relevant, and might be left to the jury, from which to find a forcible detainer. People v. Rickert, 8 Cowen's Rep. 226.

A witness testified that he had sworn on a former trial, from a memorandum not now present, to the identity of a lottery ticket now produced; and another witness swore that the ticket now produced, was the same as the one produced on the former trial; and the first witness, on going out and examining his memorandum, returned and said he had no doubt of the identity. The whole was holden admissible. Barnum v. Barnum, 9 Conn. Rep. 242. On an issue joined on the fair execution of the will, between legatees and the widow of the testator, who had bequeathed almost all his estate to persons other than his widow, she offered evidence to show that the will was unfairly obtained, and among other things, proof that she brought her husband almost all his estate so bequeathed, by the marriage. Held admissible, as being relevant to the issue. And the court said that generally, on a question of this kind, the intrinsic evidence of the will itself, arising from the unreasonableness or injustice of its provisions, taking into view the state of the testator's property, family, and the claims of particular individuals, is competent and proper for the consideration of the jury. Patterson v. Patterson, 6 Serg. & Rawle, 55, 56. On trial of an indictment for destroying the prisoner's vessel with intent to prejudice the underwriters, evidence of its value is admissible, as showing inducements to destroy or preserve it. U. States v. Johns, 1 Wash. C. C. Rep. 363. On trial of a prisoner for the murder of his wife, there being no direct evidence against him, his previous adultery was allowed in evidence, among other circumstances, against him, to repel the presumption of innocence arising from the conjugal relation. State of Connecticut v. Watkins, 9 Conn. Rep. 47. And an acknowledgment by D. that he was indebted to A., was received as evidence that he was indebted to A. and B., they being partners in trade, their debt being charged as such on book against D., and it not being

pretended in the course of the trial that D. owed A., individually, who was the principal partner in the firm. Dwight v. Brown, 9 Conn. Rep. 83, 88. To prove that D. owed C. for the board of a workman in D.'s factory, evidence was received showing that it was his course to procure and pay for the board of his other hands in the same factory; and this was held, of itself, *prima facie* evidence of D.'s having engaged the board in question. Dwight v. Brown, 9 Conn. Rep. 83, 88.

Secondly, where testimony will be rejected as irrelevant. A pauper remembering that when he was four years of age, he was in the parish of A., is no evidence that he was born there. Rex v. Trowbridge, 7 Barnw. & Cress. 252. The defendant having given proof of a delivery to him of a deed from the grantor, the plaintiff, to rebut that, offered to show that a few days before the delivery set up by the defendant, the latter broke open the grantor's trunk, and got the deed with other papers, which the grantor ordered him to put back. Held irrelevant. Hale v. Hills, 8 Conn. Rep. 39. Proving that money borrowed was expended for the benefit of a partnership, does not prove that it was loaned for their benefit; and is not *per se*, admissible for the purpose of inferring the latter. Harris v. Wilson, 7 Wend. 57, 58, 59. In malicious prosecution, for accusing the plaintiff of stealing diamonds, proof by the defendant that certain fellow-workmen of the plaintiff offered to be searched for the articles about the time of the theft, was held not admissible even to show the *quo animo* of the defendant, the plaintiff not being present, though he afterwards refused to be searched. Riley v. Gourley, 9 Conn. Rep. 154, 161. When a prisoner introduces evidence in support of his general good character, and the commonwealth endeavors to impeach it, the witness who impeaches will not be allowed to speak of conversations held with others subsequent to the commencement of the prosecution. Carter v. The Commonwealth, 2 Virg. Cas. 169. To show the publication of a libel in a newspaper, it is not admissible to prove placards in the doors of third persons, announcing that the libel will appear, which does appear accordingly. The evidence is too remote. The defendant should be connected with the placard. Raikes v. Richards, 2 Carr. & Payne, 562. To show that a grantor under whom the party claimed was of sound mind when he executed the deed, and so was of ability to grant, a draft of the deed submitted to a sergeant at law who was a connection of the grantor, was offered in evidence. Held not admissible. At most it merely showed the opinion of one of the family that the grantor was sane. It was not a part of the *res gestæ*; for it was not shown that the grantor himself submitted the paper. It might have been submitted by others; and so was disconnected with the grantor, and entirely irrelevant and made nothing. Ball's Lessee v. Ball, Irish K. B. Tr.; 5 George IV (1824), 2 Fox & Smith's Rep. 249, 267. In a prosecution for bigamy against a woman, evidence of barbarous treatment by her first husband is inadmissible. Walworth's Case, 1 C. H. Rec. 171. To defeat a sheriff's sale of land, evidence of his resignation intermediate the levy and sale, being irrelevant, should be rejected. Loffland v. Ewing, 5 Littell's Reports, 42, 45. To prove notice to an indorser, evidence that the notary's clerk inquired where he lived, declaring he was going to serve him with notice, and that after he had got information of the indorser's residence, he set out to go there, is not admissible. Farmers' Bank of Lancaster v. Whitehill, 16 Serg. & Rawle, 89. In an action on a note given to two persons, Lane and White; held the defendant could not be received to show that they at the date had another partner; for the note was recoverable in L. & W.'s name, though the debt was due to another partnership. Cotton v. Lane, 1 Alab. Rep. 320. In an ejectment, it became material for the plaintiffs to show that L., under whom they claimed, had paid for the land. To repel this, the defendants gave evidence that L. was insolvent. To answer that proof, the plaintiffs offered the will of a third person, recognizing L.'s interest in certain land, and showing its value. This was admitted in the court below; but held wrong on error, as it did not even appear that the third person had any interest in the land. Pipher v. Lodge, 16 Serg. & Rawle, 214, 222.

In an action for breach of contract to convey land, the standing of the parties in life is absolutely inadmissible in evidence, and cannot be considered by the jury. Rowland v. Dowe, 2 Murph. 347. N. B. The judge left it to the jury that the defendant was of high standing, and therefore had a higher sense of the moral obligation of a contract than if he had been in the lower ranks of life, which consideration should enhance the damages. But on motion for a new trial, he retracted the charge, and consented to the motion. Rowland v. Dowe, 2 Murph. 347, 349. Assumpsit for the price of hardware, furnished by the plaintiffs to the defendants, to be used in building certain houses in Baltimore. The defence was that the plaintiffs were to take,

in pay, a part interest in one of the houses, when finished; and the defendant produced an agreement in writing between himself and certain third persons, in respect to building the houses. One answer of the plaintiffs was, that the houses were not completed within the time stipulated; and they offered to prove that, at the time of the agreement produced being entered into, a certain day for completing them was agreed on. But held irrelevant; the plaintiffs not being parties to the agreement proposed to be proved. Owings & Piet v. Low, 7 Har. & John. 124. A man's promise to do an act in behalf of another is not evidence, *per se*, that he is an agent for that purpose. Plant v. M'Ewen, 4 Conn. Rep. 545. In an action against the master, for so putting the plaintiff (one of the sailors) in fear, that he dare not return on shipboard, but remained on a desolate island, particular instances of abuse of the crew by inferior officers of the ship, which were known to the defendant, and not punished, were held not admissible. Bennet v. Howard, 3 Day, 219. In an action for breach of contract, evidence of fraud in the breach is inadmissible as a substantive ground of recovery. Willings v. Consequa, 1 Pet. C. C. Rep. 302, 311, 312. To rebut direct evidence of paying money on the debt of the defendant and others, evidence that the plaintiff's son (one of the debtors) had funds to pay the whole debt, which he received from the other debtors, who appointed him agent to pay the debt, is not, *per se*, admissible as proof that the plaintiff paid, on his son's individual credit. Wheeler v. Packer, 4 Conn. Rep. 102. An award between L., the owner of land, and the town of H., that certain public fishing ground lies within L.'s boundaries, is no evidence for L.'s lessee, to establish a prescription for a several fishery in L.'s boundaries against an inhabitant of H. It is irrelevant to such an issue. Gould v. James, 6 Cowen's Rep. 369. The general character and habit of a man to take more than legal interest, as a lender of money, is not admissible on a question of usury in a particular loan. Jackson ex dem. Norris v. Smith, 7 Cowen's Rep. 717. To show that the contract on which the plaintiff's claim depended, and which was made by the defendant with N., the defendant proved N.'s admission that he made a usurious loan to the defendant the year before the loan on which the contract in question was given. Held entirely irrelevant; and that it should not be put to the jury as evidence, though the security for the first and last loans were in the same form. Jackson ex dem. Norris v. Smith, 7 Cowen's Rep. 717. In an action on a *quantum meruit* for services in one business, proof of the value allowed for similar services in another business by a person other than the defendant, under a special agreement, is not admissible to show the value. Robbins v. Harvey, 5 Conn. Rep. 335. The question being whether a will was revoked, proof that the testator, after having made his will, burnt certain papers taken from his desk, where his valuable papers were usually kept, is inadmissible, though in connection with the fact that the will was not to be found at his death. Jackson ex dem. Brown v. Betts, 9 Cowen's Rep. 208. Whether proof that the testator requested a codicil to be drawn, be admissible to repel presumptive proof that his will had been canceled? *Quere.* Jackson ex dem. Brown v. Betts, 9 Cowen's Rep. 208; S. C. on error, 6 Wendell, 173. Evidence of the relative situation of a testator's children in point of property is inadmissible to support the presumption of a revocation of his will, where there is no change in their circumstances between the time of making the will and that of the alleged revocation. Jackson ex dem. Brown v. Betts, 9 Cowen's Rep. 208; S. C., on error, 6 Wend. 173, S. P. Where the point in issue was notice to an indorser, a letter by which he said to the plaintiff's agent that he would waive all defence under the Statute of Limitations, and another empowering an attorney to appear for him in the suit on the note without process, were both held irrelevant, as not tending to prove the notice. U. S. Bank v. Corcoran, 2 Pet. Rep. 121, 133. On the point whether the defendant had confessed judgment to defraud his creditors, it was offered that he had said: "If a man could not make both ends meet, he ought to secure something for his family." The court said this was a symptom of incorrect principles; but had no relation to the issue. Though the defendant were proved to be a knave, the plaintiff could not be affected by it. Whiting v. Johnson, 11 Serg. & Rawle, 328. To prove that the plaintiffs had paid a note given by them for the defendant, at ninety days, they showed a record of a judgment against them on a note at sixty days. Held irrelevant: but as the defendant did not object the irrelevancy, held no exception on error. Coe v. Hutton, 1 Serg. & Rawle, 398, 407.

The general principle, that a party who puts himself on one issue admits all the rest, which therefore cannot be controverted by the proofs, is recognized by all the cases, American as well as English. A *protestando*, concerning certain facts not directly affirmed or denied by the par-

ticular pleading, is often prefixed to it, even at the present day, the pleader protesting that facts do or do not exist: and there is some old learning assigning to such an introduction its office and effect. Co. Litt. 124 b. Among other things, it is said to be of no use unless the issue be either found for the party protesting (Br. Protestando, pl. 14; Co. Litt. 124 b; Plowd. 276 b); or unless the matter protested could not have been pleaded. Id.; and 2 Wm. Saund. 103 a. But it has long been treated as a mere blank in the particular cause. Thus, in Mulliner v. Wilkes (3 Doug. 218, A. D. 1783), in assumpsit on a note, the defendant pleaded that the parties made a corruptly usurious agreement, in pursuance of which the note was given. The plaintiff protesting that no such corrupt agreement was made, replied that the defendant did not, in pursuance of any such corrupt agreement made, nor for any such purposes as were in the plea mentioned, make the note. On the argument of a special demurrer, taken because this replication concluded to the country, Law, of counsel against the demurrer, insisted that this was a complete denial of the whole plea. Buller, J.: "You have protested against the corrupt agreement; and therefore, for the purposes of this replication, you admit it. The plea contains only two parts, and you have put only one in issue." Lord Mansfield inquired from *Law* what was the use of the protestation. Law said that he thought it frivolous, and of no use; that it was an exclusion of a conclusion in another action. Buller, J.: "The use of a protestation is, to prevent the matter operating as an admission in another cause; but in the cause in which it is used, it admits the matter." And so the court finally held. Id. 219, 220; 1 Chit. Pl. 590; and per Woodworth, J., in Briggs v. Dorr, 19 John. Rep. 96, S. P.

So in pleading a bankruptcy to justify a trespass *de bonis*, &c., the plea contained distinct allegations of a trading and petitioning creditor's debt; and then went on to state that the plaintiff "became bankrupt:" replication, protesting the *trading and debt*, and denying that the plaintiff became bankrupt. This was held to admit the trading and debt; and the testimony at Nisi Prius was confined, by Lord Tenterden, C. J., to the act of bankruptcy alone. Cotton v. James, 3 Carr. & Payne, 505. So, where the assignee of a chose in action suing in B.'s name, to avoid a release by B. to the defendant, replied an assignment and notice of this to the defendant before the release; and the defendant rejoined, protesting that no assignment had been made, and denying the assignee's interest generally—but saying nothing of the notice—the whole replication was held to be admitted. Briggs v. Dorr, 19 John. Rep. 95.

One count of a declaration cannot be called in as proof by the defendant to contradict or affect the evidence in respect of another. Thus, upon a declaration in assumpsit by a landlord against his tenant for breach of good husbandry, where there was one count which professed to be founded on a special written agreement, and a second upon an implied contract; it was held, that the defendant could not insist upon the first count as evidence that a written contract existed, so as to impose upon the plaintiff the necessity of producing it. Per Le Blanc, J., Lancaster Spring Ass., 1 Stark. Ev. 295. And this is especially so, if a *nolle prosequi* be entered on the count sought to be used as evidence. Brown v. Feeter, 7 Wend. 301. But one count is, in no sense, material to the other, unless there be a reference by one to another; and then not, if the reference be to a mere formal matter, as the day, &c. Id 304, 305. A *nolle prosequi* on a count does not confess the plea to that count; its only effect is to strike the count and plea from the record. Thus, two counts—one on a note, the other for money, &c.—*actio non accrevit*, &c., to the first count, and *nolle prosequi* as to that—do not operate to confess the plea; but the fact pleaded may be contested, as if it never had been on the record. Keeler v. Bartine, 12 Wend. 110. And Marshall, C. J., in Hughes v. Moore (7 Cranch, 176), means no more than this. 12 Wend. 113.

The same things hold of a notice of set-off, and of a bill of particulars under it, which is deemed a part of the notice. Harrington v. Macmorris, 5 Taunton, 238; S. C., 1 Marsh. 33.

We had occasion in the last note to notice, for another purpose, the right of double pleading, *i. e.* appending other pleas to the general issue, or other plea—or giving notice of special matter, the former of which is universally allowed, and the latter in several states. We mention the same cases here, for the purpose of observing that, as in a declaration or notice of set-off, one substantive count or part cannot be averred against the other, or in any way influence it as matter of admission or evidence, so where several pleas are pleaded, an express or implied admission in one still leaves the other in its full abstract force, although such admission may be direct and of the very fact denied by the other. Grills v. Mannell, Willes, 378, 380, per Willes, J.; Kirk v.

Nowill, 1 T. R. 118, 125. In the last case, Buller, J., said the pleas were as unconnected as if they were on separate records. Id. 125. The same doctrine is recognized in Harrington v. Macmorris, *supra;* and by various American cases. Murray v. Boissier, 10 Mart. Lou. Rep. 293, 300; Cornell v. Hope Insurance Company, 3 Id. (N. S.) 223, 227; Cilley v. Jennes, 2 N. H. Rep. 89; Alderman v. French, 1 Pick. Rep. 1, 4; Whitaker v. Freeman, 1 Dev. 271; Vaughan v. Havens, 8 John. Rep. 109; Root v. King, 6 Cowen's Rep. 613, 624.

The same rule holds as between a plea and a notice of special matter. Accordingly, where *non est factum* was held to admit the eviction, in covenant for quiet enjoyment, the circumstance that a notice of special matter of defence was attached, denying the eviction, was allowed no weight as taking away the admission by plea. Kane v. Sanger, 14 John. Rep. 89. It is the same, though there be a stipulation that all special matter may be given in evidence by the defendant, the same as if pleaded. Dale v. Roosevelt, 9 Cowen's Rep. 307.

So it was held that a judgment in favor of one defendant, on the plaintiff's demurrer to a plea in bar, was no admission that a separate plea of the same matter by another defendant was true. Lansing v. Montgomery, 2 John. Rep. 382.

The notice in bar, which comes in place of a special plea, leaves the matter in the declaration still more open than the latter; for, when considered by itself, no implied admission can be imputed to it within the principle we are considering; whereas, the special plea, though independent of its companions, yet relative to the declaration, must be construed to admit, by its silence, what it does not expressly deny. The notice is clear of this implication, whether of special matter or a set-off. Vaughan v. Havens, 8 John. Rep. 109; Morgan v. Boone, 1 J. J. Marsh. 585, 586. In New York, these notices come in under the general issue, being allowed by statute; and so, it is presumed, generally, in other states.

It is also well to observe, while on this head of points in issue, that these notices are construed benignly and liberally; and are much in ease of the pleader where the introduction of his defence is attended with difficulty under the ancient forms. Thus, notice of "divers judgments outstanding against the plaintiff, which were a lien, &c.," was held sufficiently certain without going into particulars. Chamberlain v. Gorham, 20 John. Rep. 746. So, that the defendant would justify under a warrant, without stating its contents. Linsley v. Keys, 5 John. Rep. 123. And see 8 John. Rep. 457. It is enough if it appears that, under all the circumstances of the case, the plaintiff would not be taken by surprise. Chamberlain v. Gorham, *ut supra.*

In Pennsylvania, it seems, the plea of payment may be interposed, with a statement of special matter which answers to the New York general issue and notice, and both seem to enjoy the same security against the imputation of implied admissions. Schlatter v. Elter, 13 Serg. & Rawle, 36; Roop v. Brubacker, 1 Rawle, 304, 308, 309, and cases there cited; Steigleman v. Jeffries, 1 Serg. & Rawle, 477; Heck v. Shener, 4 Id. 249; Hollingsworth v. Ogle, 1 Dall. 257, 258, per M'Kean, C. J.; per Duncan, J., in Roth v. Miller, 15 Serg. & Rawle, 100, 104, 105. The plea of performance in an action of covenant seems there to have the same effect, as to legal questions, as it would have in common-law courts; but these courts there receive matters of defence under this plea which would operate against the specialty in chancery on bill filed or answer put in. And so under a plea of payment to a bond. Neave v. Jenkins, 2 Yeates, 107, 108; Swift v. Hawkins, 1 Dall. 17; Lewis v. Morgan, 11 Serg. & Rawle, 234, 236.

A similar practice seems to prevail in Kentucky, at least in respect to the plea of *non est factum*, with leave, &c. Peebles v. Porter, 7 Monroe, 609, 610.

In Massachusetts, a peculiar effect is given to a plea of justification in slander. It is there held that it admits the speaking of the slanderous words, although preceded by the general issue. Jackson v. Stetson, 15 Mass. Rep. 48. But this is admitted to be anomalous; and the general rule prevails in that state as to pleading in all other actions. Alderman v. French, 1 Pick. 1, 4. And see Root v. King, 6 Cowen's Rep. 613, 614. The exception does not prevail in New Hampshire (Cilley v. Jennes, 2 N. H. Rep. 89), and it is denied to be law by Chief Justice Marshall (Whitaker v. Freeman, U. S. C. C. N. C. 1 Dev. 271); who reiterates the above cited strong language of Buller, J., in its application to actions for slander, as well as to all others.

Bating the above questions of construction, and the above anomalies, the application of the general principle is usually clear of all difficulty. We shall, therefore, close this note with a few modern instances.

The general issue, or other plea in bar, admits the character in which the plaintiff sues to be

as it is set out in the declaration; as where he or they are described in the declaration to be overseers of the poor of a certain town (Carpenter & Rose, overseers, &c. v. Whitman, 15 John. Rep. 208); the proprietors of Kennebec Purchase (Prop. of Ken. Purch. v. Call, 1 Mass. Rep. 483, 485); the successors of the treasurer to whom the bond was given (per Gantt, J., in State Treasurers v. Wiggins, 1 M'Cord, 468, 470); executor or administrator (Fraux v. Fraux, 1 Pennington, 166; Smith, Adm'r of Walker v. Ludlow, Anth. N. P. Rep. 127); held in detinue, where the plaintiff declared as administrator *de bonis non*, on the possession of the testator (Floyd v. Breckenridge, 4 Bibb, 14, 17); and as an ordinary administrator; and said the admission is conclusive (Henderson's Adm'r v. Clark, 4 Bibb, 391, 392); and as an administrator *cum testamento annexo* (Thomas v. Tanner, 6 Monroe, 52, 59). The defendant cannot, on this plea, question the right of the plaintiff to come in this character, even though the court granting his letters of probate or administration be a foreign court; and therefore have no jurisdiction of letters to be used in the state where suit is brought. Champlin v. Tilley, 3 Day, 303, 305, 306. But it was agreed that if the plaintiff declare in detinue on his own possession, he must prove his letters in the ordinary way, or show possession in himself. Floyd v. Breckenridge, Henderson's Adm'r v. Clark, and Thomas v. Tanner, *ut supra*. So this plea admits that the plaintiff is a foreigner, as he alleges; and is therefore qualified to sue in the United States courts (De Wolf v. Rabaud, 1 Pet. S. C. Rep. 476, 498); or that he is, as he alleges, a citizen, and therefore entitled to proceed in a particular mode allowed by statute to citizens alone (Shivers v. Wilson, 5 Harr. & John. 130); or that he is, as alleged, a guardian (Harper v. Distrehan, 2 Mart. Lou. Rep. (N. S.) 389). So, where the plaintiffs sue as a corporation, we have seen in The Proprietors of the Kennebec Purchase v. Call (*ut supra*), that a plea of the general issue admits them to be a corporation, and supersedes the necessity of proving their charter or character at the trial. This has been repeatedly holden by other courts (Conard v. The Atlantic Insurance Company, 1 Pet. S. C. Rep. 388, 450; Whittington v. Farm. Bank, &c., 5 Har. & John. 489); and this, even in respect to a foreign corporation. Society for the Propagation of the Gospel in Foreign Parts v. Pawlett, 4 Pet. 480, 501; Taylor v. Bank of Illinois, 7 Monroe, 576, 584. It is otherwise, however, in the state of New York, even in respect to a domestic corporation and whether it sues on a contract or tort. Jackson ex dem. The Trustees of the Union Academy of Stone Arabia v. Plumbe, 8 John. Rep. 378; Bill v. Fourth Western Turnpike Company, 14 John. Rep. 416; per Thompson, Ch. J., in The Dutchess Cotton Manufacturing Company, 14 John. Rep. 238; The Utica Bank v. Smalley, 2 Cowen's Rep. 770; The Bank of Auburn v. Weed, 19 John. Rep. 300; The Farmers & Mechanics' Bank v. Rayner, 2 Hall's Rep. N. Y. S. C. 195. *A fortiori* as to foreign corporations. Williams v. The Bank of Michigan, 7 Wend. 540. But now, by 2 R. S. 458, § 3, this rule, or rather perhaps exception, is abolished, as to domestic corporations, though left in full force as to foreign.

In assumpsit, by the assignee of an insolvent, the general issue was held not to supersede the necessity of proving that the plaintiff was assignee. Best v. Strong, 2 Wend. 319. And so of an insolvent's trustees. Winchester v. The Union Bank of Maryland, 2 Gill & John. 73, and Houck v. Crouse, cited Id. 77, 78. And held, that where sealed contracts are made negotiable by statute, yet *non est factum* does not admit the assignment. McMurtry v. Campbell, 1 Hamm. Rep. 262.

The plea of *non est factum* to an action of debt or covenant puts the execution of the deed alone in issue; and the plaintiff need not prove any averments, except such as relate to the validity of the deed. Under this rule, it was held that in covenant to pay on receiving one-third of the plaintiff's dower, *non est factum* admitted that the condition was fulfilled, and dispensed with proof of this at the trial. Gardner v. Gardner, 10 Johns. Rep. 47. So of eviction, alleged in covenant for quiet enjoyment (Kane v. Sanger, 14 John. Rep. 89); so, of assets, in covenant against an heir, the declaration averring assets (Woodford's Heir v. Pendleton, 1 Hen. & Munf. 303); so that the bond declared on is not voidable as being given contrary to certain legislative provisions; for this must be pleaded specially. The Commissioners of the Poor for Horry District v. Hanion, 1 Nott & M'Cord, 554, 555. So (in some states where an equitable defence is admissible) *non est factum* admits that the bond was obtained without fraud or misrepresentation, and upon full consideration, which has not failed, &c.; and if the contrary be intended as a defence, it must be specially pleaded, or notice must be given. Adams v. Wylie, 1 Nott & M'Cord, 78; Bollinger v. Thurston, 2 Rep. Const. Ct. 447. So this plea admits the amount averred to have been awarded, in an action upon an arbitration bond. Graham v. Allen, 2 Nott

& M'Cord, 492. So *non est factum* to a constable's surety bond, though with notice that the plaintiff (relator) had been satisfied by bidding in property, does not warrant evidence of declarations made by him, calculated to lull the constable into security; the relator thus bringing the damage upon himself, and leaving the constable free from blame. The People v. Holmes, 5 Wend. 191. So, in an action by the lessee against his lessor on the covenant of title, *non est factum* admits the want of title (Barney v. Keith, 6 Wend. 555); in covenant for money, alleging non-payment and averring performance of conditions precedent, as the procuring and delivery of patents, &c., it admits the non-payment, and that the conditions were performed (Dale v. Roosevelt, 9 Cowen's Rep. 307; Courcier v. Graham, 1 Hamm. Rep. 330, 345, S. P.); in covenant averring notice, it admits the notice (Thomas v. Woods, 4 Cowen's Rep. 173, 185); in debt on a bail bond assigned by the sheriff, it admits that it was legally assigned (Soloman v. Evans, 3 M'Cord, 274); in covenant for non-delivery of slaves on demand, it admits the demand (Mitchell v. De Graffenreid, 1 Harp. Rep. 450); in debt on an appeal bond, it admits all the averments as to matters of record, non-payment, &c. (Legg v. Robinson, 7 Wend. 194; per Nelson, J., in Hamilton v. Averill, 11 Id. 624); and the want of title as well as the eviction, &c., in an action on a covenant of warranty (Cooper v. Watson, 10 Wend. 202); but not any fact which is not averred; as (in an action on a replevin bond) that the writ *de ret. hab.* was returned unsatisfied, this not being averred. Cowdin v. Stanton, 12 Wend. 120.

A plea of disclaimer in a real action admits the demandant's title (Prescott v. Hutchinson, 13 Mass. Rep. 439); the general issue in a writ of entry admits the defendant's tenancy of the freehold (Kelleran v. Brown, 4 Mass. Rep. 443; Higbee v. Rice, 5 Mass. Rep. 344; Pray v. Pierce, 7 Id. 381; Alden v. Murdock, 13 Id. 259); the ouster (Id.; Steven v. Winship, 1 Pick. 318); the tenant's possession (Mills v. Pierce, 2 N. H. Rep. 9); in dower, denial of the marriage or seizin, admits all other material allegations; as a demand of dower, &c. (Ayer v. Spring, 10 Mass. Rep. 80); and a denial of marriage admits seizin. Fitzgerald v. Garvin, Charlt. Reports, 281, 282. In formedon in the descender, *non devisavit* admits all the material facts in the count except the devise (Dudley v. Sumner, 5 Mass. Rep. 438); and in a writ of right, the mise precludes all evidence of non-tenure. Bolling v. the Mayor, &c., of Petersburgh, 3 Rand. 563.

In replevin, *non cepit in alio loco*, does not admit the taking as laid. Williams v. Welch, 5 Wend. 290.

A plea of justification in an action of malicious prosecution, admits the proceedings set out in the declaration; and throws the onus upon the defendant, even of showing probable cause. Morris v. Corson, 7 Cowen's Rep. 281. In replevin, a plea of property out of the plaintiff admits the taking (Hume v. Gillespie, 3 Monroe, 184); and *non cepit* admits property in the plaintiff. Harper v. Baker, 3 Monroe, 421. A *general* plea of tender to two counts, one on an account stated, and another on a *quantum meruit*, is conclusive that a claim for both causes exists, and cannot be afterwards limited to an account stated, or to a special agreement for a sum certain. Huntington v. The American Bank, 6 Pick. 340. A plea of payment to an action of assumpsit admits the cause of action (Haley v. Callar, 1 Alab. Rep. 63); to an action upon an award, it admits the award (Fraux v. Fraux, 1 Penning. Rep. 166); to an action on judgment, it admits the judgment. Raymond v. Wheeler, 9 Cowen's Rep. 295. *Liberum tenementum* conclusively admits the trespass, and the plaintiff's possession of the close (Singleton v. Millet, 1 Nott & M'Cord, 355; Caruth v. Allen, 2 M'Cord, 226); *solvit ad diem* admits the execution of the bond (Sandford v. Hunt, 1 Carr. & Payne, 118); and on an issue of property or not property, the taking cannot be questioned. Hume v. Gillespie, 3 Monroe, 184. A plea of performance to an injunction bond admits the dissolution of the injunction, and all other facts well pleaded (Harrison v. Park, 1 J. J. Marsh. 170, 172); and a plea of set-off admits the plaintiff's demand. Morgan v. Boone, 1 J. J. Marsh. 585, 586. An averment that a bond is discharged, admits that it was executed (Naba v. Carlin, 3 Lou. Rep. (N. S.) 373); and an answer insisting on payment admits the allegation in the petition, of goods sold to the defendant. Akin v. Bedford, 4 Lou. Rep. (N. S.) 615.

But it should be noted that a plea, though it admit the cause of action, does not admit its amount; and so of amounts admitted by affirmative pleading in any stage, as by replication, &c., unless the precise sum be made material by the pleadings. In this respect, the affirmative plea is like a judgment by default or on demurrer, where damages must still be assessed. Waggener

Proof of other contracts, &c., when admissible.

It is considered, in general, that no reasonable presumption can be formed as to the making or executing of a contract by a party with one person, in consequence of the mode in which he has made or executed similar contracts with other persons. Still less can a party be affected by the declarations, conduct, or dealings of strangers. Transactions which fall within either of these classes, are termed in law *res inter alios acta*, and evidence of this description is uniformly rejected.

Where the question between a landlord and his tenant is, whether the rent was payable quarterly or half-yearly, it has been held irrelevant, to consider what agreements subsisted between the landlord and other tenants, or at what time their rents would become due.(1) So, where the question

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v. Bells, 4 Monroe, 7, 11, 12. A good instance is the plea of payment in an action of assumpsit. Haley v. Callar, 1 Alabama Rep. 63.

To the usual plea of an insolvent discharge, the replication denied that the defendant was discharged as he alleged. Held, that it was not necessary to show jurisdiction, as this was admitted by the replication; and so was the filing of the petition, the same as any other fact not denied. Andrews v. Pledger, 4 Carr. & Payne, 381; S. C., 1 Mood. & Malk, 508. The replication of a new promise to a plea of infancy admits the infancy. Goodsell v. Myers, 3 Wend. 479. It was held that where the defendant went to trial without a rejoinder, the facts stated in the replication should be taken as admitted, although the attention of the court and jury was not called to the state of the pleadings; and there being a verdict for the defendant, a new trial was, for that reason, granted. Porter's Adm'rs v. Kennt, 1 M'Cord, 205. *Quere.* Most courts would probably have amended the issue and retained the verdict. To a plea of set-off, and that the plaintiff got a transfer of the note to avoid the set-off, a replication that the note was the plaintiff's property was held to admit both the set-off and the fraudulent transfer. Savage v. Davis, 7 Wend. 223. The plea of non-tenure to an avowry for rent, setting up a seizin and deducing title, admits the seizin and demise. Bloomer v. Juhel, 8 Wend. 408. *Riens in arrere* admits the defendant's title. Id. To an avowry and cognizance setting forth a lease and rent, by two defendants, averring that B., one of the defendants, distrained as bailiff of A., the other; the plaintiff pleaded, simply denying that B. was bailiff; and held that this admitted the lease and the amount of rent, as set forth. Soloman v. Harvey, 1 Nott & M'Cord, 81. *Qui non negat, fatetur*, is the maxim in respect to pleading. All material allegations not denied are admitted. Thus, where in trespass *de bonis asportatis* the defendant pleaded that he assisted the sheriff in taking the goods in execution against the plaintiff; and the plaintiff replied a previous *ca. sa.*, an arrest and a voluntary escape, and that the defendant then sued out the execution in question; and the rejoinder was that this execution was sued out by another, and not the defendant; this was held to admit the escape and other material allegations, except that this execution was sued out by the defendant. Cheever v. Mirrick, 2 N. H. Rep. 376, 377. On replication setting forth a code of by-laws and alleging a breach, an issue on the breach admits the by-laws. Union Bank of Maryland v. Ridgley, 1 Har. & Gill's Rep. 324. In assumpsit, the defendant pleaded a set-off of $2,500; replication that the defendant was in debt to the plaintiff $3,000, and paid the plaintiff $2,500 in part thereof; rejoinder, he had not owed the $3,000; the plaintiff has the onus; for he has admitted by the replication the payment of the $2,500. Waggener v. The Bells, 4 Monroe, 7, 11.

(1) Carter v. Pryke, Peake, 95. And see Spenceley v. De Willott, 7 East, 108.

NOTE 197.—In an action for a vexatious suit, other actions for other causes, brought by the defendant against the plaintiff, are inadmissible in evidence. Bay v. Law, 1 Pet. C. C. Rep, 207, 209. And, to mitigate damages in assault and battery, a previous provocation is inadmissible, unless it immediately precede the assault; as a previous libel published by the plaintiff of and concerning the defendant (Lee v. Woolsey, 19 John Rep. 319); or a slander against the defendant's sister (Avery v. Ray, 1 Mass. Rep. 12); or that the parties were on bad terms, and the

was as to the quality of beer to be furnished by the plaintiff to the defendant, it was held, that evidence could not be admitted of the quality of beer supplied by the plaintiff to other persons.(1) In like manner, in an action of trover, brought by the assignees of a bankrupt against a creditor, to recover property alleged to have come into the possession of the defendant after an act of bankruptcy, the fact that other creditors, who had received goods from the bankrupt before the delivery to the defendant, had returned them to the assignees, after the fiat had been issued, was held not to be admissible in evidence against the defendant.(2) So, in an action

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plaintiff had, on previous days, used provoking and abusive language of, and to the defendant. Rawlings v. The Commonwealth, 1 Leigh's Rep. 581. Nor shall the defendant, in an action for a libel, be allowed to show that he was previously libeled by the plaintiff, unless the last libel purport to be an answer to the first. Beardsley v. Maynard, 4 Wend. 357; Gould v. Weed, 12 Wend. 12.

On the other hand, to enhance the damages in assault and battery, the plaintiff cannot show a suit brought by the defendant against him on purchased notes, with a view to set off his judgment against the plaintiff's. Jacoby v. Guier, 6 Serg. & Rawle, 399.

Action of assault against a music master of a cathedral, for beating a boy, one of the choristers, for singing at a catch club, which might be injurious to the performance in the cathedral. The plaintiff belonged to the school. The defendant justified, in that he forbade the plaintiff going to the catch club, as an injurious exercise; and being disobeyed, he moderately corrected him; and would have justified upon the practice of the like schools in other parts. But this evidence as to other practice was held not admissible. It was irrelevant. The master, having no jurisdiction out of his school, could not thus justify the correction. Newman v. Bennett, 2 Chit. Rep. 195.

Two signing a joint note is, *per se*, no evidence of their being partners. Hopkins v. Smith, 11 John. Rep. 161. And where the question is upon fraud in one transaction, evidence of fraud in others, totally disconnected, is inadmissible. Somes v. Skinner, 16 Mass. Rep. 360. Where the defendant claimed under the devisor's will of 1817, which the plaintiff (the heir) sought to impeach, by reason of the testator's incapacity, the defendant was not allowed to show that the plaintiff had, in 1814, purloined a previous will of the testator; for that did not bear on the now point of inquiry. Den ex dem. Stevens v. Van Cleve, 4 Wash. C. C. R. 262, 265. In an action against the owners, for negligently managing a ship, so that she was wrecked, and the plaintiff lost his passage, another act of negligence not bearing on the wreck, and which could not possibly cause it, was held irrelevant; viz: neglect at an earlier part of the day. Matton v. Nesbit, 1 Carr. & Payne, 70. In an action on a note purporting to be witnessed by E., the genuineness of which attestation was in issue, the defendant was not allowed to show that D., a former holder of this note, had forged another note with E.'s name as a witness; nor that D. wrote the body of this note. Keith v. Taylor, 3 Verm. Rep. 153. In slander, under a plea of justification that the plaintiff was perjured, the court refused to receive testimony that the plaintiff, when not under oath, contradicted what he swore in committing the supposed perjury, until it was first proved that he had sworn false by other testimony; holding that the declaration might then be received to show knowledge and corruption. Eastburn v. Stephens, Litt. Sel. Cas. 82. *Quere.* Was it not admissible in either view? In slander for accusing a school of filth and bad food, which was sought to be justified as true; to rebut the proof of justification, held that the plaintiff could not inquire of the treatment of boys at any other particular school, nor the manner of their education. Both are out of the issue. Boldron v. Widdows, 1 Carr. & Payne, 65. See note 196.

(1) Holcombe v. Hewson, 2 Camp. 391. For other examples, see Boldron v. Widdows, 1 C. & P. 65; Smith v. Wilkins, 6 C. & P. 180; Delamotte v. Lane, 9 C. & P. 261; Barden v. Keverberg, 2 M. & W. 61.

(2) Backhouse v. Jones, 6 N. C. 65.

against the acceptor of a bill of exchange, where the defence was that the acceptance was a forgery, evidence offered on the part of the defendant that a collection of bills, bearing his forged signature, had been in the plaintiff's possession, and that some of such bills had been circulated by him, was held to be inadmissible, without distinct proof that the bill in suit had formed part of the collection.(1)

Again, upon the trial of an issue whether smoke, issuing from the manufactory of A., was prejudicial to the premises of B., evidence that A. had paid money to C., the owner of premises adjacent to those of B., for alleged damage occasioned by the smoke, is not admissible.(2)

Proof of other transactions to show knowledge.

On the other hand, it may frequently be very proper, and in some cases absolutely necessary, to look beyond the transaction which is the immediate subject of inquiry, into previous transactions, for the purpose of making a just inference as to the knowledge of the parties, their motives or intentions.(3) The case of Gibson v. Hunter,(4) affords an instance of this kind. That was an action by an indorsee against the defendants, as acceptors of an instrument purporting to be a bill of exchange; a question arose on the third count, which stated the bill to be payable to bearer, under the following circumstances: It appeared in evidence that the name of the person mentioned as payee was merely fictitious, but this fact was not known to the plaintiff; and for the purpose of showing, that the defendants at the time of their acceptance knew the name in the bill to be fictitious, or that the defendants had given authority to the drawer to draw the bill in question payable to a fictitious person, the plaintiff proposed to prove that the defendants had given a general authority to the drawer to draw bills of exchange upon them, to be made payable to fictitious persons, and evidence to this effect was produced; the counsel for the defendants objected to this evidence, on the ground that it had no relation to the particular bill in question, and that the facts of any particular transaction could not legally be inferred from circumstances which applied wholly to other transactions. Lord Kenyon, C. J., who tried the cause, admitted the evidence; upon which the counsel for the defendants tendered a bill of exceptions. The Court of King's Bench gave judgment for the defendant in error. A writ of error was then brought in the House of Lords; and the question on the admissibility of the evidence was referred to the

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(1) Griffits v. Payne, 11 A. & E. 131. See, also, Viney v. Bars, 1 Esp. 293; Balcetti v. Serani, 1 Peake N. P. C. 142; Thompson v. Moseley, 5 C. & P. 502.

(2) Tennant v. Hamilton, 7 Cl. & Fin. 122. The question arose as to the cross-examination of a witness in the Court of Session in Scotland, and the House of Lords decided that the question was incompetent, as leading to a new collateral inquiry, not affecting the issue, or testing the credit of the witness.

(3) See *infra* as to the *proof of knowledge* in issuing counterfeit money.

(4) 2 H. Bl. 288.

judges. On this question there was a division among the judges; but the majority of them, together with the Lord Chancellor, and Lord Kenyon, C. J., being of opinion that the evidence was properly received and left to the jury, the judgment below was affirmed.(1)

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(1) NOTE 198.—See *ante*, note 196, and note 206. In an action for falsely representing one Johnson to be solvent, a witness was allowed to prove that the defendant had made the same representation to him, and thus defrauded him of goods; as this showed or tended to show a fraudulent connection between the defendant and Johnson. Beal v. Thatcher, 3 Esp. Rep. 194. In an action for conspiracy to defraud, by representing A., a bankrupt, as a man of property, evidence that the defendants made the representations to third persons, who, without the defendant's request, recommended A. to the plaintiff, who was thus injured, was held admissible. Gardner v. Preston, 2 Day, 205. To show fraud in selling an inferior kind of goods for blue guineas, a witness was allowed to prove a sale to himself of a parcel of blue guineas, by the defendants, before the sale to the plaintiffs; and the declaration and conduct of the defendants towards him on the subject of the distinct parcel. Snell v. Moses, 1 John. Rep. 90, 99, 100, 102. Where the question is on fraud upon creditors, in the sale of real estate, the purchase of personal property by the grantee from the grantor, with the intent to defraud creditors, made after the sale of the real estate, is admissible in evidence to show that the first sale was fraudulent. Jackson ex dem. Hooker v. Mather, 7 Cowen's Rep. 301. On the trial of a question of fraud in obtaining a deed by an administrator, from one heir, evidence is admissible of his conduct in respect to the property of another heir to the same estate. So of a release from several different distributees. Lovell v. Briggs, 2 N. H. Rep. 218, 222, 223. Previous acts by the father, allowing his minor son to make contracts and settlements in respect to his services, are admissible in evidence to bind him by like subsequent acts of the son. Chilson v. Phillips, 1 Verm. Reports, 41. In replevin to avoid the sale of a horse by the plaintiff to R., on the ground of fraudulent misrepresentation by R., who immediately sold the horse to the defendant, the plaintiff was allowed to prove other similar acts by R., in respect to other persons and property, about the same time. McKenney v. Dingley, 4 Greenl. Rep. 172. A., claiming that C., in consideration of a note sold by A. to him, sold A. goods *bona fide*, and not to defraud creditors, the latter may show that before the goods were sold, a considerable note and mortgage were given by C. to A., though the proof has but a remote bearing. Treat v. Barber, 7 Conn. Rep. 274. On issue upon a plea to an indenture, that its object was the buying and selling of lottery tickets (and therefore illegal), evidence that the plaintiff bought and sold tickets after the date, was held pertinent. Williams v. Woodman, 8 Pick. 78. On a question whether a court of conscience holden before the mayors of Limerick had exceeded its jurisdiction as to the subject matter, it appeared that the court had been held on Thursdays for upwards of thirty years, and that the matter and adjudications were recorded in a book; and that during the same time it had been holden on other days without record. Held, that the Thursday records might be read, as evidence of jurisdiction upon other days. Hogan v. Mahon, 1 Hud. & Bro. Irish T. R. 284. On a question whether a certain injury to certain blankets arose from sea damage, or damage done at the factory, proof was received that other blankets coming from the same factory, and having an appearance similar to those in question, were injured at the factory, to repel the proof that the damage was done by the sea. Bradford v. Boylston Fire and Marine Ins. Co., 11 Pick. 162, 166 to 167. On a question whether the filling up of a harbor by earth was occasioned by an embankment, to repel the inference that it was, evidence may be given that other harbors similarly situated were filled in a similar way, without the aid of an embankment. Folkes v. Chadd, 3 Doug. 157; S. C., 4 Stark. Ev. 382, there called the Wells Harbor Case. In libel; to repel proof of the charge (that the plaintiff had attempted to destroy all religious institutions), his drawing up, circulating and paying subscriptions for support of preaching, were held receivable. Stow v. Converse, 4 Conn. Rep. 17, 43. To prove possession, in a proceeding for forcible entry and detainer, the complainant was allowed to prove that he had, sixteen years before, demised to one of the defendants a barn then standing on premises of which the *locus in quo* was parcel, though not standing there

when the entry was made. But it was admitted that this was very feeble evidence. Dutton v. Tracy, 4 Conn. Rep. 79, 94. In trover for goods alleged to have been fraudulently obtained by the defendant and L., subsequent acts of collusion and fraud by them to obtain goods from others, were held admissible as tending to show their intent in respect to the plaintiff. Allison v. Matthieu, 3 John. Rep. 235. Where there were circumstances creating suspicion that a note had been fraudulently altered, the alteration of other notes drawn and indorsed by the same parties, to take up one for which the note in question had been given, was held admissible as going to strengthen the suspicion. Rankin v. Blackwell, 2 John. Cas. 198.

A knowledge in the vendee that the vendor is insolvent, may be inferred from the former buying goods of the latter in great quantities, for a long time and at a great discount. Yates v. Carnsew, 3 Carr. & Payne, 99. On an issue whether a party was committing a willful trespass, so as to subject himself to an immediate arrest, upon the malicious trespass statute (1 Geo. IV, ch. 56), he may give evidence as to a right of way claimed by him, in order to show *quo animo* he he entered, though in truth a trespass was unwarrantably committed. Looker v. Halcomb, 12 Moore, 410, 416. That one was reputed to be an Irishman, and had the accent or brogue of an Irishman, and was reported to be an Irish deserter, was received as *prima facie* evidence that he was an Irishman. Jackson ex dem. People v. Etz, 5 Cowen's Rep. 314. On trial of an indictment for the forgery of bank notes, it appeared that the prisoner was arrested on the stairs leading to a room in the third story, where J. and M. were employed in counterfeiting notes on the United States Bank. The court being thus satisfied that he was connected with J. and M. in the business of counterfeiting, received evidence that different parts of the machine employed in counterfeiting were found with them. The United States v. Craig, 4 Wash. C. C. Rep. 729, in connection with United States v. Moses, Id. 726. On a trial for high treason, it being proved that the prisoner had enlisted into the enemy's army, his unsuccessful attempt to persuade another to enlist was allowed in evidence, as showing the *quo animo*. Respublica v. Roberts, 1 Dall. 39. It is not admissible on the trial of an indictment for passing a counterfeit bill with knowledge, to prove, on the part of the prosecution, that the prisoner was arrested in company with one who had previously been convicted of the same offence, nor that he boarded at the house of one in whose possession counterfeit money, and instruments for counterfeiting had been found (who had also been convicted of the offence), unless the prosecution can also show that the prisoner was connected in the business of counterfeiting with those in whose company he was found. But if the prisoner has, in his examination before the magistrate, denied those facts, the examination becomes evidence, which the public prosecutor may rebut by other evidence. Goldsby's Case, before Radcliff, Mayor, 1 C. H. Rec. 81. On trial of an indictment for receiving stolen goods of A., it is not competent to show that the prisoner's house was the common resort of felons, for the purpose of disposing of their plunder. People v. Pierpont, before Riker, Recorder, 1 Wheeler's Cr. Cas. 139. M. sued for the value of a bill which he had received as a good one, but was defeated in his suit, on the ground that the bill was counterfeit. Yet others told him it was good, and he gave it to G., who said he could pass it in consideration of five dollars, to be spent between them. The jury, on an indictment against M. and G. for passing it under these circumstances, acquitted M. and convicted G.; and in the course of the trial, it was held not necessary, in order to fix the prisoners with guilt, to show a knowledge that the bill was counterfeit, to an absolute certainty; but only reasonable grounds of belief. Gallaher's Case, before Coldon, Mayor 5 C. H. Rec. 1. To show that false swearing was corrupt, proof may be given that the deponent had used expressions of malice in respect to the one against whom he swore. Rex v. Munton, 3 Carr. & Payne, 498. On trial of an indictment for administering sulphuric acid to horses, with intent to kill them, administering at different times, may be shown, in order to demonstrate the intent. Rex v. Mogg, 4 Carr. & Payne, 364. On trial of an indictment for manslaughter by the application of a lotion to the skin, evidence may be given of the effect of the lotion when applied to other patients. Rex v. Long, 4 Carr. & Payne, 398. The defendant was indicted for a robbery, in advising the prosecutor to give money in order to appease the members of a mob, who demanded it from him with threats. To show that this advice was not *bona fide*, but given as a member of the same mob, other like demands made by the same mob at other places, before and afterwards in the course of the same day, in presence of the prisoner, may be received. Rex v. Winkworth, 4 Carr. & Payne, 444. Knowledge of a forgery by one in whose favor an instrument was forged, is evidence that he was the forger. Commonwealth v. Stevens, 10 Mass. Rep.

Upon a similar principle, evidence of a transaction between one of the parties to an action and a stranger, will be admissible, where its tendency is to rebut a *prima facie* case of liability affecting such party. Thus, in an action for work and labor, where the defence was, that the credit was given by the plaintiff to A., and not to the defendant, and that the defendant had paid A. for the work in question; A., who had become bankrupt since the work in question, was called as a witness for the defendant, and stated that the order was given by him; and he also stated that, at the time of his bankruptcy, the defendant, in reference to his general account including the work in question, had overpaid him; this latter statement was objected to upon the ground that the state of the account between the defendant and A. was *res inter alios;* but it was held to be admissible, as showing the *bona fides* of the defence, that A. had been dealt with by the defendant as a principal, and not as an agent.(1)

Proof of customs in other manors, &c.

With respect to the relevancy of a presumption, that a customary right exists in one place, from the fact of its being proved to exist in another, it is to be observed, that when a right is claimed by custom in a particular manor, proof of a similar custom in an adjoining manor, though within the same parish or leet, is not, in general, admissible in evidence, and this not even though there be evidence to show that the latter manor was a subinfeudation of the former; at least, unless it be clearly shown that they were separated after the time of legal memory, since, otherwise, they may have had different immemorial customs.(2) Lord Raymond, C. J., said,(3) he had always looked upon it as a settled principle in the law, that the customs of one manor could not be given in evidence to explain the customs of another manor; "for if this kind of evidence were to be allowed, the consequence seems to be, that it would let in the custom of one manor into another, and in time bring the customs of all manors to be the same." And in addition to this argument of inconvenience, the objection taken to the evidence in that case, namely, that it was inapplicable to the point in dispute, appears to be very strong; customs being different in different manors, and in their nature distinct. Unless, therefore, some connection

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181. Where there is no written statute or constitution prescribing the business of an officer of state (*e. g.* the accountant-general), it is determinable by the usage of himself and his predecessors in his department. Evidence of such usage is receivable, on the trial of an indictment preferred against such officer, charging neglect of certain duties to the injury of the nation. Per Lord Mansfield, C. J., in Rex v. Bembridge, 3 Doug. 327, 331.

(1) Gerish v. Charties, 1 C. B. 13.

(2) Anglesea (Marq.) v. Hatherton (Lord), 10 M. & W. 218; Somerset (Duke) v. France, 1 Str. 662; Ruding v. Newell, 2 Str. 957; Furneaux v. Hutchings, Cowp. 807; by Buller, J., in Noble v. Kennoway, 2 Doug. 512; by Lord Kenyon, C. J., in Carter v. Pryke, Peake N. P. C. 95; by Wood, B., in Doe d. Foster v. Sisson, 12 East, 63; Erskine v. Ruffie, 3 Gwill. 965.

(3) In Somerset (Duke) v. France, *ut supra.*

or relation is proved to have existed between them, as by showing that they were all formerly holden under the same lord, or that the one manor was anciently parcel of the other manor,(1) such evidence is not admissible.

But several cases appear to have determined, that, where all the manors within a certain district are held by the same peculiar tenure, and a question arises in any one of them upon an incident to the tenure, evidence may be given of the usage which prevails in any of the other manors within the district. The first reported case of this kind is Champian v. Atkinson,(2) where the question was, whether a certain fine, called a *grassum* fine was payable on the death of a tenant, when the lord was an infant; and the defendants were allowed to give in evidence, upon the trial of this issue, that in other adjoining manors, where the *grassum* fine prevailed, it was the custom not to pay to the lord before he attained his full age; similar evidence was there said to have been received, on a question of copyhold tenure, between certain manors in Middlesex.

On the authority principally of this case of Champian v. Atkinson, the case of The Duke of Somerset agt. France(3) was decided. On a trial at bar, where the issue was, whether a general fine was due from the tenants of certain manors in Cumberland to the duke as next admitting lord, the court after much argument received evidence, that the same fines had been paid in similar cases to the lords of other manors. Raymond, C. J., and Reynolds, J., laid down the general rule as above stated, and were strongly against admitting the evidence; but afterwards agreed to receive it, on the authority of Champian v. Atkinson, and of cases said to have been so ruled on the northern circuit. Fortescue, J., thought the evidence admissible, and made a distinction between the *custom* and the *tenure* of a manor, and as the question, there to be tried, merely concerned the tenure of the plaintiff's manors, he was of opinion that it would be proper to inquire what were the qualities that attended other estates holden by the same tenure.

Rule on question as to custom of the country.

On a question relative to the custom of tithing,(4) Lord Mansfield, C. J., after laying down the general rule, that "proof of the custom in one parish is not evidence to affect another parish," adds this qualification, "unless this custom is laid as a general custom of the country." Thus,

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(1) Moulin v. Dalison, Cro. Car. 484.

(2) 3 Keb. 90, on trial at bar, explained by Rolfe, B., in Anglesea (Marq.) v. Hatherton (Ld.), 10 M. & W. 246.

(3) 1 Str. 662. See also Lowther v. Raw, Fortesc. 44, 55; S. P., on appeal to the House of Lords from the judgment of Lord Talbot, C.; Ely (Dean and Chapter) v. Warren, 2 Atk. 189, S. P. See also Rowe v. Parker, 5 T. R. 31; and Lord Barclay's Case, Hale de Jure Maris, 35.

(4) Furneaux v. Hutchings, 2 Cowp. 807.

where half of a river belongs, by the constant custom of the country, to the lords of the manors on each side of the water, proof of the custom in one manor is evidence of the same customary right in another.(1) It is evidence of a custom pervading one common district of manors.

If proof be given that, in a particular manor, borough English or gavelkind prevails, it may be shown what the customs of borough English or gavelkind are, from other manors.(2)

Where in each of several sub-manors, part of the same district and belonging to the same lord, there appeared to be a certain peculiar class of tenants answering the same description, and to whom their tenements were granted by similar words, it was held, that evidence of the rights which had been enjoyed by the tenants of one manor, was admissible to show what rights the tenants were entitled to in another.(3)

Proof of the manner in which a particular trade is carried on at one place, is evidence as to the course of that particular trade in another place.(4)

Proofs of acts of ownership in other lands.

In like manner, acts of ownership in one place may sometimes afford a legitimate presumption of the right of ownership in another. In an action of trespass, the plaintiff claimed the whole bed of a river flowing between his land and the land of the defendant, the defendant contending that each was entitled *ad medium filum aquæ:* it was held,(5) that it was allowable for the plaintiff to give in evidence acts of ownership exercised by him upon the bed and banks of the river on the defendant's side lower down the stream, and where it flowed between the plaintiff's land and a farm adjoining the defendant's land, and also to prove repairs done by the plaintiff to a fence which divided that farm from the river, and which was in continuation of a fence dividing the defendant's land from the river. It was said by the court, that the acts of ownership in question might reasonably lead to the inference, that the entire edge and bed of the river, and consequently the part in dispute, belonged to the plaintiff. In a previous case,(6) it had been decided in the Exchequer Chamber, upon a question

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(1) R. v. Ellis, 1 M. & S. 662.

(2) By Rolfe, B., in Anglesea (Marq.) v. Hatherton (Lord), *ut supra.*

(3) Rowe v. Brenton, 8 B. & C. 758. See the observations of Lord Abinger, C. B., on this case, in Anglesea (Marq.) v. Hatherton, 10 M. & W. 237. The matter in dispute was neither a question of tenure nor of custom, as to which some nice distinctions are taken by Fortescue, J., in Somerset (Duke) v. France, *ut supra.* As to evidence of the rights of the crown in one part of the duchy of Lancaster, from proof of rights exercised in another part of the duchy, see Jervison v. Dyson, 9 M. & W. 540. As to customs of different lands in the same manor, see Damerell v. Protheroe, 16 L. J. (N. S.) Q. B. 170.

(4) Noble v. Kennoway, 2 Doug. 510.

(5) Jones v. Williams, 2 M. & W. 331, where the nature of this kind of evidence is explained by Parke, B.

(6) Doe d. Barrett v. Kemp, 2 Bing. N. C. 103.

whether a piece of waste of land between a highway and inclosures belonged to the plaintiff (the owner of the adjoining inclosures), or to the lord of the manor, that the lord might give evidence of grants by him of waste land terminating in a common, between the road and the inclosures of other persons at a distance from the spot claimed by the plaintiff; but that such evidence must be confined to the waste adjoining the road which passed by the spot so claimed.(1)

The case of Stanley v. White,(2) may here be mentioned as a leading authority upon the subject. It was an action of trespass for cutting down the plaintiff's trees; and the question was whether they belonged to the plaintiff or the defendant. It appeared on the trial, that the trees in question grew in a woody belt of considerable extent, entire and undivided, which encircled the plaintiff's manor, and lay contiguous to a number of closes belonging to several owners, one of which closes was that of the defendant. Evidence was admitted of several acts of ownership, in different parts of the belt, by those under whom the plaintiff claimed, which had been acquiesced in by the owners of the adjoining land. And the Court of King's Bench afterwards, on a motion for a new trial, adjudged the evidence to have been properly admitted, as evidence of the general right through the whole extent of such entire undivided inclosure, which might be presumed to have belonged formerly to one owner. This appears to be the true principle, on which the proposed evidence in that case was admissible. For, generally speaking, acts of ownership, submitted to by the holder of one portion of land, cannnot be proof that the person exercising them has any right to the adjoining land.(3)

Though it is a general rule, that a custom of tithing, &c., in one parish will not be evidence of a custom in another, yet such an inquiry may sometimes be proper in cross-examination. Thus, in an action by a rector for tithes, where the point in issue is whether there exists a modus of a certain sum of money for a particular farm in a township within the parish, the defendant will not, in general, be allowed to inquire whether other farms in the same township are not subject to the same payment. But

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(1) See S. C., 7 Bing. 332, where a *venire de novo* was granted, because the court considered that they could not assume that all the pieces of waste, with respect to which evidence was received, lay on the sides of a road or roads terminating in a large common. They were, however, of opinion that evidence was admissible of grants of parcels of one and the same waste, lying on both sides of the road, although the continuity of the waste was interrupted for a short distance by the intervention of houses. The same principle is recognized in Tyrwhitt v. Wynne, 2 B. & A. 554, where leases were rejected on account of no previous proof being given that the *locus in quo* was part of a larger district to which these leases applied. And see Brisco v. Lomax, 8 A. & E. 211.

(2) 14 East, 332. See also Bryan v. Winwood, 1 Taunt, 208; Hollis v. Goldfinch, 1 B. & C. 218.

(3) See by Bayley, J., and Best, J., in Hollis v. Goldfinch, 1 B. & C. 218, 222. As to proof of working part of mine being evidence of possession of whole, see Taylor v. Parry, 1 M. & G. 604.

where a modus is alleged on one side, it may be relevant on the other side to make an inquiry of this nature, for the purpose of showing that such payments cannot be a modus, consistently with the evidence which has been previously adduced. This was adjudged to be admissible in the case of Blundell v. Howard.(1) The question there was not put by the defendant with a view of supporting the modus set up by him, but was put by the plaintiff, in order to show that this and similar payments by the occupiers of different tenements were merely portions of a sum in gross paid throughout the township by way of composition, and could not be a modus, since the ecclesiastical surveys, which had been produced on the part of the rector, were entirely silent as to any modus co-extensive with the township.(2)

Evidence of character.

The character of the parties to a civil suit affords, in general, such a weak and vague inference as to the truth of points in issue between them, that it is not usual to admit evidence of this description. Thus, in an action of ejectment by an heir at law, to set aside a will for fraud and imposition committed by the defendant,(3) witnesses cannot be examined to the defendant's good character. So, on the trial of an information against the defendant for keeping false weights,(4) where it was proposed to call witnesses on behalf of his character, Eyre, C. B., ruled that such evidence was not admissible in a civil suit. "The offence imputed is not," he said, "in the shape of a crime. To admit such evidence would be contrary to the true line of distinction, which is this, that in a direct prosecution for a crime, evidence of character is admissible;(5) but when the prosecution is not directly for the crime, but for the penalty, it is not. If evidence to character were admissible in such a case as this, it would be necessary to try character in every charge of fraud upon the excise and custom-house laws."(6)

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(1) 1 M. & S. 292. See R. v. Stallard, 7 C. & P. 263; where an inquiry as to what other persons had said of the prosecutor became relevant on account of an inquiry respecting the prisoner's expressions concerning him. See Tennant v. Hamilton, 7 Cl. & Fin. 122.

(2) See Armstrong v. Hewitt, 4 Price, 216; and Leonard v. Franklin, Id. 264.

(3) Goodright d. Farr v. Hicks, B. N. P. 296; S. C., cited in Doe d. Stephenson v. Walker, 4 Esp. 50.

(4) Att. Gen. v. Bowman, 2 B. & P. 532, n. *a*.

(5) In criminal cases, evidence of the general good character of the accused, having reference to the charge against him, is admissible in his behalf. See Janson v. Stuart, 1 T. R. 754; 2 Russ., Cr. & M., by Greaves, 784.

(6) NOTE 199.—The English cases go strongly to the exclusion of general character in a civil suit, unless it be in issue by the very nature of the action. Even in an action of slander for imputing a felony, and for a malicious prosecution, where the defendant justified on the record, averring a larceny, evidence of the plaintiff's good character was denied. But it does not appear that the defendant had attempted to support his justification. If he had, it is conceived the evidence would have been receivable on the same ground which would make it admissible to repel the charge, on trial of an indictment. Cornwall v. Richardson, Ry. & Mood. N. P. Cas. 305.

Indeed, this case is treated, *post*, Volume II, as presenting the offer of the plaintiff to sustain his character merely because a justification was put on the record. Where there is a plea of probable cause, followed by evidence in its support, in answer to an action for a malicious prosecution, the character of the plaintiff is directly in issue. He may of course prove his good character; and it is said the defendant may, in the first instance, attack the plaintiff's character. This, of course, must be confined to cases where the crime in question is infamous. Gregory v. Thomas, 2 Bibb, 286. And see per Crenshaw, J., cited *infra*.

It will readily be perceived that character may be brought into the issue in a variety of ways. This may be so not only in the common case of slander or libel, where it is always more or less in question (Swift's Ev. 140, per Daggett, J.; 7 Conn. Rep. 118); and as we have just seen, in actions for malicious prosecution or malicious arrest on the charge of a crime (see farther, *post*, and per Crenshaw, J., in Rogers v. Wilson, 1 Alab. Rep. 410); but in various other cases, owing to the peculiar object and incidents connected with the inquiry. Cases of criminal conversation, seduction and breach of marriage promise are familiar instances. See Vol. II. So, in some cases where the question is one of mere property. Where it was sought to prove that a will was obtained from a testator by the unfair practices of certain women, their bad character was allowed to be shown, it appearing that they had represented themselves as women of good character, and thus influenced the testator to make his will in their favor. Nussear v. Arnold, 13 Serg. & Rawle, 323. And in another case, where the testator was of weak mind, and entirely under the control of his son H., who had made representations to him tending to create the belief that whatever he might leave by will to his son M. would be squandered by his (M.'s) wife, she being unthrifty and extravagant; and the testator had made a will nearly disinheriting M.; on an issue to try the validity of the will between the two sons, the above facts being first shown, testimony was offered by M. and received by the court as proper, of his wife's general good character and conduct. Dietrick v. Dietrick, 5 Serg. & Rawle, 207. So where the defendant and neighbors assembled and pulled down the defendant's house, into which the plaintiff had vexatiously obtruded himself, in trespass for this injury, the defendant was allowed to prove in mitigation of damages, that the plaintiff was a worthless vagabond, and was regarded as a nuisance in the neighborhood, and that the house was pulled down to induce him to remove. Rhodes v. Bunch, 3 M'Cord, 66. So in trespass for killing the plaintiff's slave, to rebut the presumption of such ill conduct in the slave as would justify the defendant; held, that the general good character and orderly deportment of the slave were admissible in evidence. Pierce v. Myrick, 1 Dev. 345.

But aside from such exceptions, the rule is, that in civil suits the character of either of the parties is out of the question. Even on trial of an issue upon the adultery of the wife; which was established by proof merely presumptive, in a proceeding by the husband to obtain a divorce, her fair character was refused as evidence in her favor. The court, by Daggett, J., said: "The rule of law is, that in civil proceedings, unless the character of the party be directly put in issue, by the proceeding itself, evidence of his general character is inadmissible. Charges of cruelty, gross fraud, and even forgery, are often agitated in suits by individuals; and the result not unfrequently deeply affects the property and reputation of the party; yet no individual has been suffered to attempt to repel the proof, by showing a good reputation. The present is a civil suit. Character is not put in issue by the proceedings; and if it can be given in evidence, it may also be given in evidence in all inquiries into facts affecting the reputation in other civil cases. The principle would lead to great uncertainty; and be productive of no benefit in the administration of justice. 'Formerly, evidence of the defendant's good character in criminal proceedings, was admitted in capital cases only, and that *in favorem vitæ;* but such evidence is now admitted in all cases where the character of the defendant is in jeopardy.' Cites 2 Stark. Ev. 365. "But the relaxation of the rule in criminal cases has not affected the rule in civil suits." Humphrey v. Humphrey, 7 Conn. Rep. 116, 118, 119.

Accordingly, in trover for goods, where a fraud upon creditors by a colorable bill of sale was in question, and fully made out by the usual presumptive proof, the general character of the parties to the bill for honesty, was denied as evidence. Woodruff v. Whittlesey, 1 Kirby, 60, 62. So the good character of the plaintiff in debt on bond, where the defence was fraud in obtaining it. Anderson's Ex'rs v. Long, 10 Serg. & Rawle, 55. So, in an action for money had and received, though the plaintiff's evidence, as to the manner of obtaining it, impeached the character

Where, however, in a civil suit, character is a matter in issue, there the evidence of it ceases to be of a circumstantial nature, and there can be no objection to receiving it. Various questions, however, have arisen in civil suits as to the point, whether the character of the parties, or of a third person, was directly in issue or not.

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of the defendant's testator. Nash v. Gilkeson, 5 Serg. & Rawle, 352. So, in an action for not shipping wine of the quality stipulated by the defendant. Kentland v. Bissett, 1 Wash. C. C. Rep. 144. So of the plaintiff's good or bad character in an action of assault and battery. Givens v. Bradley, 3 Bibb, 195, 196. Nor in trespass *quare domum fregit*, with intent to ravish the plaintiff's wife, can the defendant give her character in evidence to mitigate damages; or to infer that he entered the house with her consent. Davenport v. Russell, 5 Day, 145, 148. In assumpsit by a physician for his services, the defendant cannot by evidence, attack his general character in his profession (Jeffries v. Harris, 3 Hawks, 105); and held that in crim. con., the plaintiff's character (*e. g.* as a beastly drunkard) or the character of his house (*e. g.* as a low grog shop) was not in issue. Norton v. Warner, 9 Conn. Rep. 172. In no case is it allowable to adduce evidence in support of a party's character, until it has been impeached. Townsend v. Graves, 3 Paige, 453, 455, 456. On a question in libel, whether the Ethosian Club, of which the plaintiff was a member, was an infidel club; held, that its general reputation was not relevant. Stow v. Converse, 4 Conn. Rep. 17, 40 to 42.

It was held that though the party's character be not in issue, yet he having adduced evidence in its support, the opposite party may produce evidence in reply. Grannis v. Branden, 5 Day, 260.

In the state of New York, the general rule as to character in civil suits was, at one time, slightly broken in upon. The Supreme Court held, some thirty years ago, that in actions for torts, especially such as charge gross depravity upon circumstances merely, evidence of uniform integrity and good character, is admissible to repel the charge. The misfeasance here imputed was collusion between a naval officer and a belligerent, to cause a capture. Ruan v. Perry, 3 Cain. Rep. 120, 123. This decision is spoken of in terms of general approbation by Walworth, C., in Townsend v. Graves (3 Paige, 455); and has been repeatedly acted upon at Nisi Prius, and by very intelligent local courts, in a broader sense than recent authoritative construction would seem to warrant. It was received by the late Van Ness, J., in an action for a conspiracy to cheat by misrepresenting the character of a third person (Rumsey v. Lovett, Ant. N. P. Rep. 17, 20, 21; but see note *a* to that case); and by Riker, Recorder, in an action of trover, imputing the fraudulent exposure of the plaintiff's rye, shipping on board of the defendant's sloop (himself master) to capture, by the Bulwark, a British seventy-four, during the late war. Green v. Aspinwall, Mayor's Court, N. Y., Jan. term, 1816, 1 C. H. Rec. 11, 19.

But the decision in Ruan v. Perry has been lately reviewed by the court where it was made, who have now adopted the English rule as settled by the cases in the text. They intimate that the admission of general character as evidence, in civil suits, must, at most, be confined to cases of fraud depending for its support on slight circumstances; and perhaps to cases of official misconduct. Accordingly, where a fraudulent valuation of a loss under a fire insurance policy, was imputed to the plaintiff (although as is known, such an imputation involves the charge of moral perjury committed by the assured in the preliminary proofs), the evidence of his good character which the judge at Nisi Prius received, was made the main ground for granting a new trial. The chief justice (Savage) expressly adopts the case of The Attorney General v. Bowman, cited in the text, as the ground of decision. He adds, that a contrary rule would be extremely dangerous; that the character of every transaction must be ascertained by its own circumstances, and not by the character of the parties. Fowler v. The Ætna Fire Ins. Comp., 6 Cowen's Rep. 673, 675, 676. The practitioner who looks to the large calendars of our law and chancery cases, involving greater or less degrees of moral dereliction, will agree that inquiries into character, if tolerated in such suits, would be not merely useless or dangerous in the particular case, as suggested by Daggett, J., and Chief Justice Savage, but the evil would be enhanced by becoming interminable.

In actions for adultery or seduction, the wife's or daughter's general conduct, if not their general character in regard to chastity, is involved in the issue, as affecting the damages; and accordingly, it seems that evidence of general bad character, or even of particular acts of immorality,(1) is admissible on the part of the defendant in such actions in reduction of damages.(2) But evidence of this description must be confined to a period antecedent to the defendant's alleged misconduct.(3) In such actions, where the defendant has endeavored to impeach the character of the wife or daughter, by general evidence, upon cross-examination, or by calling witnesses, general evidence of good character is admissible, in reply;(4) but it may be doubted, whether the plaintiff in reply can give general good character in evidence, where the defendant's evidence has not been general, but has related to particular instances, especially where the imputations are made in the course of the daughter's cross-examination, who has therefore an opportunity of explaining them away upon re-examination.(5)

In actions for defamation, imputing specific misconduct to the plaintiff, general evidence of the plaintiff's good or bad character is irrelevant, even though the defendant has pleaded a justification;(6) and where no justification is pleaded, the plaintiff will not be permitted even to disprove the defamatory allegations.(7)

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(1) Verry v. Watkins, 7 C. & P. 308.

(In actions for seduction, the relation of master and servant is the foundation of the action (Bartley v. Richtmeyer, 4 Comst. 38); and where the father (who in the case of an apprenticed child, cannot bring the action) sues, evidence cannot be given showing *his* bad character or the defendant's circumstances. Dain v. Wycoff, 3 Selden R. 191.)

(2) Dodd v. Norris, 3 Camp. 519; Gardiner v. Tadis, 1 Selw. N. P. 25; Roberts v. Malston, B. N. P. 296; Elsam v. Faucett, 2 Esp. 563; Andrews v. Askey, 8 C. & P. 9. As to the husband's bad character, see B. N. P. 27; Bromley v. Wallace, 4 Esp. 237. And see as to the plaintiff's bad character in actions for breach of promise of marriage, Foulkes v. Sellway, 3 Esp. 236; Leeds v. Cook, 4 Id. 258; Irving v. Greenwood, 1 C. & P. 350.

(As the plaintiff in such actions may recover smart money or vindictive damages, the circumstances going to aggravate or extenuate the offence may be shown (Cook v. Ellis, 6 Hill (N. Y.), 466); not so where the action is brought expressly for loss of services. Whiting v. Hitchcock, 4 Denio, 461.

(3) Elsam v. Faucett, *ut supra.* Whether in actions for seduction it is necessary to cross-examine the daughter as to specific acts of immorality before they can be proved on the part of the defendant, see Carpenter v. Wall, 11 A. & E. 803. *Post*, Vol. II, *Of Evidence to impeach the Credit of the opposite Party's Witness.*

(4) Bamfield v. Massey, 1 Camp. 460; Dodd v. Norris, 3 Id. 519.

(5) Ibid.; Bate v. Hill, 1 C. & P. 100. See King v. Francis, 3 Esp. 116. It may be observed, that it is often impossible to give a satisfactory answer to a charge unexpectedly made, except by general evidence. See R. v. Clarke, 2 Stark. R. 242, where general evidence of character was received after the prosecutrix's character had been impeached upon her cross-examination.

(6) Cornwall v. Richardson, R. & M. 305.

(7) Stuart v. Lovell, 2 Stark. R. 93.

(Under the Code of New York, the defendant may plead and prove justification and facts tend-

But it seems still to be unsettled whether, in such an action, the defendant is at liberty to prove that reports were generally current that the plaintiff had been guilty of the alleged misconduct, for the purpose of lessening the damages, by showing that the defendant was not the originator of the slander;(1) at any rate, evidence to this effect will be admissible where, at the time of uttering the words complained of, the defendant had referred to reports of the kind.(2)

And where the defamatory matter imputes general misconduct to the plaintiff, and the defendant justifies, or contends that the alleged defamation was contained in a communication that was privileged, the plaintiff will be at liberty to give evidence of his general good conduct. Thus, in an action of libel upon a servant, who had lived in the defendant's service, imputing general dishonesty and misconduct to her, Lord Alvanley, C. J., permitted the plaintiff to call a witness, with whom the plaintiff had lived before going into the defendant's service, to speak to her general good character.(3)

In action for malicious prosecution, &c.

It seems, according to the later authorities, that evidence of the plaintiff's bad character is not admissible in an action for a malicious prosecution,(4) or for false imprisonment.(5)

In criminal matters, evidence of the character of the complaining party frequently affords a material presumption in regard to the perpetration of offences. Thus, where the charge is that of rape, or of an assault with an attempt to commit a rape, the general bad character of the prosecutrix may, under the circumstances of particular cases, afford a just inference as to the probability of her having consented to the commission of the act for which the prisoner is indicted. Accordingly, upon the trial of indictments for such offences, evidence is admissible on the part of the prisoner, that the woman bore a notoriously bad character for

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ing to prove the truth of the defamatory words in mitigation of damages, though he fails in proving a justification. Brisby v. Shaw, 2 Kernan R. 67.)

(1) See in favor of the affirmative, Williams v. Callender, Holt N. P. R. 307; Leicester (Lord) v. Walter, 2 Camp. 251; Eamer v. Merle, cit. Id. 253; Newsam v. Carr, 2 Stark. R. 70; Knobell v. Fuller, Pea. Ad. Ca. 139; ——— v. Moore, 1 M. & S. 284; Moore v. Ostler, Rosc. Ev. 398 (5th ed.); Hardy v. Alexander, Id. (both commented on in Richards v. Richards, 2 Mo. & R. 558):—of the negative, Jones v. Stevens, 11 Pri. 235; Waithman v. Weaver, D. & R. N. P. C. 10.

(2) Richards v. Richards, 2 Mo & R. 557.

(See also Dole v. Lyon, 10 John. R. 447. Such references to the author of the report may show the *quo animo*, and are admissible for that purpose (Taylor v. Church, 4 Selden R. 452); not so as to words spoken on another occasion. Howard v. Sexton, 4 Comst. 157; Root v. Lowndes, 6 Hill R. 518.)

(3) King v. Waring, 5 Esp. 13. See also Fountain v. Boodle, 4 Q. B. 5.

(4) The evidence was admitted by Lord Kenyon, C. J., in Rodriguez v. Tadmire, 2 Esp. 721; rejected by Wood, B., in Newsam v. Carr, 2 Stark. R. 70.

(5) Downing v. Butcher, 2 Mo. & R. 374.

want of chastity and common decency; and it is not necessary that the woman should have been previously interrogated on the subject.(1) It appears also, at least upon trials for rape, that evidence is admissible that the woman had been before criminally connected with the prisoner. But it seems that evidence of particular facts cannot, in general, be received to impeach the chastity of the woman; as, that, previously to the commission of the offence, she had a criminal connection with particular persons.(2) It was held in one case, that the woman, in a prosecution for rape, is not bound to answer questions to such facts as tend to criminate and disgrace herself.(3) But it has been since held, that she may be cross-examined as to such matters,(4) or as to her having had connection with the prisoner previously to the alleged rape;(5) and if she deny the facts to which she is cross-examined, the prisoner may produce evidence to contradict her,(6) for such evidence is not immaterial to the question whether the prosecutrix has had the particular intercourse with the prisoner against her consent.(7)

Evidence as to good character of prisoner.

In trials for felony and high treason, and in trials also for misdemeanors, where the direct object of the prosecution is to punish the offence, the prisoner is always permitted to call witnesses to his general character;(8)

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(1) R. v. Clarke, 2 Stark. R. 244.

(2) By Holroyd, J., in R. v. Clarke, *ut supra*. He also ruled, that the woman's answers as to particular facts would be conclusive; but it is to be observed, that this is treating the question as merely discrediting the witness, and not as relevant to the issue. See Vol. II, *Of the Examination of Witnesses*. And see R. v. Robins, and R. v. Aspinall, *infra*. Perhaps it may be considered that the question of the woman's chastity is not directly involved in the issue upon such charges, as it is in actions for crim. con. and seduction. The determination of this question may, however, afford a material inference as to the truth of the charge; and the alleged objection to the evidence is in some degree obviated by the power, as in actions of seduction, of producing general evidence of good character in reply.

(3) R. v. Hodgson, R. & R. 211. See Vol. II, *Of the Examination of Witnesses*.

(4) R. v. Robins, 2 Mo. & R. 512; R. v. Barker, 3 C. & P. 589.

(5) R. v. Martin, 6 C. & P. 562, where Williams, J., expressly dissented from the doctrine laid down in R. v. Hodgson, in which he had been counsel. And see C. & P. 590, n.

(6) R. v. Aspinall, cit. 3 Stark. Ev. 952; R. v. Robins, *ut supra*.

(7) NOTE 200.—It would not be going too far, perhaps, to say that the party injured by rape, or an assault with intent, &c., might be sustained in her testimony by evidence of good character, even without any attempt being first made to impeach it. Per Daggett, J., in The State of Connecticut v. De Wolf, 8 Conn. Rep. 93, 100, 101. She being deaf and dumb, such testimony was received, without any previous effort to impeach, on trial for an indictment for the assault. Id. And per Daggett, J., it would be allowed in favor of a stranger passing transiently through the state. Id.

(8) NOTE 201.—General character was allowed in evidence for the defendant on the trial for a capital offence; and per Parsons, C. J., it is admissible for the defendant in all criminal prosecutions, which Sewall and Parker, J's, doubted. Commonwealth v. Hardy, 2 Mass. Rep. 317, 318. This may be encountered by evidence on the part of the prosecution; but no evidence can be given against the defendant's good character, till he has put it in issue, by calling witnesses on his part. Per Parsons, C. J., in Commonwealth v. Hardy, 2 Mass. Rep. 317, 318. It was denied

and in every case of doubt, proof of good character will be entitled to great weight.(1) The inquiry as to the prisoner's general character ought manifestly to bear some analogy and reference to the nature of the charge

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that it is admissible in actions or informations for penalties; but said to be confined to trials for crimes subjecting to corporal punishment. Per Judge Owsley, in Givens v. Bradley, 3 Bibb, 196. It is said by other authorities to be admissible in all criminal cases where character is in jeopardy. 2 Stark. Ev. pt. 4, p. 365; adopted per Daggett, J., in Humphrey v. Humphrey, 7 Conn. Rep. 118, 119.

Testimony cannot be given in reply, of conversations heard since the commencement of the prosecution, though they relate to the prisoner's character before the alleged crime. Carter v. The Commonwealth, 2 Virg. Cas. 169. On trial of an indictment for keeping a disorderly house, proof is inadmissible, that the neighbors generally complained of it as disturbing them. It is no more than general reputation of a disorderly house, which is inadmissible. Commonwealth v. Stewart, 1 Serg. & Rawle, 342.

(1) NOTE 202.—We had occasion, in a previous note (183), fully to consider the conclusive effect of good character, when opposed to a case of larceny, resting on the prisoner's possession of the stolen goods—and that only. We shall not here repeat the adjudications. They are in keeping with other authorities, all of which concur in the value of character, when used in reply to presumptions which are not strong. See also *ante*, note 177.

It was said by an Irish judge (Smith, B.), on trial for murder:—"Character is of great weight in every case, and requires particular attention when the charge is grounded on circumstantial evidence. It creates a greater degree of doubt than where the prosecution is supported by direct evidence. In the former case, character ought to be particularly attended to, because the jury is more or less embarrassed, and called upon to weigh the case with more scruple and doubt, from the very nature of the testimony on the part of the crown." Rex v. Crawley, Dublin Oyer and Terminer, 40 Geo. III, Macnally's Ev. 579.

Other authorities speak with more diffidence. It "ought never to have any weight except in a doubtful case." 1 Stark. Ev. 35. Character cannot defeat the force of strong circumstances. Freeland's Case, before Radcliff, Mayor, Gen. Sess. N. Y., 1 C. H. Rec. 82, 83. But the same learned judge allowed that it should overcome slight evidence of scienter in a case of forgery. James's Case, N. Y. Gen. Sess., Aug. 1816, 1 C. H. Rec. 132, 133. General good character has weight in all cases where the facts are doubtful or admit of different interpretations. But where the testimony is positive and satisfactory to the jury, it cannot avail. Said on a trial for murder, per Story, J., in United States v. Freeman, 4 Mason, 510; per Parsons, C. J., in Commonwealth v. Hardy, 2 Mass. Rep. 317. Again; though the case be clear against the prisoner, yet character is admissible; but, unless the evidence is dubious, or the testimony presumptive, general character is entitled to but little weight. The State v. Wells, 1 Coxe, 424, 429; per Savage, C. J., in The People v. Vane, 12 Wend. 82. It cannot always avail against a circumstantial case, which may sometimes be so strong as to overcome positive testimony (The Struggle v. The United States, 9 Cranch, 71); but good character alone should uniformly be allowed to outweigh the mere testimony of an accomplice. Per Savage, C. J., in The People v. Vane, 12 Wend. 82.

On the other hand, where the recorder, on a trial for grand larceny, charged that, from the age of the prisoner, it was evident that he must have acquired a character of some kind; that if it was good, it was in his power to have shown it; and his omission to offer any evidence on that point, was a circumstance which the jury ought to consider as weighing strongly against him; on error, this was holden well. The testimony on the part of the prosecution was that of an accomplice. Savage, C. J., said:—"Had the witness implicated some respectable citizen whose character was above reproach, can there be a doubt that good character alone would have been a perfect shield? A man is not to be convicted of a crime because he has a bad character, or no character; but, in cases like the present, character becomes important; and where no such evidence is produced, the presumption is it cannot be produced. The further inference is, that the defendant is a man of bad character, and would naturally be associated with such men as the witness." The People v. Vane, 12 Wend. 78, 82.

against him. On a charge of stealing, it would be irrelvant and absurd to inquire into the prisoner's loyalty or humanity; on a charge of high treason, it would be equally absurd to inquire into his honesty and punctuality in private dealings. Such evidence relates to principles of moral conduct, which, however they might operate on other occasions, would not be likely to operate on that which alone is the subject of inquiry; it would not afford the least presumption that the prisoner might not have been tempted to commit the crime for which he is tried, and is therefore totally inapplicable to the point in question. The inquiry must also be as to the *general* character: for it is general character alone which can afford any test of general conduct, or raise a presumption that the person who had maintained a fair reputation down to a certain period, would not then begin to act a dishonest unworthy part. Proof of particular transactions, in which the defendant may have been concerned, is not admissible as evidence of his general good character.(1)

What, then, is evidence of general character? The best medium of proof is, by showing how the person stands in general estimation; proof that he is reputed to be honest, is evidence of his character for honesty, and the species of evidence most properly resorted to in such inquiries. It frequently occurs, indeed, that witnesses, after speaking to the general opinion of the prisoner's character, state their personal experience and opinion of his honesty; but when this statement is admitted, it is rather from favor to the prisoner than strictly as evidence of general character.(2) In cases where the intention forms a principal ingredient in the offence, a wider scope is allowed. On a charge of murder, for instance, the natural expressions of good will or acts of kindness on the part of the prisoner towards the deceased, are always considered important evidence, as showing what was his general disposition towards the deceased, from which the jury may be led to conclude, that his intention could not have been what the charge imputes.(3)

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(1) NOTE 203.—Nor in reply to such evidence; *e. g.* that the party has been guilty of seduction. Betts v. Lockwood, 8 Conn. Rep. 487, 488. Nor is what particular persons have said admissible; nor what was learned on an inquiry in the neighborhood, set on foot for the purpose. Douglass v. Tousey, 2 Wend. 352.

(2) See 31 How. St. Tr. 190, 310.

NOTE 204.—Public opinion is the question, in common cases, where character is in issue. Per Parsons, C. J., in Boynton v. Kellogg, 3 Mass. 192. Character is a term convertible with common report. Per Gibson, J., in Kimmel v. Kimmel, 3 Serg. & Rawle, 337. Character and reputation are the same. Per Duncan, J., in S. C., page 338. General character is the estimation in which a person is held in the community where he has resided. Per Marcy, J., in Douglass v. Tousey, 2 Wend. 354.

(3) NOTE 205.—On trial of an indictment for murder, in killing a trespasser, evidence for the prisoner, that he was in possession of land, and that the deceased was coming to commit a trespass, is admissible to show the state of feeling existing between the parties; and the prosecution may give evidence, with the same view, that lawsuits were existing between the parties; but the court will not inquire whether the suits were malicious, nor examine the title. The State v.

Cross-examination of witnesses to character.

It is not the practice to cross-examine witnesses to character, unless the prosecutor has some distinct charge to which to cross-examine the witness,(1) or to make the calling of them a ground for addressing the jury on the part of the prosecution; though the practice in these respects is not imperative, and, in particular instances, it may be deviated from with propriety.(2) It is expressly provided by the statute, 6 & 7 Wm. IV, c. 111, that if upon the trial of any person for any subsequent felony, such person shall give evidence of good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of a conviction of such person for a previous felony, and the jury shall inquire concerning such previous conviction, at the same time that they inquire concerning the subsequent felony.(3) If a prisoner cross-examines the witnesses for the prosecution, as to his character, this is giving evidence within the statute, and the previous conviction may be proved.(4)

Evidence of bad character.

Evidence will not be admitted, on the part of the prosecution, to show the bad character of the accused person, unless he has called witnesses in support of his character; and even then, the prosecutor cannot examine to particular facts, the general character of the accused not being put in issue, but coming in collaterally.(5)

It would not be allowable to show on the trial of an indictment, that the prisoner has a general disposition to commit the same kind of offence as that charged against him. Thus, in a prosecution for an infamous crime, an admission by the prisoner, that he had committed such an offence at another time, and with another person, and that he had a tendency to such practices, ought not to be received in evidence.(6)

In criminal cases, it is peculiarly the duty of courts of justice to prevent evidence being given which would support a charge against the prisoner, of which he was not previously apprised, under the pretext of its affording some presumption as to the offence which is the subject of the in-

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Zellers, 2 Halst. 220, 230, 234. And on a trial for the murder of a slave, the prisoner was allowed to prove that the deceased was insolent and impudent to white persons. But the court admit that such evidence must be confined to the killing of slaves. State v. Tackett, 1 Hawks, 210, 217, 218.

(1) R. v. Hodgkiss, 7 C. & P. 298.

(2) Rules of practice in cases of felony, promulgated by the judges in 1837. 7 C. & P. 676; R. v. Stannard, Id. 673. That a right of reply is given as to the whole case, see R. Whiting, 7 C. & P. 771.

(3) The object of this statute, as stated in the title, was "to prevent the fact of a previous conviction being given in evidence to the jury in the case before them, except when evidence to character is given;" and its operation is limited to felonies not punishable with death.

(4) R. v. Gadbury, 8 C. & P. 676.

(5) Hurd v. Martin, Cowp. 441; cit. B. N. P. 296.

(6) R. v. Cole, Mich. Term, 1810, by all the judges, MS.

dictment. In treason, therefore, no evidence is to be admitted of any overt act that is not expressly laid in the indictment. This was the rule at common law: and it is again prescribed and enforced by the statute of Wm. III, which contains an express provision to that effect,(1) in consequence of some encroachments that had been made in several state prosecutions. The meaning of the rule is, not that the whole detail of facts should be set forth, but that no overt act, amounting to a distinct independent charge, though falling under the same head of treason, shall be given in evidence, unless it be expressly laid in the indictment; but still, if it conduce to the proof of any of the overt acts which are laid, it may be admitted as evidence of such overt acts.(2) With this view, the declarations of the prisoner, and seditious language used by him, are clearly admissible in evidence, as explaining his conduct, and showing the nature and object of the conspiracy.(3) And acts of treason, tending to prove the overt acts charged, though committed in a foreign country, may be given in evidence.(4)

On the trial of an indictment for burglary and larceny,(5) it appeared upon the evidence, that the prisoners might have entered the house before it was dark, and that they had not taken any part of the goods at the

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(1) 7 Wm. III, c. 3, § 8.

(2) See Fost. Cr. L. 245, 246; R. v. Vaughan, 13 How. St. Tr. 453; R. v. Deacon, 15 Id. 747; S. C., Fost. Cr. L. 9.

(3) R. v. Watson, 2 Stark. R. 134.

(4) R. v. Deacon, 15 How. St. Tr. 747; S. C., Fost. Cr. L. 10.

NOTE 206.—It was held that breaking open the United States mail (a felony) was inadmissible, on trial of an indictment for a treasonable insurrection. The reason given was, that this was a distinct crime, indictable and punishable separately, and indeed for which the prisoner was actually indicted; though it seems to be conceded, in the same case, that had it been shown, or offered to be shown, that this act was in furtherance of, or any way connected with the treason, it would have been receivable. U. States v. Mitchell, 2 Dall. 357. Abbott, C. J., said, "he always understood that the ground of objection in Algernon Sidney's Case (3 Harg. St. Tr. 802), to the introduction of his private papers, was, not that the papers had never been published, but that they had no relation to the treasonable practices charged in the indictment." Rex v. Watson, 2 Stark. Rep. 140. In treason and felony, evidence may be given of the finding of articles secreted, although some time subsequent to the prisoner's apprehension. Papers found at the lodgings of a conspirator, at a period subsequent to the apprehension of the prisoner, may be read in evidence, although no absolute proof be given of their previous existence, where strong presumption exists that the lodgings have not been entered by any one in the interval between the apprehension and the finding, and where the papers are intimately connected with the objects of the conspiracy as detailed in evidence. Rex v. Watson, 2 Stark. Rep. 137, 139, 140. But in searching any house other than the prisoner's, a paper found in a trunk with a signature of a person other than the prisoner, and not addressed to him, is not evidence, unless it be proved that he was the owner of the trunk, or in some way connected with the paper. United States v. Craig, 4 Wash. C. C. Rep. 729, 731. After proving an overt act of treason, in one county, evidence may then be given of an overt act of the same species of treason in another, to show the *quo animo*; though the overt act must be laid in the indictment as being in the particular county where the trial takes place. Respublica v. Malin, 1 Dall. 33, 34, 35.

(5) R. v. Vandercomb, 2 Lea. C. C. 816; S. C., East P. C. 519. For disproving a prisoner's *alibi*, proof admitted of acts done by him, though criminal. R. v. Briggs, 2 Mo. & R. 199.

time when they were discovered in the house, upon which the counsel for the prosecution proposed to give evidence of a larceny in the house, committed by the prisoners on a preceding day: but the court rejected the evidence, on the ground that it tended to prove a felony of a totally distinct kind, which had no reference to the subject matter of the prosecution; the prisoners were, therefore, acquitted on this charge, but were afterwards indicted for the other offence, and convicted.

But although it is usual to confine the prosecutor to one single act of felony, yet when the character of the particular act charged against the prisoner is to be collected from other acts done by him, all of them constituting one entire transaction, or mutually explanatory of each other, it is discretionary in the judge to allow the prosecutor to go into the whole.(1) Thus, in a case of robbery, where the prisoners came with a mob to the prosecutor's house, and one of them went up to the prosecutor, and civilly advised him to give them something to get rid of them—to show that this was not *bona fide* advice, but in reality a mode of robbing the prosecutor, evidence was allowed to be given of other demands of money made by the same mob at other houses, at different periods of the same day, both before and after the particular transaction, when any of the prisoners were present.(2) A case is cited by Lord Ellenborough, C. J.,(3) where a man

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(1) R. v. Ellis, 6 B. & C. 145, several purloinings from a till; R. v. Egerton, R. & R. 376, an infamous accusation on the following evening; R. v. Moggs, 4 C. & P. 364, other acts of administering poison to horses with intent to kill them; R. v. Moore, 2 C. & P. 235, acts of coining upon indictment for possessing instruments; R. v. Long, 6 C. & P. 179, firing three ricks, for which there were separate indictments. For other cases, see 2 Russ., Cr. & M., by Greaves, 772, *et seq.*

NOTE 207.—See note 206. And on trial of an indictment for receiving stolen goods, knowing them to be stolen, proof that other stolen goods were found in the defendant's house, for the receiving of which, it appeared, an indictment was also pending, was denied, without anything being said of putting the prosecutor to his election. Bell's Case, before Riker, Recorder, 6 C. H. Rec. 97. And see Rex v. Smith, *post*, note 208. In another case of the same kind, evidence of the prisoner having received other stolen goods of the same person from whom he received the goods in question, was denied. M'Niff's Case, before Radcliff, Mayor, 1 C. H. Rec. 8. But on trial of an indictment for receiving several articles stolen, if they were received at different times, though the prosecutor may be put to his election of one out of the several instances, yet evidence may be given of them all, for the purpose of proving guilty knowledge, at least, of all prior to that upon which the prosecutor elects to proceed. Rex v. Dunn, Ry. & Mood. Cr. Cas. 146.

Receiving goods of one person successively, gives a better chance to learn the character in which he is dealing, than a single act of this kind; a better chance to acquire that knowledge, which is the essential ingredient in the receiver's crime. It will readily be perceived, therefore, that where one offence cannot tend to fix the character of another, it is not admissible in evidence. Accordingly, on trial of a charge for stealing a watch, evidence that the prisoner had been guilty of another distinct larceny in stealing a cloak, is not admissible for any purpose. Walker v. The Commonwealth, 1 Leigh's Rep. 574. The distinction is more fully illustrated in the mode of proving knowledge, &c., by different acts among dealers in counterfeit currency, notices of which now immediately follow in the next notes.

(2) R. v. Winkworth, 4 C. & P. 444, by Park, J., upon a special commission, after communicating with Lord Tenterden, C. J., Alderson, J., and Vaughan, B.

(3) In R. v. Wylie, 1 N. R. 92; S. C., 2 Leach, 985. See also R. v. Storyer, 2 Russ., Cr. & M., by Greaves, 775.

committed three burglaries in one night, and stole a shirt in one place and left it at another, and they were all so connected, that the court heard the history of the three. In like manner, where a robbery or larceny has been effected at the same time as a murder,(1) or rape, or arson,(2) or burglary,(3) the possession of the stolen property is constantly given in evidence against the accused upon his trial for the latter offences.

And it will make no difference that the substantive felony is the subject of another indictment.(4) But it must be shown that the criminal act which it is sought to give in evidence is necessarily connected with that which is the subject of the prosecution, either from some connection of time and place, or as furnishing a clue to the motive on the part of the accused; otherwise the former will not be admissible. Thus, upon an indictment for stealing some pork, a bowl, and a loaf of bread,(5) it appeared that the prisoner entered the shop of the prosecutor, and ran away; in about two minutes he returned, replaced the pork in a bowl, and took away the whole together; in about half an hour he came back and took away the loaf. Littledale, J., ruled that the taking away the loaf could not be given in evidence upon that indictment. He thought that the taking the pork, and returning in so short a time, and placing it in the bowl, and running off with them together, must be taken as one continuing transaction; but that the lapse of half an hour was too long to admit of that construction. The taking the loaf, therefore, was a distinct offence.

Proof of other criminal acts to show intention.

In offences which consist in the guilty knowledge or intention of a prisoner, it is frequently necessary to examine into collateral facts, in order to arrive at a just conclusion upon a matter which must necessarily depend altogether on presumptive evidence. Thus, in a prosecution for uttering a bank note, bill, or promissory note, with knowledge of its being forged, proof that the prisoner had uttered other forged notes or bills, whether of the same kind or of a different kind,(6) or that he had other forged notes

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(1) See Wills on Circumstantial Evidence, 72, *et seq.* The memorable instance in the trial of Courvoisier, in 1840, for the murder of Lord William Russell, will occur to the recollection of the reader.

(2) R. v. Rickman, 2 East P. C. 1035.

(3) See R. v. Gould, 9 C. & P. 364.

(4) R. v. Salisbury, 5 C. & P. 155; R. v. Rooney, 7 Id. 517. A different opinion formerly prevailed. See R. v. Smith, 2 C. & P. 633.

(5) R. v. Birdseye, 4 C. & P. 386.

(6) R. v. Wylie, 1 New Rep. 92; S. C., 2 Lea. 985; R. v. Ball, 1 Camp. 324; S. C., R. & R. Cr. C. 132. That other forged notes of a different kind are admissible, though the subject of another indictment, see R. v. Kirkwood, 1 Lew. C. C. 103; R. v. Hodgson, Ibid. See also R. v. Sunderland, Id. 102; R. v. Martin, Id. 104. The point was doubted in R. v. Millard, R. & R. 245, n. See Bayley on Bills (4th ed.), 450; R. v. Smith, 2 C. & P. 633; R. v. Long, 6 Id. 179.

or bills in his possession,(1) is clearly admissible, as showing that he knew the note or bill in question to be forged. And on a prosecution for uttering counterfeit money, the fact of the prisoner having other counterfeit money upon him, or of his having uttered other pieces of money of the same kind, is, according to common practice, evidence of his having known

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In R. v. Ball (Mo. C. C. 470), on an indictment for engraving the notes of a foreign prince, evidence of engraving the notes of *another* foreign prince was held admissible.

(1) R. v. Hough, R. & R. 120; R. v. Rowley, Bayley on Bills, 447. The forgery of the other notes or bills must be distinctly proved; and they ought to be produced (R. v. Millard, *ut supra*; R. v. Phillips, 1 Lew. C. C. 105); where the point was doubted, and the evidence received; the notes had been destroyed. It would seem that presumptive evidence of forgery, as that the prisoner destroyed the note, ought to be received.

NOTE 208.—Helm's Case, before Riker, Recorder, 1 C. H. Rec. 46, 47. And see per Woodbury, J., in Lovell v. Briggs, 2 N. H. Rep. 223. The cases are uniform that evidence of uttering other spurious bills or notes of the same kind with the one in question on the trial, is admissible on the point of the prisoner's knowledge or intent in respect to the bill or note in question. And in one case, on the trial of an indictment for uttering a bill of exchange, with a forged acceptance, the court inclined that the passing of a similar bill, even after the bill in question was passed, was admissible in evidence to show knowledge in respect to the first. Rex v. Smith, 4 Carr. & Payne, 411. But in such case it should appear that the latter act is in some way connected with the former; at least, the bill must be precisely similar; so that it may be inferred that the latter was concocted at the same time and for the same fraudulent purpose. Rex v. Taverner, Carr. Supp. p. 195, cited also in note *a*, to Rex v. Smith.

The cases are not so confident that bills of a different kind being passed by the prisoner, are admissible. Bayley on Bills (Boston ed. 1826, p. 397), sets it down as questionable, though Le Blanc, J., in Rex v. Millard, Id. 396, note 54, thought they were; and The State v. Twitty, 2 Hawks, 248, stated *post*, holds this as to the *possession* of other notes. And see Quin's Case, *post*, note 209. Several other American cases appear to make no distinction; but let in evidence of other utterings without regard to the similarity or dissimilarity. The State v. Van Houten, 2 Penning. Rep. 672, and the note at 674; Smith's Case, before Riker, Recorder, 1 C. H. Rec. 49. But see per Peters, J., in Stalker v. The State of Connecticut, 9 Conn. Rep. 343, who cites 3 Stark. Ev. 379, per Bayley, J., who said that on an indictment for forging and uttering a bill of exchange, evidence of a forged bank note in the pocket of the prisoner was not admissible. On trial for uttering a forged check on one bank, the uttering another forged check on another bank was received in evidence against the prisoner. Coffey's Case, before Colden, Mayor, 4 C. H. Rec. 52, 53, 54; S. C., Judicial Repos. 293. The point was said by the mayor to be new, and the sentence suspended till the opinion of the Supreme Court should be taken. In the Judicial Repository it is said, on arresting the prisoner, several spurious checks were found upon him, which it was offered to produce; and to show that he had passed several spurious checks dissimilar in amount to the check in question; all of which was received in evidence. And see Lagrille's Case, before Riker, Recorder, June, 1823 (1 Wheel. Cr. Cas. 415, 416), where a similar point was reserved in respect to the prisoner having passed bills unlike the one in question.

On the whole, the decided balance of authority would seem to be in favor of receiving the evidence, whether the other bills, &c., be *ejusdem generis* or not.

To warrant proof of passing other false bills, &c., they must be produced, or their non-production accounted for in the usual way, and the usual steps taken to let in secondary evidence (Helm's Case, before Riker, Recorder, 1 C. H. Rec. 46, 47), as by giving notice to the prisoner to produce them, and showing that they were in his possession and he neglected to produce them, or that they were destroyed by him. Lagrille's Case, before Riker, Recorder, June, 1823, 1 Wheel. Cr. Cas. 412, 414, 415, 416; Rex v. Millard, Bayley on Bills (Boston ed. 1826), p. 396 note 54.

Vaughan, B., refused to allow proof of uttering another note of the same description with that

that the money, which he is charged with uttering, was counterfeit;(1) and proof of the prisoner's conduct in such other utterings (as, for example, that he passed by different names), is, for the same reason, clearly admissible.(2) Such evidence, far from being foreign to the point in issue, is extremely material; for the head of the offence charged upon the prisoner is, that he did the act with knowledge; and it would seldom be possible to ascertain under what circumstances the uttering took place (whether

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in question, because an indictment was pending for the other act of uttering. Rex v. Smith, 2 Carr. & Payne, 633, and see note 207.

But on a second trial for passing spurious bills, the passing others for which the prisoner was formerly tried and acquitted, may be received in evidence to show his knowledge, in connection with his conduct and the circumstances leading to and attending the former trial; though, in consequence of the acquittal, such circumstances come with diminished force. Tinger's Cases, 5 C. H. Rec. 74, N. Y. Gen. Sess. May 1, 1820, before Colden, Mayor; Bartow's Cases, 3 Id. 143, before the same judge, Sept. 1818; Smith and Dougherty's Cases, 4 Id. 166, before the same judge, N. Y. Gen. Sess. Dec. 1819.

State v. Petty, 1 Harp. Rep. 59, 61. All the cases concur that, on trial of the charge of passing counterfeit bills or notes, the fact that the prisoner had other similar bills or notes in his possession, may be received as proof of knowledge or intent.

The cases do not speak with so much confident uniformity; though, on the whole, they appear to be decisive, that dissimilar counterfeits may be shown to have been in his possession. Different acts and declarations of the prisoner in relation to other counterfeit bank notes, as circumstances to show his acquaintance with bank notes in general, and his skill in ascertaining whether they were genuine, were offered against him and received, though it was objected that the others were dissimilar; and several other distinct acts, in passing bad notes, were received in evidence; and all with a view to infer the prisoner's knowledge. The State v. Twitty, 2 Hawks, 248, 258. And see Quin's Case, *post*, note 209. A large sum of counterfeit bills being found with the prisoner while out of the jurisdiction of the court, this was received in evidence against him. Van Houton's Case, before Radcliff, Mayor, 2 C. H. Rec. 73. In this case, one bill was similar. The question was not raised upon the dissimilarity of the others; but the objection was put on the ground that the bills were found in New Jersey, out of the jurisdiction of the New York court. See Stalker v. State of Connecticut, *ante*, per Peters, J., &c., and S. C., *post*, note 209.

To let in proof of the possession of other spurious bills by the prisoner, as collateral proof, the passing of the bill immediately in question must be first shown. Jones' Case, before Riker, Recorder, and Irving, First Judge, 6 C. H. Rec. 86.

(1) By Thompson, B., in R. v. Wylie, 1 N. R. 95; S. C., 2 Lea. 983. See 1 Russ., Cr. & M., by Greaves, 80, *et seq.*

(2) See R. v. Millard, *ut supra*; R. v. Tattershall, cited by Lord Ellenborough, C. J., 2 Lea. 984.

NOTE 209.—On trial of an indictment for having knowingly passed a counterfeit Spanish milled dollar, the prisoner's admission that he had made other like dollars and passed them at fifty cents, even though connected with proof of counterfeiting implements being found in his possession, appears once to have been denied, because the proof went to show a distinct offence. State v. Odel, 2 Const. Rep. 758, 759. But in a subsequent case, the finding of the implements on the prisoner, unaccompanied with any admission on his part, was received against him as proof of the *quo animo;* and the objection that this went to prove a distinct crime was overruled. State v. Antonio, 2 Const. Rep. 776, 784, 791, 792, 797. It would seem, from a remark of Bay, J., at the page last cited, that The State v. Odel (*supra*), is misreported. On trial of an indictment for having in possession false coin with intent to pass it, evidence was received that the prisoner had in possession at the same time counterfeit bills. Quin's Case, before Riker, Recorder, 6 C. H. Rec. 63, 64. But not that he had an engraved print, neither signed nor countersigned, if not appearing that it was a forgery. Stalker v. The State of Connecticut, 9 Conn. Rep. 341.

from ignorance, or with an intention to commit a fraud), without inquiring into the demeanor of the prisoner in the course of other transactions. The more detached in point of time the previous utterings are, the less relation they will bear to that stated in the indictment; and the question then would be, whether the evidence is sufficient to warrant the inference of knowledge at one time, from such particular transactions at another time.(1) That may be thought a question to be left, in most instances, at least, to the jury. But whatever weight the evidence may have (which is quite another consideration), it is, in general, admissible; not as evidence of another offence, but simply of another transaction in which the prisoner was engaged, affording a reasonable presumption as to his conduct with regard to the offence with which he is charged.

It has been held that evidence of what the prisoner has said at a time collateral to a former uttering, to show that what he said at the time of such former uttering was false, is not receivable.(2) In like manner, upon an indictment for forging a bill of exchange, what a prisoner said respecting other bills which are not in evidence, is not admissible.(3)

It may be thought that collateral evidence of facts, occurring soon after the offence with which a prisoner is charged, may sometimes afford as reasonable a presumption of guilty knowledge, as when the facts occurred at some time before the offence. Upon an indictment for uttering a bill with a forged acceptance, knowing it to be forged, it was proposed to give in evidence other forged bills, precisely similar, with the same drawers' and acceptors' names, uttered by the prisoner about a month after the uttering of the bill mentioned in the indictment. Gaselee, J., after consulting Alexander, C. B., was disposed to allow the evidence to be received, but said that he would reserve the point for the opinion of the judges; upon which the counsel for the prosecution declined to press the evidence.(4) It is to be observed, however, that in this case the similarity of the notes showed that they originated with one person; and, in an earlier case of an indictment for uttering a forged bank note, where the prosecutors offered to prove the uttering of another forged note, five weeks after the uttering which was the subject of the indictment, the court (consisting of Lord Ellenborough, C. J., Thompson, C. B., and Lawrence, J.), held that the evidence was not admissible, unless the latter uttering was in some way connected with the principal case, or unless it could be shown that the notes were of the same manufacture.(5)

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(1) By Lord Ellenborough, C. J., in R. v. Wylie, 1 N. R. 94.

(2) R. v. Phillips, 1 Lew. Cr. C. 105, 106. See R. v. Faber, 7 C. & P. 224.

(3) R. v. Cooke, 8 C. & P. 586.

(4) R. v. Smith, 4 C. & P. 411.

(5) R. v. Taverner, 4 C. & P. 413, n. On a charge for sending a threatening letter, or of publishing a libel, acts done by the prisoner subsequently to the offence charged, are admissible to show the *animus*. See *infra*. In like manner, subsequent felonies have been given in evidence

Upon other proceedings, besides prosecutions for forgery, or the uttering of forged notes or counterfeit coin, it is frequently material to give evidence of other acts, though not in issue, in order to raise a presumption as to the intent of the prisoner in committing the act for which he is indicted. Thus, upon an indictment for maliciously shooting, evidence was allowed to be given, that the prisoner, about a quarter of an hour before the shooting with which he was charged, intentionally shot at the prosecutor,(1) the whole being one continued transaction in the prosecution of the malicious intent of the prisoner. So, on a charge for sending a threatening letter, other letters written by the prisoner, both before and after that for which he is indicted, may be read in evidence, for the purpose of explanation.(2) And, in like manner, in actions or indictments for libel or slander, it has been held that other writings or words, whether in themselves actionable or not,(3) may be given in evidence, occurring both before and after the subject of the action, in order to show the *animus* of the defendant.(4)

Upon an indictment for receiving stolen goods, which had been all stolen at the same time, but received at different times, the prosecutor was put to his election of some particular act of receiving; but it was held, that evidence might have been given of the prisoner having in his possession, and of having pledged and disposed of, other articles of the stolen property, in order to show his guilty knowledge, as all the property had been stolen from the same persons, and had been brought to the prisoner by the party indicted with him for the theft.(5)

Proof of other criminal acts, in prosecution for conspiracy to cheat.

On an indictment against several prisoners, for a conspiracy to carry on the business of *common cheats*, proof is admissible that the prisoners at a different time made similar representations to other tradesmen besides those named in the record,(6) cumulative instances being necessary to

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to explain a preceding one. See R. v. Egerton, R. & R. 376; and R. v. Winkworth, 4 C. & P. 444; *Supra*, p. 767.

(1) R. v. Voke, R. &. R. 531.

(2) R. v. Robinson, 2 East P. C. 1110; S. C., 2 Lea. 749.

(3) Rustell v. Macquister, 1 Camp. 49, n; Pearson v. Lemaitre, 5 M. & G. 700, where Pearce v. Ormsby, 1 Mo. & R. 455, and Symmons v. Blake, Id. 477, are questioned.

(4) Charlter v. Barrett, Peake R. 22; R. v. Pearce, Id. 75; Mead v. Daubigny, Id. 125; Lee v. Huson, Id. 166; Stuart v. Lovell, 2 Stark. R. 93; Chubb v. Westley, 6 C. & P. 436; Plunkett v. Cobbett, 5 Esp. 136; M'Leod v. Wakley, 3 C. & P. 311; Delegal v. Highley, 8 Id. 444; Barwell v. Adkins, 1 M. & G. 807. As to proof of collateral matters in actions for malicious prosecution, to show malice, see Caddy v. Barlow, 1 M. & R. 275.

(5) R. v. Dunn, 1 Moo. C. C. 146. The report contains a marginal note, that the evidence had been confined to acts previous to that on which the prosecutor had elected to proceed. The same point has occurred in respect of utterings subsequent to that for which a prisoner is indicted. See further R. v. Hinley, 2 Moo. & R. 524; R. v. Mansfield, Car. & M. 140.

(6) R. v. Roberts, 1 Camp. 400. See also R. v. Steel, Car. & M. 337.

NOTE 210.—Such evidence is equally applicable to indictments or actions for a fraud resulting

prove the offence. The same sort of evidence is allowed in a prosecution for barratry, and, as before mentioned, in prosecutions for the greatest of all offences, high treason. The same kind of proof is constantly admitted in trials for murder; where former grudges and antecedent menaces are evidence of the prisoner's malice against the deceased.(1)

Rule as to conspiracy and riot.

On the trial of an indictment against several persons for a conspiracy in unlawfully assembling for the purpose of exciting discontent and disaffection, it would be irrelevant to inquire, on behalf of the defendants, what the conduct of those employed to disperse the meeting may have been at the time of the dispersion, if no evidence has been previously offered on the part of the prosecution as to the conduct of the meeting at that time or subsequently; for the conduct of the dispersers of the meeting can have no bearing on the intention and object of the meeting itself; in other words, it is irrelevant to the matters in issue.(2) In such a prosecution, as the material points for the consideration of the jury are, the general character and intention of the assembly, and the particular case of each defendant as connected with that general character, it would be relevant to prove, on the part of the prosecution, that bodies of men came from different parts of the country to attend the meeting, arranged and organized in the same manner, and acting in concert. It would be relevant also to

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from a conspiracy among several. This, and the like, has often been held in private suits. Thus in an action for obtaining goods by giving a false credit to A., evidence that the defendant had represented him as credit-worthy to persons other than the plaintiff, was received. Rumsey v. Lovett, Anth. N. P. Rep. 17. And the several cases of Beal v. Thatcher, Gardner v. Preston, and Allison v. Matthieu, stated *ante*, are to the same effect. See also per Woodbury, J., in Lovell v. Briggs, 2 N. H. Rep. 223. The same kind of testimony is uniformly received in our courts, on trials of indictments for conspiracy. The object of it is to show the *quo animo*. Hitchcock's Case, before Riker, Recorder, 6 C. H. Rec. 43, 44. In a note at p. 4, the Recorder stated, in passing sentence, that the question had been submitted to and passed upon by Spencer. C. J., after examining the authorities. The same point was resolved in The People v. Bleecker et al., before Riker, Recorder (2 Wheel. Cr. Cas. 256, Nov. 1823). So, on trying whether a sale of a wagon by a debtor to G., who sold it to C., the debtor's brother-in-law, who loaned it to the debtor, was fraudulent in respect to a creditor, the latter was allowed to prove that about the same time the debtor sold a farm, saying that C. would give the deed, who did so, and received pay in goods, which he delivered to the debtor. Benham v. Crary, 11 Wend. 83.

Indeed, where the party acts alone in his endeavors to defraud, the same doctrine is equally applicable. This was held in replevin for a horse, which the buyer had obtained by falsely representing himself as a man of credit. Similar representations, and obtaining goods from others about the same time, in the same town, were received as evidence of a general plan to amass property by fraud. And this was held especially admissible, as it was sought to connect him with the defendant as fraudulently claiming, under the buyer, the horse and other property obtained pursuant to a general plan in which both were connected. M'Kenney v. Dingley, 4 Greenl. 172. (See also Cary v. Hotailing, 1 Hill R. 311; and Murfey v. Brace, 23 Barb. 561; and Bronson v. Wiman, 4 Selden, 182.)

(1) The People v. How, *supra;* 1 Wheel. Cr. Cas. 412.

(2) R. v. Hunt, 3 B. & A. 566, 577.

show, that early on the day of the meeting, in a spot at some distance from the place of meeting (from which very spot a body of men came afterwards to the place of meeting), a great number of persons, so organized, had assembled, and had there conducted themselves in a disloyal, riotous, or seditious manner.(1) Further, it would be relevant, on such a trial, to produce in evidence certain resolutions, which had been proposed by one of the defendants, at a large assembly very recently held in another part of the country, for the same professed object and purpose as were avowed by the meeting in question, and that the defendant acted at both meetings as president or chairman; in a question of intention, as this is, it would be most clearly relevant to show against that defendant, that at a similar meeting, held for an object professedly similar, such matters had passed under his immediate auspices.(2)

Upon trials of indictments for offences involving a charge of conspiracy, much evidence is usually produced, which does not relate to the particular conduct of a prisoner. Such evidence, however, is not necessarily of a presumptive nature. Thus, it is usual to give general evidence of a conspiracy previously to showing the connection of the prisoner with it.(3) It has been seen, in treating of hearsay evidence, that the acts and declarations of other conspirators in the absence of the prisoner are admissible against him;(4) it has been seen also, in treating of admissions, that the prisoner may be affected by writings from other persons, which came into his custody before his apprehension.(5) In these cases, however, the evidence is of a direct nature, applying to the acts in furtherance of a conspiracy, and not circumstantial as proving only collateral circumstances from which these acts are to be inferred.

Acts and declarations of prisoner, when evidence for him.

As in trials for conspiracies, whatever the prisoner may have done or said, at any meeting alleged to have been held in pursuance of the conspiracy, is admissible in evidence against him, on the part of the prosecution; so, on the other hand, any other part of his conduct at the same meetings will be allowed to be proved on his behalf: for the intention and design of the party, at a particular time, are best explained by a complete view of every part of his conduct at that time, and not merely from the proof of a single and insulated act or declaration. In the case of Walker and Others,(6) who were tried for a conspiracy to overthrow the government, evidence having been produced, on the part of the prosecu-

(1) R. v. Hunt, 3 B. & A. 573, 574.
(2) Id. 568, 572.
(3) The Queen's Case, 2 B. & B.
(4) *Supra*, Chap. 7, Sect. 1.
(5) *Supra*, Chap. 7, Sect. 10.
(6) 23 How. St. Tr. 1131. And see 31 Id. 43.

tion, to show that the conspiracy existed and was brought into overt act at meetings in the presence of Walker, the counsel for the prisoners were allowed to ask a witness whether, at any of these times, he had heard Walker utter any word inconsistent with the duty of a good subject? The question was opposed, but held by Heath, J., to be admissible. The prisoner's counsel were also allowed, in the same case, to inquire into the general declarations of the prisoner at those meetings; as, whether the witness had heard him say anything that had a tendency to disturb the peace of the kingdom; and questions to the same effect were put to many other witnesses in succession.

The question, in the case last cited, was expressly confined, and so required by the court to be, to the conduct of the prisoner at those particular meetings, which had been previously inquired into on the part of the prosecution. Proof of what the prisoner might have said or done at other meetings, or at other times, unconnected with the transactions proved against him, would not have been admissible evidence in his favor. In Lord George Gordon's Case,(1) a witness was asked by the prisoner's counsel, on cross-examination, as to a statement made by the prisoner, on the night before a meeting in St. George's Fields, and with respect to which meeting much evidence had been produced. This was objected to; and the court decided that the question was not regular. Lord Mansfield, C. J., held, that as the counsel for the crown had given evidence of what the prisoner said at the meeting upon the 29th of May, the counsel for the prisoner might show the whole connection of what the prisoner said besides at that meeting; but that they could not go into evidence of what he said on the antecedent day. And in Hanson's Case,(2) on a charge for promoting a riot, the counsel for the prisoner was not allowed to prove what he had said privately to a friend, previously to his going to the place of riot, respecting his motive in going thither. Many other cases might be cited to the same effect.

The rule on this subject appears to have been extended much beyond the line here laid down, on the trial of Horne Tooke.(3) In that case, several publications were given in evidence, on the part of the crown, containing, as was alleged, republican opinions, which had been distributed by the prisoner during the period assigned for the existence of the conspiracy; and this evidence was much relied on, as showing that the notion of a reform, which was expected to be set up by the prisoner in his defence, was a mere pretext to cover treasonable designs: to repel this conclusion, the counsel for the prisoner offered in evidence a book, which had been written by the prisoner twelve years before, on the subject of parliamentary reform: the evidence was objected to, as having no relation

(1) 21 How. St. Tr. 542.
(2) 31 How. St. Tr. 4281.
(3) 1 East P. C. 61; Gurney's Report of S. C., Vol. 2, 36; 25 How. St. Tr. 345.

with the particular transaction in question, and because the prisoner's opinions, whatever they were formerly, might have afterwards changed. But Eyre, C. J., said, that the question was not whether this book had a reference to the conspiracy charged, but whether it had not reference to the proof given in support of the charge; and he thought it evidence to rebut the supposition, that the reform of Parliament was a pretence made by the prisoner. The book was accordingly received in evidence. There is great authority, however, for doubting whether such evidence would, on revision, be considered strictly admissible.(1) It seems, indeed, reasonable, if some other acts of the prisoner, besides those charged in the indictment, are proved against him for the purpose of showing his design in the affair in question, that he should be allowed to explain those acts by proof of other *cotemporaneous* particulars of his conduct, which show that he had a different design from that imputed to him. But this limitation (namely, that such other particulars, offered in evidence by the prisoner, ought to be cotemporaneous with those proved on the other side, or, at least, confined within the same limits to which the evidence on the part of the prosecution is subject), appears to be just and necessary; for otherwise the prisoner would be at liberty to take the whole range of his life, in the course of which, his character and his designs may have undergone a complete change.(2)

In Hardy's Case,(3) great liberty was allowed to the counsel for the prisoner in examining into particulars of his conduct, even into his speculative opinions; and perhaps it may be questionable whether the rule was not carried to its utmost extent in that case. The question there put to the witness was this: whether, from his personal acquaintance with the prisoner, he had ever heard him state what was his plan of reform? The question was objected to. The overt act charged was that the prisoner, for the purpose of accomplishing the treason of compassing the king's death, did conspire with others to call a convention of the people, in order that the convention might depose the king; and the counsel for the pris-

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(1) See the observations on this point by Lord Ellenborough, C. J., in R. v. Lambert, 31 How. St. Tr. 355; S. C., 2 Campb. 400. In that case, which was an information for a libel in a newspaper, it was held that the defendant had a right to have read in evidence any extract from the same paper connected with the subject charged as libelous, although disjoined from it by extraneous matter, and printed in a different character.

(2) R. v. Abraham, 2 C. & K. 550, may be referred to as an example of this limitation. The prisoner was indicted for burglary. The prosecutor's shop had been broken open, but the only evidence to connect the prisoner with the offence was that some of the stolen property was found in his possession. The defence at the trial was that he had found it, but it was unsupported by evidence; and Alderson, B., said, that if it had appeared that before suspicion attached to the prisoner he had given this account of his possession of the property to his neighbors, the property being there at the time, and before search made, he had not the slightest doubt that, *valeat quantum*, this would have been very competent for the prisoner.

(3) 24 How. St. Tr. 1065—1093. See trial of O'Coigly and O'Connor, 27 Id. 31, and 31 Id. 189, 310.

oner submitted, that for the purpose of showing that the convention was intended to be held, not with the design imputed by the indictment, but with an innocent design, they might go into evidence of what the prisoner had at other times declared, inasmuch as the counsel for the prosecution had gone into all that the prisoner had, at any part of his life, declared touching this fact, and had gone also into evidence of what other members of the corresponding societies had said. They then defended the question by an able argument, in the course of which several cases were cited from the state trials; particularly the case of Lord Russell (the one which came nearest in principle to that under discussion), where the charge against the prisoner was for compassing the king's death, and the overt act was consulting to raise rebellion and seize the king's guards; and Lord Russell, in his defence, called many witnesses to speak to his affection towards the government, and his detestation of risings against it; some of the witnesses gave evidence of his conversations and sentiments on this subject, showing his aversion to all risings of the people; Dr. Burnett and Dr. Cox, in particular, spoke fully to this point, and without any objection either from the court or from the counsel for the prosecution. After the question had been argued at some length, Eyre, C. J., is reported to have thus addressed the prisoner's counsel:(1) "I do not know whether you can be content to acquiesce in the opinion that we are inclined to form upon the subject, in which we go a certain way with you. Nothing is so clear, as that all declarations which apply to facts, and even apply to the particular case that is charged, though the intent should make a part of that charge, are evidence against a prisoner, and are not evidence for him; because the presumption upon which declarations are evidence, is, that no man would declare anything against himself, unless it were true; but that every man, if he were in difficulty, or in apprehension of any difficulty, would make declarations for himself. Those declarations, if offered, as evidence, would be offered, therefore, upon no ground which entitles them to credit. That is the general rule. But if the question be, what was the political speculative opinion which this man entertained touching a reform of Parliament, I believe we all think that opinions may very well be learned and discovered by the conversations which he has held at any time or in any place." The question afterwards put to the witness was, whether, before the time of the convention which was imputed to the prisoner, he had ever heard from him what his objects were, and whether he had at all mixed himself in that business; and, in answer, the witness stated what he had heard from the prisoner respecting his plan of reform.(2)

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(1) 24 How. St. Tr. 1094

(2) 24 How. St. Tr. 1097. Another question, which is stated to have been put by the prisoner's counsel to one of the witnesses, and allowed to be answered, was, as to what the prisoner

SECTION IV.

Of Evidence in Matters of Opinion.

In connection with the subject now under discussion may be considered the question how far the opinion of a witness is admissible in evidence.

Opinion admissible in matters of skill.

Generally speaking, a witness must speak to facts, and his mere opinion is not evidence. But upon questions of skill or science, men who have made the subject matter of inquiry the object of their particular study are competent to give their opinions in evidence.(1) Such opinions, however, are to be deduced from facts that are not disputed,(2) or, at least, from facts that are in evidence before the jury; they need not, however, be founded upon their own personal knowledge of such facts, but may be formed upon the statement of facts proved by others.

Thus, the opinions of medical men are evidence, not only as to the state of a patient whom they have seen; or as to the cause of the death of a person whose body they have examined; or as to the nature of the instrument causing wounds which they have inspected;(3) but also in cases where they have not themselves seen the patient, and have only heard the symptoms and particulars of his state detailed by other witnesses at the trial; their opinion on the nature of such symptoms is always admitted. Thus, in prosecutions for murder, they are allowed to state their opinion, whether the wounds or injuries, described by other witnesses, were likely to be the cause of death.(4) So, upon a question of sanity,

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had declared to be the object of the corresponding societies. This question was not opposed. Ibid. p. 1101.

(1) See by Lord Mansfield, C. J., in Folkes v. Chadd, 3 Doug. 157, 159; by Lord Kenyon, C. J., in Chaurand v. Angerstein, Peake R. 44. And see 1 Smith Lea. Ca. 286. As to the course adopted in equity, on such occasions, see Webb v. Manchester and Leeds Railway Co., 4 Myl. & Cr. 120.

Moorehouse v. Mathews, 2 Comst. 514; Price v. Powell, 3 Id. 322; Joy v. Hopkins, 5 Denio, 84; 4 Barb. 256, 261, 614; Crawford v. Andrews, 6 Geo. 244; Steamboat Clipper v. Logan, 18 Ohio, 375; Pickard v. Bailey, 6 Foster (N. H.), 152; Hobby v. Dana, 17 Barb. N. Y. 111; Commonwealth v. Wilson, 1 Gray (Mass.) 337; 19 Barb. 338; Reed v. The People, 1 Parker C. R. 481.

(2) See by Lord Mansfield, C. J., *ut supra.*

(3) See Burnet on the Criminal Law of Scotland, p. 458.

So a physician who has made a *post mortem* examination may state the cause of death, and whether the deceased had been pregnant (The State v. Smith, 32 Maine R. 369); or the derivation and nature of the disease causing death (Jones v. White, 11 Humph. 268); or of the disease in question. Lush v. M'Daniel, 13 Ired. 485; Reed v. The People, *supra;* Lake v. The People, 1 Parker C. R. 495; S. C., 2 Kernan R. 358.

(4) See R. v. Shaw, 2 Russ., Cr. & M., by Greaves, 924, 925; where contradictory evidence of this nature was given. The recent case of Thomas Drory, tried and convicted at the Essex Spring Assizes, 1851, is another example.

See American cases cited in last note.

they may form their judgment from the representations which witnesses at the trial have given of the conduct, manner, and general appearance exhibited by the patient; or they may give their opinion whether certain circumstances were likely to produce a paroxysm of the disorder.(1) But they cannot be asked to state their opinion, upon the very point which the jury have to decide, namely whether the act, for which the prisoner is being tried, was an act of insanity.(2)

In Folkes v. Chadd,(3) which may be considered as one of the leading cases upon this subject, where the question was whether a bank, which had been erected for the purpose of preventing the overflowing of the sea, had caused the choking up of a harbor, it was held that the opinions of engineers, as to the effect of such an embankment, were admissible. So a shipbuilder may state his opinion as to the seaworthiness of a ship, from examining a survey which had been made by others, and at which he was not present.(4) In like manner, in an action for a nuisance, an architect, acquainted with the particular locality, may be asked if the nuisance complained of depreciated the value of the houses in the neighborhood.(5) And a London stockbroker is a competent witness as to the course of business of London bankers.(6)

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(1) R. v. Wright, R. & R. 456; R. v. Searle, 1 Moo. & R. 75.

Lake v. The People, *supra;* a physician may give an opinion on a supposed state of facts; but if he has not heard the whole evidence in a case, he cannot give an opinion founded on what he has heard. 2 Kernan, 358. If the facts are not disputed, he may give an opinion founded on them; not so where they are disputed. U. States v. M'Glue, 1 Curtis Ct. Ct. 1.

(2) R. v. M'Naghten, 10 Cl. & Fin. 200, 211; S. C., 8 Scott N. R. 595; 1 C. & K. 135, 136; R. v. Wright, *ut supra.*

2 Kernan, 358.

(3) 3 Doug. 157; S. C., cit. by Buller, J., in Goodtitle d. Revett v. Braham, 4 T. R. 498.

(4) Thornton v. The Roy. Exch. Ass. Co., Peake, 25; Beckwith v. Sydebotham, 1 Camp. 117.

So a seafaring man, familiar with the proper mode of stowing a given cargo, may give his opinion whether the cargo in question was properly stowed (Price v. Powell, 3 Comst. 322); and an engineer, builder or master, may, after looking at a boat injured by collision, give an opinion as to the direction from which the blow came (Steamboat Clipper v. Logan, 18 Ohio, 375); to prove value of a vessel or damages to it, the witness need only be acquainted with the value and such matters as affect it. Sikes v. Paine, 10 Ired. 280. On a question of science, a witness who is not a scientific man cannot give an opinion as an expert (Lincoln v. Barre, 5 Cush. 590); but he may give an opinion if he really have knowledge (Pickard v. Bailey, 6 Foster N. H. 152); so on a question of skill, or skill and science. Lush v. McDaniel, 13 Ired. 485; McLean v. The State, 16 Ala. 672; Luning v. The State, 1 Chand. (Wis.) 178. Nor can an expert give an opinion on subjects of general knowledge. Concord Railroad v. Greely, 3 Foster (N. H.) 237. As to who are experts, see Cook v. Parham, 24 Ala. 21; Brantley v. Swift, Id. 390; Stein v. Bruden, Id. 130; Hartford Pro. Ins. Co. v. Harmer, 2 Ohio (N. S.) 452; 17 Barb. 111; and Wiggins v. Wallace, 19 Id. 338.

(5) Gauntlett v. Whitworth, 2 C. & K. 724.

So on a question as to the damage caused to a garden, plants, fruit trees and shrubs by the burning of a brick kiln near it, a gardener may give his opinion. Vandine v. Burpee, 13 Met. 288.

(6) Adams v. Peters, 2 C. & K. 723.

Persons who are acquainted with the character of ancient handwriting, may give their opinion as to the date of an ancient document,(1) or as to whether it is genuine or a forgery.(2) In like manner, where the question is whether a seal has been forged, seal engravers may be called to show the difference between a genuine impression and that supposed to be false.(3) In prosecutions for forging, or uttering forged bank notes, or uttering counterfeit money, the opinion of a clerk of the bank, or of an officer connected with the mint, is invariably resorted to. So the opinion of an artist in painting, is evidence as to the genuineness of a picture. And, upon questions as to the infringement of copyright in a piece of music, the opinion of musical men is constantly given in evidence as to whether the piece alleged to have been pirated is original, or as to how far the alleged piracy is an imitation.

The genuineness of a post-mark upon a letter is best proved by persons from the post-office at which it was stamped; but the evidence of persons who are in the habit of receiving letters from that office is also admissible.(4)

Upon an indictment for uttering a forged bill, which it was suggested had been written over pencil marks that had been rubbed out, it was held that the evidence of an engraver, who had examined the paper with a mirror and traced the pencil marks, was admissible.(5) This, it is to be observed, was rather a question of fact than of opinion, as the jury, with the half of the same mechanical aids to which the witness had resorted, would have been equally competent to form an opinion upon the subject; but, as such aids might not be at hand, or perhaps could not readily be procured, the evidence seems properly to have been admitted, though, as it was stated by the learned judge,(6) its weight would depend upon the way in which it was confirmed.

Rule confined to matters of science and skill.

The rule under consideration must be considered as confined to the admissibility of the opinions of scientific men, upon questions of science or skill; witnesses, therefore, are not permitted to state their views of legal or moral obligation, as to the manner in which others would probably be influenced in case the parties had acted in one way rather than another;(7)

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(1) Tracy Peerage, 10 Cl. & Fin. 191.

(2) See Davies dem. Lowndes, Ten. Arn. Rep. C. P. 454, n. *g.* 456; and *post*, Vol. II, Chap. 6 Sect. 4, *Of the Proof of Handwriting.*

(3) By Lord Mansfield, C. J., in Folkes v. Chadd, 3 Doug. 157.

(4) Woodcock v. Houldsworth, 16 M. & W. 124; Fletcher v. Braddyl, 3 Stark. R. 64; Abbey v. Lill, 5 Bing. 299. See the remarks of Best, C. J., Id. 303.

(5) R. v. Williams, 8 C. & P. 434.

(6) Parke, B., after consulting Tindal, C. J.

(7) By Lord Denham, C. J., in Campbell v. Rickards, 5 B. & Ad. 846.

nor can they be allowed to give their opinion on things with which a jury may be supposed to be equally well acquainted.(1)

Therefore a medical man cannot be asked whether a physician, in refusing to consult with another physician, had honorably and faithfully discharged his duty to the medical profession;(2) though if any specific rules of the profession had been given in evidence, it seems it might have been shown that a physician, by violating these rules, had rendered himself unworthy of the countenance of his brethren.(3) Thus, in an action for a libel, imputing to the plaintiff, who was a member of the Jockey Club, that he had acted dishonorably in withdrawing a horse which he had entered for a race,(4) a witness, who was also a member of the club, had stated, on cross-examination, that by the rules of the club, the owner of a horse entered for a race was entitled to withdraw him without giving any reason, and such owner, if he had betted against the horse's winning, would be entitled to receive the money: upon re-examination he was asked what was his opinion respecting the morality of such a case; and it was held that his opinion, upon this subject, was legitimate evidence, with the view of ascertaining the extent and meaning of the rule in question.

In some cases it is difficult to say whether the evidence proposed to be given is of a scientific character or not; and there has been a difference of opinion as to the application of the rule in particular instances. Thus, there have been different decisions upon the question whether the opinion of brokers or underwriters is admissible, as to the materiality of facts not communicated at the time of effecting an insurance. In the case of Carter v. Boehm,(5) it was held that such evidence was not admissible. Lord Mansfield, C. J., in delivering the judgment of the court, there said: "Great stress was laid upon the opinion of the broker; but we all think the jury ought not to pay the least regard to it. It is mere opinion, which is not evidence. It is an opinion which, if rightly formed, could be drawn only from the same premises from which the court and jury were to determine the cause; and therefore it is improper and irrelevant in the mouth of a witness." This case was followed by that of Durrell v. Bederley,(6) where a similar rule was laid down by Gibbs, C. J., and both these

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(1) By Tindal, C. J., in Ramadge v. Ryan, 9 Bing, 335.

So the opinions of innkeepers, that a guest keeping his money locked up in a trunk or portmanteau is guilty of negligence, are not admissible. Taylor v. Monnot, 4 Duer R. 116.

(2) Ramadge v. Ryan, 9 Bing. 333.

(3) By Tindal, C. J., Id. 335.

(4) Greville v. Chapman, 5 Q. B. 731.

(5) 3 Burr. 1905 (A. D. 1764).

(6) Holt, 283.

authorities were recognized by the Court of King's Bench, in Campbell v. Rickards.(1)

On the other hand, in Berthon v. Loughman,(2) Holroyd, J., ruled at Nisi Prius, that the opinion of a witness, who was conversant in the business of insurance, whether particular facts if disclosed to an underwriter would have made a difference as to the amount of a premium, was admissible evidence. This case was followed and confirmed by Rickards v. Murdock,(3) and they were both recognized by the Court of Common Pleas, in Chapman v. Walton.(4)

A learned writer, in commenting upon these apparently conflicting decisions, has observed:(5) "The question of materiality in an assurance seems one which may possibly happen to fall within either of the above two classes," [*i. e.*, where the subject matter of inquiry does, or does not partake so far of the nature of a science, as to require a course of previous habit or study in order to the attainment of a knowledge of it]; "for, setting out of the question the cases of life policies, where the medical evidence is unquestionably scientific, and necessary in order to enable the jury to come to a right conclusion,(6) it is submitted that it may happen, even in cases of sea policies, that a communication, the materiality of which is in question, may be one, respecting the importance of which no one except an underwriter can, in all probability, form a correct opinion. If such a case were to occur, it possibly would not be considered as falling within the decision in Campbell v. Rickards. In that case the facts concealed were of the very simplest nature; a vessel which sailed after the one insured, had arrived thirty-nine days before it, and it was easy, without

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(1) 5 B. & Ad. 840 (A. D. 1833, M. T.) In this case the authority of Rickards v. Murdock, *ut infra*, was doubted.

The description of premises in a policy of insurance is construed as a warranty by the insured that they are as described (Wall v. East River Co., 3 Selden, 370); and the insured is not permitted to show, where a building is insured as a *store-house*, that this term has, by recent general usage, acquired a technical meaning so as to be descriptive of a building used for storage and manufacturing purposes. S. C., 3 Duer, 264. The policy shows what the contract was (Jennings v. Chenango Co. M. Ins. Co., 2 Denio, 77; French v. Carhart, 1 Comst. 96); and a misstatement by the insured avoids the policy. Wilson v. The Herkimer Co. M. Ins. Co., 2 Selden, 53.

(2) 2 Stark. R. 258 (A. D. 1817).

(3) 10 B. & C. 527 (A. D. 1830).

(4) 10 Bing. 57 (A. D. 1833, T. T.) In this case the authority of Durrell v. Bederley (*ut supra*), was doubted. It is to be remarked that the case of Chapman v. Walton, which was decided in the term immediately preceding the decision in Campbell v. Rickards, was not referred to in the latter case.

(5) 1 Smith Lead. Ca. 286, a, note to Carter v. Boehm. And see the additional note by the editors of the third edition. It appears that in Carter v. Boehm the fact, the concealment of which the broker thought material, was that the assured had, in two letters, expressed his own opinions and fears as to the probability of a certain event taking place, against the occurrence of which the assurance was effected.

(6) See Lindenau v. Desborough, 8 B. & C. 586.

much experience in the business of an underwriter, to divine the probable fate of the ship insured under these circumstances."

In confirmation of this view, it may be observed that the facts were of a very different nature in Chapman v. Walton. They were as follows: a broker had effected a policy on a ship upon a voyage to St. Thomas, in the West Indies, with leave to call at certain ports. The assured afterwards received a letter from his supercargo announcing his intention to sail for the Canaries, and thence to other West India islands, besides St. Thomas. The Canaries were not covered by the policy. The assured took the letter to the broker and told him that the voyage was altered, and that he left him to do the needful with it. The broker got the policy altered by adding leave to proceed to the other West India islands named in the letter. The vessel was lost at the Canaries, and it having been decided in an action upon the policy, that the voyage was not covered by the alterations, an action was brought by the assured against the broker for negligence in not having procured the proper alterations to be made. On the part of the defendant several policy brokers were called, and the policy and letter being placed in their hands, they were asked what alterations in the policies a skillful insurance broker ought, *in their judgment*, to have formed, having these documents in his possession, and being instructed to do the needful. And it was decided that this question might properly be put. Tindal, C. J., in delivering the judgment of the court, remarked: "The point to be determined is, not whether the defendant arrived at a correct conclusion upon reading the letter, but whether, upon the occasion in question, he did or did not exercise a reasonable and proper care, skill, and judgment. This is a question of fact, the decision of which appears to us to rest upon this further inquiry, viz: whether other persons exercising the same profession or calling, and being men of experience and skill therein, would or would not have come to the same conclusion as the defendant. And it appears to us that it is not only an unobjectionable mode, but the most satisfactory mode of determining this question, to show by evidence whether a majority of skillful and experienced brokers would have come to the same conclusion as the defendant. It is not a simple abstract question, as supposed by the plaintiff, what the words of the letter mean: it is what others, conversant with the busines of a policy broker, would have understood it to mean, and how they would have acted upon it under similar circumstances.(1)

The evidence, therefore, was held to be receivable in this case, upon the same principle as, upon an indictment against a surgeon for manslaughter by causing a patient's death by negligent or improper treatment, the evidence of professional men is received, both for the prosecution and for the defence, as to what, in their opinion, would be the proper method

(1) 10 Bing. 63, 64.

of treatment under the symptoms which the patient is proved to have exhibited.

In cases of collision.

Upon the same principle, in questions arising out of collisions on the sea or on navigable rivers, a master of the Trinity House, or a nautical witness, may give his opinion, after hearing the evidence, as to what ought to have been done by the defendant under the circumstances detailed: he cannot, indeed, be asked in direct terms whether he thinks the conduct of the defendant's captain was right or not,(1) or whether the facts proved showed negligence on his part;(2) as in such cases the witness would in fact be placed in the situation of the jury, and asked to draw a conclusion of fact, and then to give his opinion upon it. But the same result may in effect be attained by asking the witness whether an officer of competent skill would have acted in the same manner as the defendant's captain had done,(3) or whether, in his opinion, a collision could have been avoided by proper care on the part of the captain.(4)

In collisions between carriages on land, such evidence is not required, as the jury may be presumed to be sufficiently acquainted with what is termed the "rule of the road," to be able to draw a correct inference from the facts in evidence without the assistance of any persons possessing any peculiar skill or knowledge upon the subject.

Handwriting.

The proof of handwriting does not properly fall under this branch of the law of evidence, for although, except in cases where the witness can speak positively to the writing of a particular document, as, in the instance of an attesting witness, such proof necessarily depends upon opinion, still that opinion is always required to be founded upon some acquaintance, on the part of the witness, with the handwriting in question. This subject will, therefore, be deferred to another portion of the work.(5)

Foreign laws.

So likewise the proof of foreign laws, and of their operation and effect, which must be proved by witnesses who are acquainted with them, might properly be treated of in this section, as the evidence in question depends, in a great measure, upon the opinion or skill of the witness who is called to speak upon the matter. But it is considered that this subject will be

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(1) By Coleridge, J., in Sills v. Brown, 9 C. & P. 604.

(2) See Malton v. Nesbit, 1 C. & P. 70, 72. The marginal note in this case is calculated to give an erroneous impression of the question that was really allowed to be put.

(3) By Abbott, C. J., in Malton v. Nesbit, *ut supra*.

(4) By Coltman, J., in Fenwick v. Hall, 1 C. & K. 312.

As to the diligence and skill required in such cases, see Edwards on Bailments, 604–612.

(5) *Post*, Vol. II, Chap. 6, Sect. 4, *Of the Proof of Handwriting.*

more conveniently treated of in another portion of this work, in connection with the admissibility and effect of the proceedings in foreign courts.(1)

SECTION V.

Of Admissions on the Record.

The rule which is now the subject of discussion (namely, that evidence is to be confined to the points in issue), will be further illustrated by considering the effect of admissions made upon the record. 1. With regard to judgments by default and judgments upon demurrer; 2. With regard to payment of money into court; 3. With regard to pleading over; and, 4. As to particulars of demand annexed to the record.

1. Of the effect of judgment by default, or upon demurrer.

A judgment by default is an admission of the cause of action. Thus, in an action on a bill of exchange against the defendant as acceptor, it admits that he accepted it, and that the bill is as stated in the declaration; and he cannot afterwards show, on the execution of a writ of inquiry, that he had not accepted it,(2) nor can he object to the sufficiency of the stamp on which the bill is drawn:(3) the only use in producing the bill is, for the purpose of seeing whether there is any indorsement upon it of money having been paid.(4) And it seems that, since the promulgation of the new rules, according to which payment must now be pleaded,(5) where payment has not been pleaded, the production of the instrument is no longer necessary.(6) In an action for goods sold and delivered, or for money had and received, the defendant, by suffering judgment to go by default, admits that something is due; and he cannot afterwards dispute the contract of sale, or show fraud on the part of the plaintiff in making the contract;(7) but the plaintiff will only have to prove the amount due to him.

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(1) *Post*, Vol. II, Chap. 1, Sect. 6.

(2) Green v. Hearne, 3 T. R. 301; Bevis v. Lindsell, 2 Str. 1149.

(3) See Lane v. Mullins, 2 Q. B. 254.

(4) 3 T. R. 302; Billers v. Bowles, Barnes, 233; Ellis v. Wall, Id. 234; Mills v. Lyne, Bayl. Bills, 385; Marshall v. Griffin, R. & M. 41. See also Anon., 3 Wils. 155; Snowden v. Thomas, 2 W. Bl. 748.

(5) R. Hil., 4 Wm. IV, *Pleadings in Particular Actions*, I. 3; 5 B. & Ad. viii.

(6) By Lord Denman, C. J., in Lane v. Mullins, *ut supra.*

(7) East India Company v. Glover, 1 Str. 612.

NOTE 211.—Judgment by default against an executor or administrator involves an admission of assets as to the particular suit. Ruggles v. Sherman, 14 John. Rep. 446. In trespass, *quare clausum fregit*, it admits the description of the *locus in quo*. Frean v. Cruikshanks, 3 M'Cord, 84. In an action on a jailor's bond, alleging that a prisoner was in his custody, and charging a voluntary escape, the default admits the custody. Bernard v. The Commonwealth, 4 Litt. 148, 151.

On the execution of a writ of inquiry after judgment on demurrer, the defendant cannot controvert anything but the amount of the sum in demand; for by demurring in law, the defendant admits the facts stated in the declaration. Thus, in an action for goods sold and delivered, to which the defendant pleaded coverture, and the plaintiff replied that the defendant's husband had resided abroad, and that the defendant, during all the time, &c., had carried on trade as a *feme sole*,(1) the court were of opinion, that after judgment on demurrer to this replication, evidence of the wife having acted as agent to the husband ought not to have been admitted on the execution of the writ of inquiry; that the only question to be decided by the jury, was the amount of the debt, and that the question, whether the debt had been contracted by the defendant as agent for her husband,

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In covenant, it admits all the plaintiff's averments. Courcier v. Graham, 1 Hamm. Rep. 347. In debt on bond averring the performance of a condition precedent (notice to a surety), and non-payment, both are admitted; *semble*, otherwise as to the breaches, if they be suggested after judgment by default. Barwise v. Russell, 3 Carr. & Payne, 608. And see Hodgkinson v. Marsden, 2 Campb. 121. But *semble*, that on a writ of inquiry of damages for delay of execution, and to assess the amount of mesne profits, on affirmance of a judgment in ejectment, which writ is given by 1 R. L. 143, § 3, and 1 R. S. 598, § 39, the defendant is concluded the same as on a default in an action for a tort. Jackson ex dem. Eden v. Rathbone, 3 Cowen's Rep. 296.

In all such, and the like cases, the jury, on writ of inquiry, are bound to give some damages, at least nominal. Jackson ex dem. Eden v. Rathbone, *supra*; Reigne v. Dewees, 2 Bay, 405; Parsons v. Cain, 1 Rep. Const. Court, 196; Rudesil v. Lesesene, 2 Rep. Const. Court, 58; Bates v. Loomis, 5 Wend. 134.

But the judgment concludes none other than the defaulted defendants. It will not conclude the defendant's surety for the debt in question. Foxcroft v. Nevens, 4 Greenl. 72.

Nor does a default admit any other than material, substantial, traversable averments. It does not admit the day, nor *alia enormia* in assault and battery (Bates v. Loomis, 5 Wend. 134); nor any matter material, if it be left in blank, as where the time happens to be so (Varnon v. Moore, 1 Monroe, 213, 214); nor the amount of the debt even *semble*, in an action of debt on simple contract (Brill v. Neele, 1 Chit. Rep. 619; and note *b* at page 620; per Mills, J., in Waggener v. Bells, 4 Monroe, 11); and this is clearly so in all actions sounding in damages. Per Mills, J., in Waggener v. Bells, *ut supra*.

(Under the New York Code, where a demurrer is frivolous, the party prejudiced may apply to a judge in or out of court, by motion, for judgment on that ground. § 247; Roberts v. Clark, 10 How. Pr. 415; 12 Id. 399; 14 Barb. 393.)

(1) De Gaillon v. L'Aigle, 1 B. & P. 368. See also Lane v. Mullins, *ut supra;* Stephen v. Pell, 2 Dowl. P. C. 629.

As to the effect of admissions in equity pleading, see *post*, Vol. II, Chap. 1, Sect. 2, *Of the Admissibility and Effect of Proceedings in Chancery.*

NOTE 212.—But a judgment in favor of the plaintiff on a bond assigning several distinct breaches, on a general demurrer to the whole declaration upon the bond, does not conclude as to those breaches the assignment of which is substantially defective; for the correct assignment of a single breach is sufficient to defeat the demurrer. Thus, where the bond was to perform the duty of an office generally, upon which a specific breach of duty must be assigned, and not a general violation; but both general and specific breaches were assigned, the defendant demurred; and the court overruled the demurrer; but said the plaintiff should assess damages on the specific assignment of breaches only. People v. Brush, 6 Wend. 454, 458. Yet a judgment against a party on demurrer, concludes him as to all matters of substance, which are substantially well pleaded, all the facts in the pleading demurred to, as effectually as if they had been found against him by verdict. Carlyle v. Long, 5 Litt. Rep. 167, 168.

or in her separate capacity, ought to have been considered as determined by the record.

2. Of the effect of payment of money into court.

Payment into court,—which must now be pleaded in all cases; either as a matter of course, in actions for the non-payment of money,(1) or by leave of the court or a judge, in most actions for consequential damages, such as assault, libel, criminal conversation, debauching the plaintiff's daughter, and the like,(2)—may be pleaded either to the whole or a part of the plaintiff's claim.(3)

The effect of payment into court, as an admission, must be considered with reference to the state of the pleadings and the subject matter of the admission.(4)

Where money is paid into court upon the general indebitatus counts, the payment only amounts to an admission that the defendant is liable in respect of some contract to the extent of the sum so paid in.(5) But where the plaintiff declares upon a special contract, the plea of payment into court operates as a confession of the contract as set forth in the declaration;(6) because the payment admits that something is due, and, therefore, must admit that the contract was made, by which alone anything is due.(7) Thus, a general plea of payment of court, in an action of covenant, is an admission of some damage on every part of the breach of covenant in the declaration.(8)

In the former case, that is, where money is paid in upon the general indebitatus counts, it is incumbent on the plaintiff to show, not only that a larger sum is due, but that a contract exists in respect of which the defendant is liable beyond the amount so paid into court;(9) and when the action is brought against more than one defendant, the plaintiff must

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(1) R. Hil., 4 Wm. IV, r. 18; 5 B. & Ad. vi.

(2) 3 & 4 Wm. IV, c. 42, § 21.

(3) R. Trin., 1 Vict. 8 A. & E. 278. Under various statutes the plea of payment of money into court is authorized in an action for any act done under the authority of the statute.

(4) Before Lord Mansfield's time, payment of money into court was not an admission of anything; by Sir James Mansfield, C. J., in Rucker v. Palsgrave, 1 Camp. 558. As to the commencement of the practice, see 2 H. Bl. 376; 1 Lord Raym. 254.

(5) By Tindal, C. J., in Archer v. English, 1 M. & G. 873, 876. See also Burrough v. Skinner, 5 Burr. 2640; Hulton v. Bolton, 1 H. Bl. 299, n.; Seaton v. Benedict, 5 Bing. 28; Stevenson v. Berwick (Corp.), 1 Q. B. 154; Stapleton v. Nowell, 6 M. & W. 9; Kingham v. Robins, 5 Id. 94; Elgar v. Watson, C. & Marsh. 494; Churchill v. Day, 3 M. & R. 71; Emmett v. Norton, 8 C. & P. 508; Booth v. Howard, 2 Dowl. P. C. 438.

(6) By Parke, B., in Kingham v. Robins, 5 M. & W. 99. And see Archer v. English, and the other cases cited in the last note. See also Yate v. Willan, 2 East, 128.

(7) By Alderson, B., in Stapleton v. Nowell, 6 M. & W. 11, on the authority of Bayley, J. And see by Tindal, C. J., in Thompson v. Jackson, 1 M. & G. 244.

(8) Wright v. Goddard, 8 A. & E. 144.

(9) By Tindal, C. J., in Archer v. English, 1 M. & G. 873, 876. And see by Parke, B., in Kingham v. Robins, 5 M. & W. 101, correcting what was said by himself and Littledale, J., in Morgan v. Smith, 4 B. & Ad. 673.

moreover show a joint liability upon some contract beyond the amount paid in.(1)

Effect of, as admission of contract.

Where money is paid in upon a declaration in this general form, it amounts to an admission of the existence of a contract as to any transaction which is capable of being converted into a contract, by the assent of the parties. Thus, where the defendant had possessed himself of goods belonging to the plaintiff, and had sold part and kept the residue in specie, and paid money into court generally, upon a declaration containing a count for goods sold and delivered and the usual money counts, it was held that he thereby admitted the transaction to have been converted into a contract, and that the plaintiff was entitled to recover the value of the goods under the count for goods sold.(2)

Where there is a count on a special contract together with the general indebitatus counts, payment of money generally upon the whole declaration is an admission of the defendant's liability upon the special contract. Thus, where the declaration stated a specific bargain to pay a particular sum of money for a certain consideration, a general payment of part of the money into court, by admitting the bargain, admitted also the sum which was originally due; and the only question that could be raised after that admission would be, whether the remainder of the money had been previously paid.(3) If the contract had been to pay, not any particular price, but the average price at which such articles were sold, to be ascertained by a certain time, a general payment of money into court would not have admitted the amount of the breach as stated in the declaration, though it would admit a cause of action on each count, and something due on each of the breaches: the contract is admitted, but not the averment of the average price.(4) And the same principle applies where the sum contracted to be paid is laid under a videlicet, as according to the rules of pleading such an averment is not material. Thus, where the plaintiff declared upon a contract that the defendants would employ him as the editor of a newspaper at a certain salary, to wit, at the rate of £400 per annum, and the common counts were added to the declaration, and the defendant paid money into court generally, it was held, that though the payment into court admitted the contract to engage the plaintiff as editor, it did not amount to an admission of the rate of salary as alleged.(5)

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(1) Archer v. English, *ut supra;* Ravenscroft v. Wise, 1 C., M. & R., 203, and Walker v. Rawson, 1 Moo. & R. 259, are overruled by these later decisions.

(2) Bennett v. Francis, 2 B. & P. 550.

(3) Cox v. Brain, 3 Taunt. 95. In this case the money had been paid into court, upon a plea of *tender*, but the principle is the same as that which governs the plea of payment into court.

(4) Stoveld v. Brewin, 2 B. & A. 116.

(5) Cooper v. Blick, 2 Q. B. 915. See Banbury Union (Guardians) v. Robinson, 4 Q. B. 919.

Where the defendant has paid money into court generally, upon a declaration containing a count on a policy of insurance together with money counts, he will not afterwards be permitted to show that the policy was originally different from that set out in the special count, but altered by the broker without his knowledge.(1) But in such a case, where the special count states a total loss by capture, the payment into court admits the contract and the capture, but only a partial loss to the amount paid in.(2)

Where the declaration contains a special count and also the common counts, money paid in upon the latter only will not admit either the contract stated in the special count, or any allegation contained therein. Thus, where to a special count charging the defendants as partners upon a contract the money counts were added, and the defendant paid money under the latter, it was held, that this was no admission of the partnership alleged in the first count.(3)

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(1) Andrews v. Palsgrave, 9 East, 325.

NOTE 214.—Johnston v. The Columbian Insurance Company, 7 John. Rep. 315. Where the defendant pays the premium into court, and the plaintiff takes it out, under an agreement that this shall be without prejudice, he may still claim on the trial as for a total loss. Sleight v. Rhinelander, 1 John. Rep. 192, 193, 194, and 202.

(Under the Code of New-York, the defendant may, at any time before the trial or verdict, serve upon the plaintiff an offer in writing to allow judgment to be taken against him for the sum or property, or to the effect therein specified, with costs. If the plaintiff accept the offer, and give notice thereof in writing, within ten days, he may file the summons, complaint and offer, with an affidavit of notice of acceptance; and the clerk must thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence; and if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but must pay the defendant's costs from the time of the offer. § 385. As to mode of making the offer, see 12 How. Pr. R. 552.)

(2) Bucher v. Palsgrave, 1 Camp. 557; S. C., 1 Taunt. 419. See Everth v. Bell, 7 Taunt. 450.

(3) Charles v. Branker, 12 M. & W. 743.

NOTE 213.—Bucher v. Palsgrave, 1 Taunt. 419. Payment of money into court upon a general indebitatus assumpsit, is no admission of a contract beyond the amount of the sum paid in. Thus, where it was for goods sold to the defendant's wife, the plaintiff's particular amounted to £28 5*s.* 6*d.* for various articles. The sum of £10 was paid into court. On the trial, it appeared that the wife had obtained all the goods under such circumstances that the defendant was not liable at all; but the judge at the trial considered the payment of money as the admission of a general liability, and directed a verdict for the whole amount. Held, on motion for a new trial, that the verdict should have been restricted to the £10. It would be otherwise in respect to a special contract. Seaton v. Benedict, 5 Bing. 28; S. C., 2 Mo. & Payne, 66. The sum paid in is to be deemed stricken out of the declaration; and unless a larger sum is proved by the plaintiff at the trial, the verdict should be for the defendant. Columbia Bank v. Southerland, 3 Cowen's Rep. 336; Boyden v. Moore, 5 Mass. Rep. 365. It was said that the plea of a tender, and paying money into court, on a declaration upon a *quantum meruit*, did not preclude the defendant from showing a special contract in respect to the work declared for, so as to reduce the damages to the sum paid in. Downey v. Young, 1 Dev. 432, 433. And in an action on a promissory note, it was held that the defendant might pay into court the balance due, deducting a certain amount for a partial failure of consideration; and that at the trial, if the proposed deduction were allowed, so

that a balance due to the plaintiff should not appear to be more than the sum paid in, the defendant should have a verdict. Shiel v. Randolph, 4 M'Cord, 146.

In an action by the payee against the acceptor of a bill drawn by a third person, with the general counts, including an account stated, the defendant paid into court £10 on the general counts. No more than £10 was due on the bill, and there was no other debt appearing between the parties. Held, that the £10 should be applied to the bill; for, said Lord Tenterden, Chief Justice, the plaintiff alleges a reckoning, the defendant admits that by the payment, and we may intend they reckoned on the bill. Early v. Bowman, 1 Barnw. & Adolph. 889. And the following case, it will be perceived, may be sustained on the same ground. The plaintiffs declared in counts for work done, and on an account stated. The defendant paid into court £420 2*s.* 1*d.* expressly upon the latter count, *upon an account stated.* On the trial, the plaintiffs gave no evidence of an account stated, but only of work and labor to about £115. Held, that notwithstanding the form of the payment, yet the defendant might apply it to the only debt proved on the trial. And the plaintiff was nonsuited, which nonsuit was sustained, on the motion for a new trial. Churchill v. Day, 3 Mann. & Ryl. 71. The learned reporters make the following commentary on this case: "The payment of money into court admits every fact the proof of which would have been necessary to entitle the plaintiff to a verdict for the sum paid in; and, therefore, even upon this record, the defendant must be taken to have admitted an accounting which left him liable to the payment of £420 2*s.* 1*d.* But the payment must not be considered as the admission of an account in which that particular balance was found; for if the plaintiff were to prove an account actually stated, or an acknowledgment, which is tantamount to an account stated, for a larger sum, it would be competent to the defendant to reduce that large demand so as to meet the sum paid into court, by evidence of payment, satisfaction or release, &c., of the difference. Where money is paid into court upon a count on a special contract, or generally, upon a declaration containing a count upon a special contract, the principle is the same, though the effect is rather different. If I declare upon a bill of exchange for £100, and the defendant brings into court only £60, he not only admits his liability to pay £60 on account of that bill, but he also admits that he is *prima facie* liable to pay the other £40; because, under the general issue alone, I could not have obtained a verdict for the £60 without giving evidence which would have shown me entitled, *prima facie*, to the whole £100. But it is competent to the defendant to rebut this *prima facie* liability by any evidence which does not go to show that at the time of the payment of the money into court, he did not owe £60, or at least some sum of money, *upon the bill.* Thus he may show that, to the extent of £40, or to any extent less than the whole amount of the bill, I held it as a trustee, or that the consideration was partially void; or he may protect himself by matter *ex post facto*, as payment, satisfaction, release, &c. And see Godsall v. Boldero, 9 East, 72, 79; Bell v. Ansley, 16 East, 146; Blackburn v. Scholes, 2 Camp. 341."

In Massachusetts, the effect of a general payment of money into court is much more rigorous than in England, where, as we have seen by the text, and by the above case of Seaton v. Benedict, this act of payment does not preclude the defendant from objecting to the whole of the plaintiff's cause of action beyond the amount paid in. In Massachusetts, the payment seems to entitle the plaintiff not only to recover for a demand which otherwise could not have come in under his declaration, but for the whole amount of such demand. Thus, in assumpsit, the declaration contained one count on a note, one for goods sold and delivered, and one for money had and received. Money was paid into court, "on account and satisfaction of the plaintiff's damages in the suit." The count for goods sold was sought to be supported by proof that the defendant had trespassed by cutting and carrying away the plaintiff's timber. It was made a question whether the action thus lay for a tort. The court held that, to be sure, the action would not lie in this form; but the defendant was concluded by the form of his payment into court from raising the question. He had admitted the contract set forth in all the counts. If he had intended not to do so, he should have paid in on a particular count. But the court finally relieved him from the inadvertence by amending the rule. Jones v. Hoar, 5 Pick. 285. The English courts would have applied the money to meet the demands appearing to be legally due, which were, in this case, the note and nominal damages under the other counts; and if, in this view, no more should appear to be due than the sum paid in, the verdict would have been for the defendant. So where, to a declaration containing one count on an account stated, and

In an action to recover the amount of the sale of goods, which have been sold by sample at a particular price, the defendant will not be allowed to show, after payment into court upon the whole declaration, that the goods were of a quality inferior to the sample.(1) But under a common count for goods sold, payment into court will not preclude the defendant from showing that the goods were not made according to order, but that he had, at the request of the plaintiff, retained some of them upon trial.(2)

A declaration in trover being general, payment into court in that action admits no liability beyond the amount paid in; it is incumbent, therefore, on the plaintiff to show what articles the defendant has converted.(3)

In an action of assumpsit for goods sold and delivered, and on the money counts, in which the defendant paid money into court generally and pleaded the general issue, with a plea of the Statute of Limitations, payment into court was held not to take the case out of the statute.(4)

In an action on a bill of exchange, the defendant, by paying money into court generally, dispenses with the regular proof of the party's handwriting,(5) and cannot object to the sufficiency of the stamp on which the bill is drawn.(6) So, in an action of covenant, he admits the execution of the deed.(7) On the same principle, payment of money into court admits that the contract was in writing, if required to be so by the Statute of Frauds;(8) it also admits the plaintiff's right to sue in that court;(9)

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another on a *quantum meruit* for services, the defendants pleaded a tender of $300, and paid that sum into court; and as to the residue, pleaded *non assumpserunt;* at the trial they would have shown that the plaintiff was bound by an award of $300 to him for his services in question. This being overruled, and a verdict on the *quantum meruit* being for $400; on motion for a new trial, it was held that the defendant was precluded by the plea and payment, and that the plaintiff might recover the real value of his services, notwithstanding that, had the payment been special, he would have been tied down by the award. Huntington v. The American Bank, 6 Pick. 340.

It was held at Nisi Prius, that, after a payment of money into court on a single count for work and labor, yet the defendant might show infancy—a defence to the whole action—and thus cut the demand down to the amount paid in. *Cor.* Buller, J., Hitchcock v. Tyson, 2 Esp. Rep. 481, note.

Taking out a summons to be permitted to pay a certain sum—*e. g.* £42 15*s.*—into court, would seem to be a conclusive admission that so much is due; and to supersede the necessity of proof to that extent; though no judge's order be made upon the summons, and no money be paid into court. Williamson v. Henley, 6 Bing. 299.

(1) Leggett v. Cooper, 2 Stark. R. 103.

(2) Mainworthy v. Page, 3 Jur. 126, Exch.

(3) Cook v. Hartle, 8 C. & P. 568.

(4) Long v. Greville, 3 B. & C. 10; Reid v. Dickons, 5 B. & Ad. 499; recognized in Shearwood v. Hay, 5 A. & E. 390. And see Lechmere v. Fletcher, 1 C. & M. 623; Cox v. Parry, 1 T. R. 464.

(5) Gutteridge v. Smith, 2 H. Bl. 374.

(6) Israel v. Benjamin, 3 Camp. 40.

(7) Randall v. Lynch, 2 Camp. 357; Watkins v. Towers, 2 T. R. 275.

(8) Middleton v. Brewer, Peake N. C. P. 15.

(9) Miller v. Williams, 5 Esp. 19.

the title on which he sues—as, for instance, his being a surgeon,(1) or farmer of tithes, &c.(2) It will also amount to a waiver of any objection, either as to the non-performance by the plaintiff of a condition precedent, or as to the action being brought too soon.(3)

Payment of money into court is an admission only of a legal demand. If the contract declared upon be illegal, the defendant cannot give it validity by his admission; no admission of the parties will oblige the court to give effect to an illegal transaction.(4)

Although payment of money into court admits the contract, that is, the entire consideration for the act and the entire act which is to be done for such consideration, yet it will not be an admission of other parts of the contract, which are distinct and collateral, respecting the liquidation of damages after breach of the contract.(5) If indeed the provision is of such a nature as will discharge the defendant from all liability under the contract, unless the plaintiff has complied with the condition (as was the case in Clay v. Willan,(6) where the goods were not to be accounted for to any amount unless properly entered and paid for), that will operate not merely in reduction of the damages, but in bar of the action; and, therefore, in such a case, if the defendant pays money into court on a declaration against a carrier in a common form, he cannot afterwards give in evidence such a provision, which entirely negatives the contract as stated in the declaration.

In an action on the case for negligence in not properly securing a cow, by means whereof the cow destroyed one belonging to the plaintiff, the defendant paid money into court, pleading that the plaintiff had sustained no greater damage. The plaintiff replied that he had sustained greater damage. It was ruled that the defendant could not go into evidence to show that his cow had not killed the plaintiff's cow, as the contrary was admitted by the plea.(7)

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(1) Lipscombe v. Holmes, 2 Campb. 441.

(2) Broadhurst v. Baldwin, 4 Price, 58.

(3) Harrison v. Douglas, 3 A. & E. 396. Payment into court will preclude a defendant from moving in arrest of judgment an account of the insufficiency of the counts in the declaration upon which the money has been paid in. Wright v. Goddard, 8 A. & E. 144. As to pleas inconsistent with the payment into court, see Thompson v. Jackson, 1 M. & G. 242; Speck v. Phillips, 5 M. & W. 279.

(4) Ribbans v. Crickett, 1 B. & P. 264; Cox v. Parry, 1 T. R. 464, explained by Lawrence, J., 2 East, 134.

(5) See Clarke v. Gray, 6 East, 564.

(6) 1 H. Bl. 298.

(7) Lloyd v. Welkey, 9 C. & P. 771. See, further, Parfitt v. Thompson, 13 M. & W. 392.

As to how far a *new assignment* operates as an admission, see Oakley v. Davis, 16 East, 86; Norman v. Wescombe, 2 M. & W. 349; Bolton v. Sherman, Id. 399, by Parke, B.; Alston v. Mills, 9 A. & E. 248; Dand v. Kingscote, 6 M. & W. 197; Brancher v. Molineux, 1 M. & G. 710; Darby v. Smith, 2 Moo. & R. 184.

Even a summons for leave to pay a sum of money into court, though not acted upon, is some evidence of liability to that amount.(1)

As the payment of money into court is an acknowledgment on the record of its being due, the party cannot receive it back, although he has paid it wrongfully or by mistake.(2)

3. Of the effect of pleading over.

The effect of pleading over would seem properly to appertain to the science of special pleading; but it has a considerable bearing upon the law of evidence; and it has become of more practical importance since the promulgation, by the judges, of what are known in the profession as the New Rules in Pleading.(3)

The general rule upon this subject may be thus stated:—Every material fact, which is not denied by the opposite party, is taken to be admitted upon the record;(4) and whatever is so admitted need not be proved, and cannot be disproved.(5) But an admission in one pleading does not operate as an admission with respect to an issue joined upon any other pleadings.(6)

In the same manner, although a special demurrer admits all the mate-

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(1) Lawson v. Mangles, 2 Moo. & R. 427.

(2) Vaughan v. Barnes, 2 B. & P. 392; Malcolm v. Fullerton, 2 T. R. 645.

(3) See 5 B. & Ad. iii; 10 Bing. 465; 2 C. & M. 14.

(4) Wimbush v. Tailbois, Plowd. 48; Hudson v. Jones, 1 Salk. 90. See, also, King v. Norman, 4 C. B. 884, 895.

(5) B. N. P. 298; Anon., Dy. 183; Nicholson v. Simpson, 1 Str. 297; S. C., Fort. 356. See, also, 2 Vent. 170; Salk. 91; Green v. Hearne, 3 T. R. 301; Stephen v. Pell, 2 Dowl. P. C. 629; Evans v. Ogilvie, 2 Y. & J. 79; Jones v. Brown, 1 N. C. 484; Bonzi v. Stewart, 4 M. & G. 295; Carter v. James, 13 M. & W. 145; Coulishaw v. Cheslyn, 1 C. & J. 48. But see, as to this last case, what is said by Lord Denman, C. J., in Blewett v. Tregonning, 3 A. & E. 579. See, also, Needham v. Fraser, 1 C. B. 815.

The New York Code of Practice provides (§ 168) that every material allegation of the complaint, not controverted by the answer, and every material allegation of new matter in the answer, constituting a counter claim, not controverted by the reply, shall, for the purposes of the action, be taken as true. But the allegation of new matter in the answer, not relating to a counter claim, or of new matter in a reply, is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case may require. Under this provision no allegation is deemed material, unless an issue taken upon it, whether of law or fact, will decide the cause, so far as relates to the particular cause of action to which the allegation refers: a denial of circumstances is improper, and facts pleaded in mitigation of damages in an action for libel cannot be demurred to. Newman v. Otto, 4 Sand. 668; Fry v. Bennett, 5 Id. 54. The issuable facts are such as must be proved to sustain the action or defence, and not such as merely go to establish such facts. Williams v. Hayes, 5 How. Pr. 470. An allegation of facts by way of proving other facts, may be stricken out as surplusage. 2 Comst. 170. And no unanswered allegation is to be deemed material, which is not made in direct and positive terms. Oechs v. Cook, 3 Duer, 161. The rules of pleading under our Code, and consequently the rules of evidence, are, in many respects, the same as those established under the English rules of court. Garvey v. Fowler, 4 Sand. 665, per Duer, J. See, also, the Common Law Procedure Act, of 1854, 17 & 18 Vict., c. 125.

(6) Harrington v. Macmorris, 5 Taunt. 228; Gould v. Oliver, 2 M. & G. 208; Stracy v. Blake 1 M. & W. 168. See by Patteson, J., in Knight v. M'Dowall, 12 A. & E. 442.

rial facts that are well pleaded(1) in the pleading demurred to, still the statements made in such pleading cannot be referred to by either party upon the trial.(2)

Admits only material facts.

Only *material* facts, however, which are not denied, are taken to be admitted.(3) Thus, where a declaration in assumpsit stated that the defendants were the *owners* of a certain vessel, in which the plaintiff shipped certain goods, to be safely carried by the defendants, *as owners* of the said vessel, and that the defendants promised safely to carry the said goods *as aforesaid;* alleging as a breach that they were damaged through the negligence of the defendants; and they pleaded non-assumpserunt; it was held, that their ownership was not admitted in the plea;(4) the allegation of ownership being perfectly immaterial. On the other hand, where a declaration in a case stated that the defendant was *possessed* of a ship, which, by the carelessness of his servants, damaged the plaintiff's ship, it was held, that the plea of not guilty admitted that the defendant was possessed of the ship,(5) that being a material allegation.

Allegations which are *not traversable* are *immaterial;* and, therefore, such allegations, though not denied, are not to be taken as admitted.(6)

It is further to be observed that an admission by pleading over operates only to the extent of the facts stated upon the record. Thus, if, in an action of covenant for non-repair, the defendant pleads, firstly, performance, and secondly, a license, he thereby admits only so much of the deed as is expounded upon the record; and if the plaintiff wishes to avail himself of any other part of the deed, he must prove it in the ordinary way.(7)

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(1) See by Lord Denman, C. J., in Van Sandau v. Turner, 6 Q. B. 785.

(2) Firmin v. Crucifix, 5 C. & P. 98; Montgomery v. Richardson, Id. 247; Ingram v. Lawson, 9 Id. 229: S. C., 2 Moo. & R. 253.

(3) R. v. Chester (Bishop), 2 Salk. 560; S. C., 1 Ld. Raym. 292; King v. Norman, 4 C. B. 884, 895.

(4) Bennion v. Davison, 3 M. & W. 179.

Under an allegation by the plaintiff that on, &c., he sold and delivered goods to the defendants, under their firm name of John Cook & Son, denied in general terms by the answer, it is not necessary to prove that the defendants were partners. The substantial issue here is whether there was a sale and delivery to the defendants. It is otherwise where the plaintiff alleges that the defendants were partners, and that he sold goods to the firm. Oechs v. Cook, 3 Duer, 161.

(5) Dunford v. Trattles, 12 M. & W. 529. See also Taverner v. Little, 5 N. C. 678; Crellin v. Calvert, 14 M. & W. 11.

(6) Gale v. Lewis, 9 Q. B. 730.

"An omission to deny material allegations in a complaint admits them to be true for the purposes of the action. Code of N. Y. § 168. The question occurs, what are material allegations within the meaning of that rule? I think none should be held to be of this character which will not prevent a plaintiff from recovering if proved to be untrue, or which, when denied, he is not obliged to prove to entitle himself to a verdict." 3 Duer, 165, per Bosworth, J.

(7) Williams v. Sillis, 2 Camp. 519.

So a fact which is material to the issue is not admitted, although not expressly denied. Thus, where a defendant pleaded a customary right of common in respect of an ancient messuage, and the plaintiff traverses the right, he does not thereby admit the antiquity of the messuage.(1) But where a defendant in assumpsit pleaded that he had paid, and that the plaintiff had accepted moneys in full satisfaction, and the plaintiff in his replication alleged that he did not accept the moneys in full satisfaction, it was held that this put the *payment* as well as the *acceptance* in issue;(2) for unless the money were *accepted*, it could not be a *payment*, but a *tender* only.(3)

Facts admitted not to be proved.

Not only is a party not called upon to prove material facts that are admitted upon the record, but he will not be permitted to prove them. Thus, in an action of slander,(4) the declaration alleged, that certain property had been feloniously stolen from the plaintiff, who, thereupon, preferred a charge against another party before justices of the peace, and that the defendant had uttered the slanderous words complained of, imputing that no felony had been committed. The only plea was not guilty. At the trial, before Patteson, J., it was proposed to call witnesses on the part of the plaintiff to show that the property, mentioned in the declaration, had been in fact stolen from the plaintiff; but his Lordship would not allow it to be done. "The statements," his Lordship said, "which are admitted on the record, that is, all those allegations which are contained in the declaration, and not denied by the plea, must be taken to be perfectly true; and it is not only unnecessary to give evidence of the truth of them, but such evidence cannot be allowed to be given; because the matters are admitted, and are not put in issue, which they might have been, if the defendant had chosen to put the plaintiff to the proof of the statements contained in them."

Facts admitted cannot be disproved.

Before closing this branch of the subject it may be of use to lay before the reader one or two examples of that part of the rule which states, that matters admitted upon the record cannot be disproved.

In an action of assumpsit, the declaration stated, that, in consideration of the plaintiff's having delivered a certain quantity of *best Dutch lead* to the defendant, the latter promised to deliver prussiate of potash to the same amount to the plaintiff; it then alleged the selling of so much *best Dutch lead* by the plaintiff, and the refusal by the defendant to deliver the

(1) Dunster v. Tresider, 5 T. R. 2.
(2) Ridley v. Tindall, 7 A. & E. 134.
(3) Per Tindal, C. J., in Bonzi v. Stewart, 4 M. & G. 329.
(4) Gwynne v. Sharpe, Car. & M. 532. See also Guy v. Gregory, 9 C. & P. 584.

full quantity of potash. The only plea was non-assumpsit. And it was ruled, that in this state of the pleadings the defendant could not contend, that the lead delivered by the plaintiff was of an inferior quality.(1)

In an action for not attending, in obedience to a subpœna, the trial of a cause between the plaintiff and A., the declaration alleged that the plaintiff had a good cause of action against A., and that the testimony of the defendant was material for the plaintiff on that trial; and that in consequence of such non-attendance, the plaintiff was compelled to withdraw the record. The defendant pleaded not guilty, and that the plaintiff might have proceeded to trial without his testimony. It was held, that the defendant having admitted that the plaintiff had a good cause of action against A., it was not competent to the defendant to avail himself of the record in the former suit (which was put in by the plaintiff for the purpose of showing that it had been withdrawn), in order to show, that the declaration was so defective that a verdict thereon would have been fruitless.(2)

There still remains a question to be considered, which the operation of the new rules of pleading, by limiting the effect of the general issue, and thereby increasing the number of pleas upon the record, has rendered one of more practical importance than it hitherto had been.

How far admission before jury.

The question is, how far an admission of a fact made by a party in the pleadings is to be deemed to be before the jury, so as to warrant them in drawing any inference of fact from that admission.

The point appears first to have been raised in the case of Edmunds agt. Groves;(3) when Alderson, B., stated the rule in the following terms; "An admission on the record is merely a waiver of requiring proof of those parts of the record which are not denied, the party being content to rest his claim on the other facts in dispute; but if any inferences are to be drawn by the jury, they must have the facts, from which such inferences are to be drawn, proved like any other facts." Lord Abinger, C. B., and Bolland, B., the other judges present, gave no opinion upon the subject.

Alderson, B., afterwards intimated an adherence to his own opinion in the cases of Bennion agt. Davison,(4) Smith agt. Martin,(5) and Carter agt. James.(6) His Lordship's opinion appears to have been founded upon the following reasons: that the *pleadings* are not before the jury, but only

(1) Pegg v. Stead, 9 C. & P. 646.
(2) Needham v. Frazer, 1 C. B. 815.
(3) 2 M. & W. 642.
(4) 3 M. & W. 179.
(5) 9 M. & W. 304.
(6) 13 M. & W. 137.

the issue(1)—that the omission to traverse an allegation in pleading amounts to no more than a protestation would have done under the old forms of pleading(2)—that it would be unjust and unreasonable to prevent a party, by the rules of pleading, from denying a particular fact, and yet to call upon the jury to treat that fact as proved; for if that were the law, a double replication would be the very essence of justice(3)—and that if an admission on the record were to be taken as an admission for all purposes, it might be used for the purpose of discrediting the witnesses, as *e. g.*, where it was admitted on the record, by not being denied, that a party called as a witness had committed usury.(4)

It may be remarked, that this opinion of Alderson, B., though it has not been dissented from by the other judges of the Court of Exchequer, does not appear to have been ever expressly adopted by them.

On the other hand, the Court of Queen's Bench, after having the cases of Edmunds agt. Groves, Bennion agt. Davison, and Smith agt. Martin before them, have, in the cases of Bingham agt. Stanley,(5) and Robins agt. Maidstone,(6) laid it down as their deliberate judgment, that an admission made in the course of pleading, whether in express terms or by omitting to traverse what has been alleged, must be taken as an admission for all purposes regarding the issue arising from that pleading, whether the facts relate to the parties or to third persons, provided that the allegation so made be material. And, in the former case, Patteson, J., said he could not understand the distinction between admissions for the purpose of pleading and admissions for the purpose of trial.(7)

The Court of Common Pleas have not as yet had occasion to pronounce any decision upon the subject; but in the case of Fearn agt. Filica,(8) where the question was incidentally raised, and the conflicting cases of Edmunds agt. Groves, Bennion agt. Davison, and Bingham agt. Stanley, were brought before the notice of the court, Cresswell, J., remarked:(9) "I take it that what my Brother Alderson means was, that the fact put in issue was to be proved, just as if no admission were made on the record; that is, that an admission on the record is not to be taken to prove the issue. If the rule is not as stated by my Brother Alderson, this singular state of circumstances might arise,—a counsel might ask a jury,

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(1) 2 M. & W. 643. See also by Tindal, C. J., in Fearn v. Filica, 7 M. & G. 517.
(2) 3 M. & W. 181.
(3) 9 M. & W. 308.
(4) 13 M. & W. 145. See also Boileau v. Rudlin, 12 Jur. 899, Exch.; S. C., 2 Exch. R. 665.
(5) 2 Q. B. 117, 127.
(6) 4 Q. B. 811, 816. See also Gale v. Lewis, 11 Jur. 730, Q. B.; S. C., 9 Q. B. 730.
(7) 2 Q. B. 121.
(8) 7 M. & G. 513.
(9) Id., pp. 517, 518.

from the mere state of the record, to infer a fact which was directly in issue."(1)

It may, though with great diffidence, be suggested, that the difference which appears to exist between some of the learned judges upon this point is, perhaps, rather one of terms than of principle; and that the difficulties will be at least considerably diminished, if the attention is steadily directed, in each case, to the precise point which is put in issue by the pleadings, and the affirmative or negative of which the jury have to determine. For it seems clear, that where any particular fact is affirmed on the one side and denied on the other, no previous admission in the pleadings can be taken as evidence to prove either the existence or non-existence of that fact.

This position will be best illustrated by an examination of one or two of the cases in which the question now under discussion has arisen.

In Edmunds agt. Groves,(2) the circumstances were somewhat singular. It was an action by the indorsee against the maker of a promissory note. The defendant pleaded that the note was illegal in its inception, and that it was indorsed to the plaintiff *with notice* of such illegality, and without consideration. The plaintiff replied that the note was indorsed to him *without notice*, and for a valuable consideration. Upon this, issue was joined. At the trial before Lord Abinger, C. B., *no evidence was offered on either side;* and the question was, which party, with reference to the state of the pleadings, was entitled to the verdict, or, in other words, upon whom the burden of proof lay. His Lordship ruled, in effect, that the burden of proof lay upon the defendant to establish the affirmative of the issue, and as he offered no evidence, the plaintiff was entitled to the verdict. And the Court of Exchequer afterwards upheld this ruling. It was contended, that inasmuch as the plaintiff, by his replication, had admitted the original illegality of the note, he was bound, upon the authority of Heath agt. Sansom,(3) to prove that he gave consideration for it. But Lord Abinger, C. B., said, he thought it was incumbent on the defendant, who had set up as a defence the fact that the note came into the hands of the plaintiff with notice of its original infirmity, to have produced some evidence to prove it; or, in other words, that the *onus probandi* was on him. Alderson, B., indeed, after laying down the position above cited, said, "there was nothing to go to the jury in this case from which they could draw the inference of fact that the note was illegal in its inception." But, in truth, the question of the original illegality of the note was quite beside the point in issue, which was, whether or not the plaintiff had received *notice* that the note was an illegal one when he took it, the affirmative of that issue being alleged by the defendant.

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(1) As to statements in bills in equity, see Boileau v. Rudlin, 12 Jur. 899, Exch.; S. C., 2 Exch. R. 665.

(2) 2 M. & W. 642.

(3) 2 B. & Ad. 291.

The case of Bingham agt. Stanley(1) was an action by the bearer against the maker of a banker's check, payable to L. or bearer. The defendant pleaded, in effect, that he gave the check to L. for an illegal consideration, and that he delivered it to the plaintiff without a good consideration: the plaintiff replied that he gave good consideration for it; whereupon issue was joined. In this case the court decided—independently of the question as to the admission upon the record of the original illegality of the check—that the affirmative of this issue lay upon the plaintiff, and that he was therefore bound to prove that he had given consideration for the note. And although dissenting from the doctrine laid down by Alderson, B., in Edmunds agt. Groves, they perfectly concurred in the correctness of the decision in that case, upon the ground above stated; namely, that the defendant had there alleged the affirmative of the plaintiff's knowledge of a certain fact, and was therefore rightly put to prove that allegation.(2)

4. Of the effect of a particular of demand.

The courts of common law have a general jurisdiction, independently of any statute, to order particulars of demand, or of set-off, to be given, in order to prevent the necessity of applying to a court of equity, and to enable them to administer justice effectually between the parties. It is now required by a general rule of all the courts,(3) that where the declaration contains counts in indebitatus assumpsit, or debt on simple contract, the plaintiff shall deliver full particulars of his demand under those counts, with the declaration, and that a copy of such particulars, and also of the defendant's set-off (if any), shall be annexed to the record.(4)

Effect of bill of particulars.

Although the bill of particulars, as it is technically termed, forms, properly speaking, no part of the record,(5) still its contents have much the same operation as the admissions made in pleading, which have just been considered.

The effect to be given to a bill of particulars has become of more importance since the promulgation of the new rules of pleading, which require that payment shall be specially pleaded,(6) and shall in no case be given in evidence in reduction of damages or debt.(7)

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(1) 2 Q. B. 117.

(2) As to the effect of a plea of abatement by way of admission, see Pasmore v. Bousfield, 1 Stark. R. 298; Weleker v. Le Pelletier, 1 Camp. 479; Morris v. Lotan, 1 Moo. & R. 233; Crellin v. Calvert, 14 M. & W. 11; Hill v. White, 6 N. C. 26.

(3) R. Trin., 1 Wm. IV, 2 B. & Ad 788.

(4) As to non-compliance with an order for particulars of set-off, see Young v. Geiger, 18 L. J. (N. S.) C. P. 43. As to the omission of dates when ordered, see Ibbett v. Leaver, 16 M. & W. 770.

(5) See Booth v. Howard, 5 Dowl. P. C. 438.

(6) R. Hil., 4 Wm. IV, *Pleadings in Particular Actions*, 1, 5 B. & Ad. viii.

(7) R. Trin., 1 Vict., 8 A. & E. 280.

The judges have also framed a rule,(1) that "if the plaintiff, in order to avoid the expense of a plea of payment, shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, it shall not be necessary for the defendant to plead the payment of such sum or sums of money. But this rule will not apply to cases where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance, without giving credit for any particular sum or sums."(2)

Before adverting to the general effect of a bill of particulars, it may be expedient to bring before the notice of the reader some of the leading decisions which have taken place upon the construction of this rule, which, it will be observed, is limited to matters of payment of money.

Where a plaintiff gives credit in his particulars for a sum of money, this will be taken as an admission that the sum was paid *by the defendant.*(3)

If the plaintiff gives credit for certain payments, and goes for a balance, and the defendant pleads payment, this plea will be taken with reference to the balance.(4) If his particulars claim a certain amount, and state that he goes for a balance generally, without giving credit for any particular sums, and the defendant does not plead payment or set-off, the plaintiff is entitled to recover, if he proves a claim to any amount;(5) if the defendant does plead payment or set-off, it is a question for the jury, under all the circumstances of the case, whether the balance claimed means a balance after giving credit for the payment or set-off.(6)

The rule of court does not apply to plea of set-off; where, therefore, the plaintiff, in his particulars, shows claims against the defendant, and admits certain claims (to a less amount), in the nature of a set-off by the defendant, it was held that the plaintiff was not concluded by the admission of the set-off.(7)

With regard to the general effect of admissions in a bill of particulars, it has been before mentioned, that a bill delivered by an attorney to his client for business done during a certain period, or by a tradesman for goods sold, is strong presumptive evidence against any additional item within the same period. The party is not, however, precluded from showing that items, included in a subsequent bill, have been omitted by mis-

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(1) R. Trin., 1 Vict. 8 A. & E. 280.

(2) The rule upon this last point was previously unsettled. See Ernest v. Brown, 3 N. C. 674; Coates v. Stevens, 2 C., M. & R. 118; Nicholl v. Williams, 2 M. & W. 758; Kenyon v. Wakes, Id. 764; Ferguson v. Mahon, 9 A. & E. 245.

(3) Smethurst v. Taylor, 12 M. & W. 545.

(4) By Alderson, B., in Eastwick v. Harman, 6 M. & W. 13, 16. As to the allowance of such a plea under these circumstances, see what is said by Patteson, J., 1 Q. B. 399.

(5) Morris v. Jones, 1 Q. B. 397. And see Wilton v. Snook, 12 M. & W. 805; Green v. Smithies, 1 Q. B. 796.

(6) Lamb v. Micklethwaite, 1 Q. B. 400; Townson v. Jackson, 13 M. & W. 374.

(7) Rowland v. Blaksly, 1 Q. B. 403. See also Morris v. Jones, and Townson v. Jackson, *ut supra.*

take in the former bill, and that the business, which is the subject of the charge, has been done by him for the defendant. A bill of particulars, however, is more conclusive; its sole object is to inform the opposite party of what he ought to come prepared to try; and it will effectually preclude the party who delivers it from giving evidence of any other demand not there stated.

Thus, where a declaration contained a count for money had and received for the plaintiff's use, and also a demand for horses sold by the plaintiff to the defendant, and the bill of particulars specified the last demand alone, it was decided that the plaintiff could not give evidence of horses being sold by the defendant as the plaintiff's agent:(1) for a contract for the absolute sale of horses to the defendant is essentially different from a contract to repay money received on a sale of horses by commission; and the proceeds of such a sale by the defendant could only be recovered under the count for money had and received, which the plaintiff abandoned by confining his bill of particulars to the demand stated in the other count.

In an action to recover the value of property deposited with the defendant for safe custody, the declaration alleged two breaches:—1. That he had not taken proper care of the property; 2. That he had not returned part. The particulars took the same distinction, giving two sets of articles, one set as damaged, the other as not returned. In the particulars, some *glass* was described as not *returned*, but it appeared by the evidence that the glass so described had been broken. It was held, that damages for the *broken* glass could not be recovered under the head of the particulars which related to goods not *returned*.(2) In this case it was supposed that the defendant would be deceived by the particulars; but where the parties must have understood each other, although the manner in which an item is described may not be quite correct, the court will not be so strict in its construction of the particulars.

Thus, where, in an action for goods sold, the plaintiff claimed a balance, after allowing credit for a sum paid at different times; and it appeared at the trial that part of the claim was for the price of an article which had been returned by the defendant, it was held that the plaintiff might show that the price of the article was also a part of the sum allowed as *money paid*.(3)

Where the declaration contains a count on a promissory note, together with money counts, and the particular of demand is confined to the note,

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(1) Holland v. Hopkins, 2 B. & P. 243. See also Macarthy v. Smith, 8 Bing. 145; Davenport v. Davies, 1 M. & W. 570.

(2) Moss v. Smith, 1 M. & G. 228. See also Doe d. Winnall v. Broad, 2 M. & G. 523, as to the non-admissibility of evidence of breaches of covenant not included in the particulars of breaches delivered under a judge's order.

(3) Lamb v. Micklethwaite, 1 Q. B. 400.

the plaintiff will not be allowed to prove the consideration for which the note was given, in order to recover under the money counts.(1) Nor can he avail himself of a verbal admission by the defendant acknowledging that he owed the plaintiff a sum of money, which corresponded with that due upon the note, nothing being said at the time about the note.(2)

So, where the declaration contained counts on three several bills of exchange, but in the particulars the plaintiff claimed in respect of the first of them only, it was held that the plaintiff clearly could not recover on the other two,—though they were admissible in evidence on a collateral inquiry, whether two of the defendants had ceased to be partners at the time when the bill was given, in respect of which they were sought to be charged.(3) But where the declaration contained two counts, each on a bill of exchange, and the particulars stated the action to be brought to recover the amount of the bill mentioned in the first count with interest, and that the plaintiff *would rely on the whole or any part of the declaration* for the recovery thereof, the plaintiff was allowed to recover on the second count.(4)

Although the plaintiff, on perceiving the defect of his first particular of demand, which only mentions a promissory note, delivers a second bill of particulars large enough to comprehend the original debt, yet this will not avail him, unless the second particular has been delivered under a judge's order.(5)

On the other hand, where the declaration, in addition to the common

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(1) Wade v. Beasley, 4 Esp. 7.

(2) Roberts v. Elsworth, 10 M. & W. 653. The court in this case granted a new trial on payment of costs by the plaintiff, with leave to amend his particulars

(3) Duncan v. Hill, 2 B. & B. 682. And see Breckon v. Smith, 1 A. & E. 488; Cooper v. Amos, 2 C. & P. 267.

(4) Hay v. Fisher, 2 M. & W. 722. And see by Tindal, C. J., in Chisman v. Count, 2 M. & G. 310.

(5) Brown v. Watts, 1 Taunt. 353.

NOTE 215.—But a judge's order is not sufficient after issue joined. The amendment can then be made on application to the court only. Fuller v. Roosevelt, 4 Cowen's Rep. 144; Graham's Pr. 437. These amendments are allowed, on a proper case, at any stage of the cause before the final trial, on terms. Spawn v. Veeder, 4 Cowen's Rep. 503.

(Under the Code of New York it is not necessary for a party to set forth in a pleading the items of an account therein alleged; but he must deliver to the adverse party within ten days after a demand thereof in writing, a copy of the account, which, if the pleading is verified, must be verified by his own oath, or that of his agent or attorney, if within the personal knowledge of such agent or attorney, to the effect that he believes it to be true, or be precluded from giving evidence thereof. And the court, or a judge thereof, or a county judge, may order a "further account," where the one delivered is defective; and the court may in all cases order a bill of particulars of the claim of either party to be furnished.

When furnished, the party is confined on the trial to the items stated in the bill. Bowman v. Earle, 3 Duer, 694. Where the demand is single, as where an action is brought for damages in causing death by wrongful act, a bill of particulars will not be ordered. Murphey v. Kipp, 1 Duer, 659.)

counts, contains special counts, of which no rule of practice, nor previously obtained judge's order, calls upon the plaintiff for particulars, and the particulars, furnished to the defendant and annexed to the record, relate to the common counts only, the plaintiff will not be precluded from giving evidence in support of the special counts. Thus, before the general rule previously referred to,(1) in an action on a bill of exchange, and for the price of goods sold and delivered, it was held the plaintiff might recover on the bill, though the particulars related to the goods only.(2)

If the plaintiff, either before or after delivering a bill of particulars, makes a demand of payment only for a part of the articles specified in the bill, such a demand will not have the effect of confining him in his evidence, nor supersede the bill of particulars.(3)

In an action on a bill or note, if the plaintiff is entitled to recover the principal sum due, he may recover interest also, as arising out of the principal, and incident to it, though it has not been specifically claimed in the particular of demand,(4) for interest may be given by the jury as damages for the non-payment of the debt.

In an action of assumpsit, where the defendant pleaded in abatement, that the promises were made by himself and another person jointly, on which plea issue was joined, and it appeared from the bill of particulars, that some of the articles had been furnished to the defendant jointly with the person named in the plea, and they were not distinguished from the rest of the articles, Lord Kenyon, C. J., held that the plaintiff was bound by his bill of particulars, which supported the defendant's plea: and therefore he nonsuited the plaintiff,(5) and the court afterwards refused a

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(1) R. Trin., 1 Wm. IV, *supra*, p. 799.

(2) Cooper v. Amos, 2 C. & P. 267. See also Day v. Davies, 5 Id. 340; Fisher v. Wainwright, 1 M. & W. 480.

(3) Short v. Edwards, 1 Esp. 374.

(4) Blake v. Lawrence, 4 Esp. 147.

(5) Colson v. Selby, 1 Esp. 452; S. C., Tidd. Pr. (9th ed.), 600.

NOTE 216.—The New York Supreme Court have departed from the case cited in the text, on good authority, but without citing any. Brittingham v. Stevens, 1 Hall's Rep. N. Y. S. C. 379. The court say a party furnishing a bill of particulars, is never held to furnish evidence against himself. In practice, it is considered a part of the pleadings. Id. 381. The contrary was expressly held in Rymer v. Cook (1 Mood. & Malk. 86, 87, note *a*), by Hullock, B., and Bailey, J., A. D. 1827, though they were reminded by Starkie of Brown v. Watts (1 Taunton, 353), which he said tended to show that the particular was to be taken as a part of the pleadings, and therefore not evidence. The decision in Rymer v. Cook was at Nisi Prius. The previous cases of Miller v. Johnson (2 Esp. Rep. 602, A. D. 1797), and Harrington v. Macmorris (5 Taunton, 228, A. D. 1813), were entirely overlooked, where (and in the latter case on full consideration), the court held that a particular, under a notice of set-off, was a part of the notice; and both being in the nature of a plea, neither was evidence. This notion is so well settled in New York, that the Supreme Court did not think it worth while to cite authorities. Fleurot v. Durand, and Ryckman v. Haight, 14 John. R. 329, note 218.

rule *nisi* to set aside the nonsuit. But the authority of this case has been since doubted.(1)

Errors in particular.

The use of a bill of particulars is to prevent the inconveniences which might otherwise arise from the general and undefined statements in the plaintiff's declaration, and to apprise the defendant of the particulars of the demand which the plaintiff has against him.(2) If it gives sufficient information to the opposite party to guard him against surprise, it answers the purpose for which it was intended, and will be sufficient, though it

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(1) Hill v. White, 6 N. C. 23.

(2) NOTE 217.—The defendant may call for this bill whenever the particulars of demand are not disclosed in the declaration (Mercer v. Sayre, 3 John. Rep. 248); and it may be demanded in real actions as well as in ejectment (Vischer v. Conant, 4 Cowen's Rep. 396; 2 R. S. N. Y. 341, § 16); in actions *ex delicto*, as well as in actions *ex contractu*. Accordingly, it was allowed in trover (Humphrey v. Cottelyou, 4 Cowen's Rep. 54); and under a general notice of set-off. Mercer v. Sayre, *supra*. For other cases, see 1 Cowen's Rep. 572, note *a*, and Graham's Pr. 433. On an affidavit that the plaintiff was a seaman, who had served on board the defendant's ship; that the defendant had paid sufficient money into court to meet the plaintiff's claim for services over and above what had been before paid; that the plaintiff had since entered successively on board several ships; and on one under a feigned name; and that the person who delivered the issue, said he did not know where the plaintiff lived, but that he was in London; a rule was made that the plaintiff's attorney furnish a note in writing to the defendant, acquainting him who the plaintiff was, of what profession, trade or business, and where he dwelt; and that the defendant, his attorney or agent, should have a view of the plaintiff, on giving notice for that purpose. Collinson v. Gill, 4 Doug. 206. In assault and battery, brought against several individuals for their conduct at a large public meeting, by a stranger, whose name and residence the plaintiff's attorney had refused to disclose, the defendant having pleaded a justification, the court made an order that the plaintiff's attorney disclose the place of residence and occupation of the plaintiff to the defendants, and that in the meantime proceedings be stayed. Johnson v. Birley, 5 Barn. & Ald. 541; S. C., 1 Dowl. & Ryl. 174. In a joint action for a libel by several, a rule was made against the attorney of one of them, that he should give an account in writing of the places of residence and occupations of the others, and that in the meantime, proceedings be stayed. The motion was granted, on an affidavit that the defendants had made unsuccessful inquiries, and were ignorant of the plaintiffs; and that the attorney had refused all information. Worton v. Smith, 6 Moore, 110. And where the defendant had pleaded in abatement the non-joinder of several persons, to whom the plaintiffs were strangers; and, on inquiry at certain places and of the defendant's attorney, information of the persons whose names were mentioned in the plea, could not be obtained; and it being that the plaintiffs should learn the truth, so as to know whether it were best to discontinue their action, an order was made that the defendant's attorney forthwith deliver a particular of their places of residence and additions, or, that in default thereof, the plea be set aside. Taylor v. Harris, 4 Barn. & Ald. 93. A similar proceeding was warmly resisted, but finally granted by the Court of Exchequer. Newton v. Verbeke, 1 Younge & Jerv. 257. In this case, an order was made by a judge (Hullock, B.), in the same manner as the usual order for a particular; and though the defendants made an affidavit that they were not able to give satisfactory information, he adjudged it to be evasive, and ordered the plea to be quashed. On a motion to set aside this order, the court sustained it, placing it on the ground of incidental power, in all cases, to compel the party by a particular to give such necessary information as the generality of his pleadings fails to furnish in any respect. See, also, Tomlin v. Brookes, 1 Wils. 246, cited by Savage, C. J., 11 Wend. 166. The plaintiff is under no obligation to furnish particulars of set-off or payment, by defendant, where he makes the defendant certain credits in his complaint. Williams v. Shaw, 4 Abb. Pr. R. 209.

may be in some respects inaccurate.(1) Thus, in an action of assumpsit for money paid to the defendant's use, where in the bill of particulars an

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(1) NOTE 218.—Where the declaration is on a bill of exchange, promissory note or other special contract, and also includes the common counts, and a judge's general order is obtained for a bill of particulars, the plaintiff, though he omit to mention the bill of exchange, note, &c., in the particular, may yet recover upon it. Cooper v. Amos, 2 Carr. & Payne, 124; The People ex rel. Waring v. Monroe C. P., 4 Wend. 200. And where there was an order to deliver a particular of set-off within one fortnight; otherwise the set-off to be excluded, and the particular was not delivered till after that time; yet it appearing that after the particular was delivered, an order, by consent, was made to amend the declaration, this was held a waiver of the irregularity as to time in delivering the bill; and the evidence was admitted. Wallis v. Anderson, 1 Mood. & Malk. 291.

The plaintiff's bill of particulars is considered as a part or amplification of the declaration (Fleurot v. Durand, 14 John. Rep. 329; Brittingham v. Stevens, 1 Hall's Rep. N. Y. S. C. 379); so that if not delivered pursuant to an order, a motion for *non pros.* will lie. Fleurot v. Durand, 14 John. Rep. 329. So, as we have seen *ante* (note 216), when it comes from the defendant, it is held a part of his notice of set-off; and unless delivered within a certain time specified, the notice itself is shut out by the order. Viewed in this light, it need not state the credit side of the account; because pleadings do not state matters of defence or answer to themselves; and another reason is that the opposite party must know what sums he has paid as well as the party giving the bill. Ryckman v. Haight, 15 John. Rep. 222; Whaley v. Banks, and Pemberton v. Bellington, Mann. Dig. Practice, B, *b*, S. P. But see Mitchell v. Wright, 1 Esp. 230, and Addington v. Appleton, 2 Camp. 410, *e contra.* Nor is it necessary to state in the bill any matter of mere defence, answer or rebuttal to the claim of the other party. *E. g.*, *money paid* on an order drawn by the defendant, is admissible, in answer to the defendant's demand, though the plaintiff's particular do not mention it. Brown v. Denison, 2 Wend. 593. In this case, the plaintiff, it is true, charged the money in the form of an account; and as such the referees rejected it, because not in the particular; but Savage, C. J., said: "The account offered was not for the purpose of making out the plaintiff's case in the first instance, but to rebut evidence produced by the defendants." Id. 595.

A bill is always "considered sufficient, if it fairly apprise the opposite party of the nature of the claim, so that there can be no surprise." Per Savage, C. J., in Brown v. Williams, 4 Wend. 360. 368, 369. And see Smith v. Hicks, 5 Wend. 48. This is the cardinal object. Form is altogether overlooked. A voluntary letter from the plaintiff's attorney, in answer to a letter of the defendant's attorney requesting a bill, that "the suit is on the note declared upon" (Williams v. Allen, 7 Cowen's Rep. 316); or a bill under an order, referring to an account before delivered (Hatchet v. Marshal, 1 Peak. N. P. Cas. 171; James v. Goodrich, 1 Wend. 289); is sufficient. Dates should be given with as much particularity as possible, with regard to which the judge will require greater or less strictness, in his discretion, on summons for amending the bill. Humphrey v. Cottleyou, 4 Cowen, 54; Quin v. Astor, 2 Wend. 577. And see Newton v. Verbeke, *ante*, note 216. Though in point of variance on trial, much greater differences than those of mere days or months have been disregarded, yet in this respect the variance ought not to be such as to mislead. Where the plaintiff's bill was for various items of labor under date of April 20, 1821, and he offered proof of labor at sundry times in 1817, 1818, 1819, the New York Supreme Court held he must be confined to the *year*, and on error the decision was holden right. Quin v. Astor, 2 Wend. 577. The particular should give as much information as a special declaration; omitting the formal or technical parts. The Court, per Parker, C. J., in Babcock v. Thompson, 3 Pick. 448. Where the plaintiff declared in one count specially, inserting a general count which would also embrace the matter of the first count; and in his particular referred to the first count as containing the sole ground of the action; though the proof varied from the first count; yet held it might be received under the general one, and that too upon this bill of particulars. So that a special count may be good as a particular, though bad as a count; for yet the defendant may not be misled. Hess v. Fox, 10 Wend. 436. This may be made still more plain by an English case. Where the particular specified a bill of £60, bearing date on a certain day, and the evidence was

of a bill for £63, dated on a different day, in the same year and month, Abbot, J., held the variance to be immaterial, as not being calculated to mislead. Dunn v. Thomas, Mann. Dig. Practice, B, *c*, pl. 17, p. 299, of the Am. ed. This would have been clearly a fatal variance in a count. But where the declaration was for money had and received, and the particular for "one $1,000 bank bill, bank not recollected, $1,000; two $500 bills of Union Bank, $1,000; two checks upon Boston banks amounting to $250; bank bills current in the commonwealth amounting to $500;" and at the trial the plaintiff proceeded for money fraudulently won at gaming with cards, the judge directed a nonsuit. Babcock v. Thompson, 3 Pick. 446. The court said: "Telling the defendant that the action was for bank bills, gave him no information that would aid him in making his defence." Id. 448. Yet, according to the English and New York practice, a mere defect or insufficiency is left to the correction of a judge's order, upon summons; and cannot be objected at the trial. There the objection usually sounds in a *variance*, which misleads. Accordingly it was held in Maryland, that where the plaintiff, in his bill of particulars, alleges that money was had and received in a particular manner, or on a particular ground or consideration; on the trial he cannot resort, in evidence, to any other manner, ground or consideration. De Sobry v. De Laistre, 2 Har. & John. 191, 221, 222, 223.

Yet in respect to variance, these bills are regarded with a spirit very favorable to letting in every claim under them, which can be covered by any possible construction of their language. This we have, in part, seen already; and it is further evinced by a series of cases.

Thus, in an action by the assignees of a bankrupt, the declaration stated the cause of action to be money had and received to the use of the *bankrupt;* the particular of demand, incorrectly described it, as had and received to the use of the plaintiffs. This was held not to be a fatal variance, it not appearing that the defendant could be misled. Tucker et al. v. Barrow, 1 Mood. & Malk. 137. So the omitting of a letter used between the Christian and surname in the title of the cause; for the law knows of but one name (Rosevelt v. Gardinier, 2 Cowen's Rep. 463); stating the indorsement of a note as in blank, which was filled up on the trial (Norris v. Badger, 6 Cowen's Rep. 449); one of two joint debtors being sued alone, and he omitting to plead in abatement, the bill being entitled and the charges made as against him alone (Gay v. Cary, 9 Cowen's Rep. 44); where the notes were described as bearing interest from the date, though they did not, the bill giving a correct description in other respects (McNair v. Gilbert, 3 Wend. 344); where the bill stated that the action was for money received from D., on a note drawn by E., for $300, dated, &c., payable to D., indorsed by D., then by the plaintiff, and then by the defendant, *on which defendant received* $300 *from D.* and the same sum, &c., from the plaintiff; and proof, that what the defendant received of D. was *not cash, but specific articles to an uncertain amount, and the whole note was released to D.* by the defendant, who afterwards, as last indorsee, demanded and received the same sum of the plaintiff; for the defendant was informed by this bill, that the money which the plaintiff had paid was sought to be recovered back; and though the bill spoke of $300 paid by D., still, if the transaction amounted in law to a *payment*, or *discharge*, or *release* of that sum, there could have been no surprise (Brown v. Williams, 4 Wend. 360, 368, 369); where the bill stated the foundation of the claim truly, but specified the amount (being money had and received) at $605 63, whereas the proof was of $644.45 (Smith v. Hicks, 5 Wend. Rep. 48); where there was a misdescription of the defendants as *belonging to the Pilot line*, the evidence being that they belonged to a different company, other matters appearing in the bill sufficient to apprise the defendants of the particulars sought to be recovered, so that they could not be misled (Benson v. Brown, 10 Wend. 258); and where an insurance broker's claim was for services, in effecting for the defendants a policy of insurance, the broker covenanting to pay the premium; the declaration being for work and labor and divers premiums; and the particular simply "For insurance." Power v. Butcher, 10 Barn. & Cress. 329. A particular for *money paid* is supported by proof of a payment in land, or other thing equivalent to money. Bonney v. Seeley, 2 Wend. 481. See Ainslee v. Wilson, 7 Cowen's Rep. 668; and Randall v. Rich, 11 Mass. Rep. 498, S. P.

As we before noticed incidentally, a deficiency in the bill as not giving adequate notice, must be supplied on a judge's order; and cannot be objected at the trial. James v. Goodrich, 1 Wend. 289. It is proper to add that any ground of variance must be taken, and objected at the trial; or it will be considered as waived. Smith v. Hicks, 1 Wend. 202.

item for money advanced was by mistake written under the name of A. B., instead of being written under that of C. D., in another part of the particular, and thus appeared to have been advance to the former, Lord Ellenborough allowed the plaintiff to prove that the item in question was intended, and must have been understood, to refer to the latter name, but by mere clerical error had been misplaced; and that if the defendant could show by affidavit that he had been misled by the plaintiff's particular, it might furnish a ground for the court afterwards to set aside that particular sum.(1) So, where the work, for which the action was brought, was stated by the particular to have been done in a month when in fact no work had been done, the plaintiff was allowed to give evidence of his having done work for the defendant in another month.(2)

Where the particulars of the plaintiff's demand were on an account stated, with this addition, "as appears by a memorandum under the hand of the defendant of this date," and the memorandum could not be received for want of a stamp; it was held, that the account stated might be proved by other evidence than the memorandum; and that parol evidence might be given of an admission of the money being due, and of a promise to pay by installments, though the admission and promise were made at the same time with the memorandum, and embodied in it.(3)

In an action brought by one partner against another to recover a balance due on a statement of accounts, where the bill of particulars was confined to the balance due on *separate* accounts,(4) the plaintiff, in support of this demand, gave in evidence an account in which the defendant made himself debtor to a certain amount, and the defendant in answer to this evidence produced an account subsequently rendered by the plaintiff, according to which there appeared to be a balance due to the defendant on the *separate* accounts; but on the opposite side of the page, there was a statement also of the *partnership* accounts, on which the balance was in favor of the plaintiff, and greatly exceeded the balance on the separate account. It was objected that the plaintiff could not recover beyond his particular; Lord Ellenborough, C. J., however held, that the defendant himself had given the plaintiff a better case than he was at liberty to make for himself, and that the plaintiff was entitled to a verdict for all

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(1) Day v. Bower, 1 Camp. 69, n. See Brown v. Hodgson, 4 Taunt. 189. See also Davies v. Edwards, 3 M. & S. 380, an action of debt to recover rent, where the locality of the premises, not described in the pleadings, had been misdescribed in the particular; but the objection was overruled.

(2) Millwood v. Walter, 2 Taunt. 224. See also Harrison v. Wood, 8 Bing. 371; Lambirth v. Roff, Id. 411; Green v. Clark, 2 Dowl. P. C. 18. And see Moss v. Smith, and Lamb v. Micklethwaite, *supra*, pp. 546, 547; Kirkman v. Jervis, 3 Jur. 605; Parsons v. Wilson, 4 Scott N. R. 1; S. C., 1 Dowl. (N. S.) 181.

(3) Singleton v. Barrett, 2 C. & J. 368.

(4) Hurst v. Watkins, 1 Camp. 68.

that had been proved to be due to him.(1) The parties afterwards came to a compromise, and agreed upon the sum to be recovered. So it has been held,(2) that although the bill of particulars confines the plaintiff's evidence to the causes of action mentioned in the particulars, yet if the defendant, in giving evidence for himself, gives evidence also for the plaintiff of some claim not included in the particulars, the plaintiff as to that claim is no longer confined to the particulars, but may avail himself of the defendant's evidence.

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(1) NOTE 219.—But the courts in New York hold, that where the defendant himself, in opposing the plaintiff's demand, specified in his bill of particulars, gives evidence which supports the plaintiff's declaration, though such evidence is out of the bill, the plaintiff may recover upon it; as in this case: the plaintiff's declaration was upon a promissory note against the defendant alone, with the common counts; the plaintiff in his bill claimed the note alone. On the trial, the defendant proved that the note in question was usurious, as being given for another note and an account due to the plaintiff from the defendant and a third person; the note in question including usurious interest on the claim which it was thus given to secure. Held, that the plaintiff might recover the amount of the original note and account, there being no plea in abatement. Williams v. Allen, 7 Cowen's Rep. 316, 318. This was held on the authority of Hurst v. Watkins, cited in the text.

When the plaintiff is proceeded against, the first order is, on a proper affidavit, that the particular be delivered, or cause shown at a fixed day and place, proceedings in the meantime to be stayed. On showing the service of the order and a non-compliance, a second order is made that the party deliver a particular (generally), and that, in the meantime, all proceedings stay. The proceedings are the same against the defendant, except that the second order shuts out his set-off, &c., on non-compliance. The demand cannot be made till the pleading or notice comes in; but then may be at any time before trial. For these and other particulars of practice on this head, see 1 Cowen's Rep. 572, *et seq.* note *a*; and Graham's Pr. ch. 4, p. 434 to 440; Rowan v. Merritt, 9 Wend. 443; Fassett v. Dorr, 11 Id. 177; and Smith v. Lehie, 1 Rep. Const. Ct. 240.

In Llavelock v. Chevely, cited in the text, the cause stood in the paper for trial, July 10th, 1817. Park, J., had, twenty-two days before, made an order that the defendant forthwith deliver a particular; but he had not done so till ten days after, and twelve days before the matter was moved at Nisi Prius. The object now seemed to be the exclusion of the set-off, by a summary order of Gibbs, C. J., who was holding the court. The claim was on an attorney's bill, and it was agreed that it had not been delivered in time for taxation. The chief justice held that by not applying to a judge (to the court as the case says) to have the set-off excluded, but waiting till this time (when the cause stood for trial), the right to reply was waived. The chief justice said, "the demanding and granting of particulars is almost a new system within the recollection of many of us. They undoubtedly facilitate the trial of a cause, but they must not be permitted to obstruct the justice of it. The party who objects to the particular, as insufficient, must make his complaint at the proper time. He cannot wait till the trial of the cause, and then raise an objection which, if earlier made, might have been disposed of."

These remarks are general, and import that in any case, where a party lies by, under a defective bill of particulars, and allows his adversary to take important steps, he will not then be permitted to call for an order in the matter, if that order will operate to the prejudice of his adversary, whether plaintiff or defendant. Such, too, appears to be the principle advanced by Sutherland, J., in Goodrich v. James (1 Wend. 289).

Where the defendant applies for a bill after issue joined, there is *prima facie* a suspicion that he means delay; and he should present an excuse by affidavit for being so late, especially where he applies after the cause is noticed for trial. Andrews v. Cleveland, 3 Wend. 437. So, it is presumed, as to an order for amending.

(2) Fisher v. Wainwright, 1 M. & W. 486.

When particulars of demand have been annexed to the record, pursuant to the rule of court before mentioned,(1) neither the order for particulars, nor the delivery of the particulars, need be proved. When they are not annexed, the particulars are proved by producing the judge's order, and proving the delivery of the particulars.(2) The delivery will be sufficiently proved by proving the signature of the party's attorney, or of his agent, on the particular.

If the particulars annexed vary from those delivered to the defendant, it will be prudent to be prepared with proof of the particulars delivered, that he may avail himself of such proof, in case the plaintiff has not proved any cause of action included in the particulars delivered.(3) This variance would be a ground of nonsuit.

The particulars, as before stated,(4) form no part of the record, and are not to be considered as incorporated with the declaration,(5) nor can they be resorted to for the purpose of explaining or aiding the pleadings.(6)

The particulars of the defendant's set-off are merely explanatory of the plea of set-off, and if the plaintiff puts them in evidence for the purpose of rebutting a defence founded on the Statute of Limitations, he does not thereby admit the correctness of their contents.(7)

CHAPTER XI.

OF THE RULE FOR DETERMINING WHETHER THE PLAINTIFF OR THE DEFENDANT OUGHT TO PROVE THE ISSUES ON THE RECORD.

THE competency of witnesses, and the quality of evidence, having been fully treated of, two questions remain to be considered; the one, as to the party on whom the burden of proving an issue is cast; the other, as to the form or particularity required in the proof: in other words, which of the parties is to prove the issue, and to what extent must the issue be proved? These will be the subjects of the two following chapters.

There are several general rules of great use for ascertaining whether the

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(1) *Supra*, p. 799.

(2) Macarthy v. Smith, 8 Bing. 145.

(3) Morgan v. Harris, 2 C. & J. 461. See Ripper v. Walton, 1 Dowl. (N. S.) 344.

(4) *Supra*, p. 799.

(5) Booth v. Howard, 5 Dowl. P. C. 438.

(6) Kilner v. Bailey, 5 M. & W. 382; Rogers v. Custance, 1 Q. B. 77.

(7) Barkitt v. Blanchard, 18 L. J. (N. S.) Exch. 34. As to the plaintiff's being entitled to a reply where the defendant has put in the particulars of the plaintiff's demand as evidence, see Rymer v. Cook, Moo. & M. 86.

plaintiff or the defendant will have to prove the issue on the record. One of the most useful of these is, the rule that the point in issue is to be proved by the party who asserts the affirmative,(1) that is, the affirmative in substance, not in mere form.(2) Upon the party who has to give such

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(1) *Ei incumbit probatio qui dicit, non qui negat.* Dig. xxii, 3, 2.

(2) See by Lord Abinger, C. B., in Soward v. Leggatt, 7 C. & P. 615. See also Mercer v. Whall, 5 Q. B. 447; Cameron v. Farmer, 2 C. & K. 746.

NOTE 220.—See Bull. N. P. 298; Vin. Abr. Ev. § a; Phelps v. Hartwell, 1 Mass. Rep. 71; Owings v. Patterson, 1 Marsh. Rep. (Ken.) 325.

"The principle," says Mr. Evans (2 Ev. Poth. 143), "that he who alleges himself to be the creditor of another, is obliged to prove the fact of agreement upon which his claim is founded, when it is contested; and that, on the other hand, when the obligation is proved, the debtor who alleges that he has discharged it, is obliged to prove the payment, is clearly one of those propositions, in which every system of jurisprudence must concur in general, whatever particular rules may be adopted, as to the mode and form of the allegations by which the necessity of such proof is to be determined." See Bogert v. Morse, 1 Comst. 377; 4 Denio, 108.

The question upon whom the *onus probandi* rests in the first instance, is usually determined by the state of the pleadings. Hence a plaintiff must, in general, prove his declaration. But if the defendant admits the facts alleged against him, and pleads and relies on another fact as a bar to the action, then the *onus probandi* is thrown upon him, and he must prove this fact (Ross v. Gould, 5 Greenl. Rep. 204); as where he pleads to a bond the want of consideration (Rudd v. Hanna, 3 Monroe, 528, 531; and see also M'Neil et al. v. Coleman, 8 Mart. Lou. Rep. (N. S.) 373); and if the nature of a plea in bar be such as not to deny the genuineness of a contract declared on, as for instance, the plea of general performance, or the plea of seizin at the time of making the covenant alleged, or the plea of payment or release, the contract may be read to the jury without any proof of execution. Ross v. Gould, *supra;* Scott v. Hull, 8 Conn. Rep. 296; and note 196. The same principle is applicable where the contract is offered in evidence merely, and its genuineness is denied. When it is admitted upon *prima facie* evidence, the jury are the proper and constitutional judges, whether the contract be genuine or not. In the examination of the contested fact, the *onus probandi* may, in the course of the trial, be thrown from one party to the other several times, according as the complexion of the proof may change. But when it is said that the *onus probandi* is on the party who offers a paper as genuine, the plain, common sense, and legal meaning is, that it has reference to all the evidence in the cause, and not merely that which is necessary to authorize it to be read in the first instance; in other words, it means that the party affirming the paper to be genuine, must furnish so much evidence as to leave a balance of proof in favor of the genuineness of the instrument, after making all due allowance for the proof adduced on the other side, to produce a contrary conviction. Ross v. Gould, *supra.* See Brooks et al. v. Barrett et al., 7 Pick. 94, 99, 100. And these general remarks, though applied to the case of a paper offered as evidence, will be found equally pertinent to any other instance, where, on the trial of a cause, some given proposition is sought to be established by the one party or the other, and there is a controversy with respect to it. "Whenever a fixed and undisputed point is established by either party, it is from that point that the conflict must commence, whether in those cases where the allegations are particular, or in those where the whole matter in dispute is open upon general pleading. Thus, if a plaintiff establishes a possession of any article taken from him by the defendant, and the defendant asserts a right of property, upon which the evidence given by the respective parties does not lead to a decisive preponderance; the decision should be in favor of the plaintiff, his possession being an adequate title, until a superior property is proved, by a preponderance of evidence on the other side. 2 Ev. Poth. 143, 144. See *ante,* note 186. So where the plaintiff shows title in himself, and the defendant relies upon an adverse possession, either as a bar to the action, or as part of his title, the burden of proving its length lies upon him. Darden v. Allen, 1 Dev. 466; Hurst's Lessee v. M'Neil, 1 Wash. C. C. R. 70, 80. "So if an heir at law claims as plaintiff in ejectment, and his consan-

guinity is established or admitted, he will be entitled to the advantage of equivalent proofs, in affirmance or contradiction of an adverse will." 2 Ev. Poth. 144. And where the plaintiff sold to the defendants a cargo, estimated at 37,000 lbs.; the defendants agreeing to have the same weighed and render an account, and if the cargo turned out to be less, the plaintiff was to pay back the deficiency *pro rata*, and if greater, they were to pay for the surplus; the defendants having so managed as to leave it uncertain what the quantity was; held, that the general estimates made by the witnesses should be taken most strongly against them. Jones v. Murray, 3 Monroe, 83, 86. In trespass for breaking a close called Lord's Leys; the defendant pleaded right on Brockeridge Common, and that Lord's Leys was part of the common; to which the plaintiff replied no right on Lord's Leys. At the trial, the plaintiff admitted that the defendant had a right on all Brockeridge Common, save the portion called Lord's Leys, and the defendant admitted he had no evidence of any exercise of the right on Lord's Leys. Upon these pleadings and admissions, it was held, that the defendant must show, either that the original grant, or the prescriptive right set up in the plea, comprehended the whole common without exception; "so that, if the original grant cannot be produced, and the evidence as to the prescriptive right over the part called Lord's Leys hangs in even scales, the balance must be declared in favor of the plaintiff." Maxwell v. Martin, 6 Bing. 522. "If the respondent in a sessions appeal, fixes an original settlement with the appellant, the obligation of proof is transferred, and the establishing a preponderance of evidence of a subsequent settlement becomes the business of the appellant." 2 Ev. Poth. 144. In assumpsit for the support of a pauper, deriving his settlement from that of his father or mother, brought in Massachusetts, against the town where the mother had her settlement; it was held incumbent on the plaintiff to show that the father had not a settlement within the commonwealth; "for though this is a negative in appearance, yet it is proved by showing where he did belong." Wilmington v. Burlington, 4 Pick. 174. See *post*, note 222. "And in general, whoever asserts a claim, or negatives a claim which, without contradiction, would be sufficiently established, must support his position either by circumstances inducing a legal presumption in his favor, or by proofs in opposition to what the law presumes against him, or respecting which the law is passive in not establishing any presumption on the one side or the other." 2 Evans' Poth. 144.

Numerous cases, illustrative of these observations, have already been noticed under the head of presumptive evidence; and as the propriety of examining them, and others of a kindred character occurring hereafter, will be readily suggested to the reader, we shall here introduce but few additional ones. In an action by the indorsee of a note against the maker, if the defendant wish to avail himself of payments not indorsed, the onus will lie on him to prove that the payments were made before the transfer, and that the plaintiff is not a *bona fide* holder, having obtained the note after it was discredited, or the like. Wilbur v. Turner, 5 Pick. 526; Webster v. Lee, 5 Mass. Rep. 334; Hemenway v. Stone, 7 Mass. Rep. 58. But if, in such case, it be shown that the note was fraudulent in its origin, or was fraudulently put in circulation, the burden will then devolve on the plaintiff, to show that he came fairly by the note, and without notice of the fraud. Munroe v. Cooper et al., 5 Pick. 412; Woodhull v. Holmes, 10 Johns. Rep. 231; Grant v. Vaughan, 3 Burr. Rep. 1516; Peacock v. Rhodes, Dougl. 633; Solomons v. Bank of England, 13 East, 134.

The indorsement of a note by one of several partners in the partnership name, as sureties for a third person, not being binding upon the firm, unless consented to by them, the burden of proving such consent lies on the creditor or holder of the note. New York Fire Ins. Co. v. Bennett et al., 5 Conn. Rep. 574. It is a rule that where the interest of a person rests upon an affirmative, it is for him to prove the affirmative. Per Tenterden, C. J., Allison v. Rayner, 1 Mann. & Ryl. 241, 244. Thus, an attorney cannot recover, from the assignee of an insolvent, the amount of a bill of costs incurred in proceedings requiring the consent of a meeting of creditors, without proving such consent, or that the client was apprised that he was proceeding at his own risk. See, also, Breedlove v. Turner, 9 Mart. Lou. Rep. 353, 380. In an action for breach of contract in not furnishing castings after notice given; the plaintiff showed that he gave notice, and requested the castings should be made on a basket belonging to the defendants, as he had a right to do by the contract; held, that it was for the defendants to show that the basket was not a pattern. Perry v. Bosford et al., 5 Pick. 189. The admissions of a party against his title are strong evidence, and the onus lies upon him, if he would avoid their effect, to show that they

proof is said to rest the burden of proof, or, as it is technically called, the *onus probandi.*

One of the surest tests for ascertaining upon which side the affirmative really lies, is to consider which party would be successful if no evidence at all were given,(1) or what substantially amounts to the same thing, to examine whether, if the particular allegation to be proved were struck out of the plea or other pleading, there would or would not be a defence to the action, or an answer to the previous pleading.(2)

Charge of breach of duty, involving negative.

Thus, where one party charges another with a culpable omission or breach of duty, the person who makes the charge is bound to prove it,

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were founded in innocent mistake. Owen v. Bartholomew, 9 Pick. 521. The presumption is always in favor of the competency of a witness, and the party who would exclude him must show that he is incompetent. Per Bayley, J., in Marsden v. Stansfield, 1 Mann. & Ryl. 669, 672. In an action by the assignee of an insolvent debtor, in which the plaintiff declares for a cause of action existing prior to the assignment, the plaintiff is bound to prove the character in which he sues, though nothing but the general issue be pleaded. Best v. Strong, 2 Wend. Rep. 319. *Vide post*, and also this case and others upon the question, how far the general issue admits the character in which the plaintiff sues, *ante*, note 196. Where distinct proof of the forgery of the instrument declared on has been introduced, and the plaintiff seeks to recover, upon the ground of a subsequent adoption of the instrument, the burden of proving this fact lies on him. Phillips v. Ford, 9 Pickering, 39. In the case of a capture of a vessel at sea, upon the question of prize or no prize, the onus lies, in the first instance, upon the captors. Miller et al. v. The Resolution, 2 Dall. 22. And where the ship and cargo were found in the possession of the enemy's hands, by capture from the subjects of a neutral nation, it was held that the possession by the enemy was accounted for, and that the presumption thence arising of enemy property was rebutted. Id. Where goods are seized, and claimed as forfeited, as part of the cargo, the onus is on the government to prove that such goods were part of the cargo on board at the time of the offence. United States v. An Open Boat, 5 Mason's Rep. 232. Where the defendant, an attorney, was sued for negligence in allowing judgment to go by default, in an action which the plaintiff had retained him to defend; the negligence being proved, held, that the onus was upon the attorney to defend himself, by showing, if he could, that the plaintiff had no defence in that action; and not for the plaintiff to begin, by showing that he had a good defence, and so had been damnified. Godefroy v. Jay, 7 Bing. 413; S. C., 5 Moore & Payne, 284. In an action by a passenger in a stage coach against the proprietors, for an injury, occasioned by the insufficiency of the coach, the plaintiff proved that while the coach was driven at a moderate rate, upon a good road, one of the wheels came off, &c.; held, that negligence is implied from these circumstances, and the burden of proof is upon the defendants, to rebut this legal inference. Ware v. Gay et al., 11 Pick. 106. See Story on Bailments, 378, 379. Though a deed may be read in evidence to the jury, after preliminary proof by the subscribing witnesses, yet, if the genuineness of the instrument is controverted, the onus is still on the party introducing it, to satisfy the jury beyond a reasonable doubt, that it is genuine. Ross v. Gould, 5 Greenl. 204. Where the action was on a single bill, by which the money therein mentioned was to become due, if the obligor could not make it appear "that no other person committed the trespass;" held, that as consideration was presumed, the onus of proving that some other person did commit the trespass, lay on the defendant, if he wished to avail himself of that fact. Hays v. Lusk, 2 Rawle, 24.

(1) By Alderson, B., in Amos v. Hughes, 1 Mo. & R. 464. See, also, Ridgway v. Ewbank, 2 Id. 218; Geach v. Ingall, 14 M. & W. 97; Belcher v. M'Intosh, 8 C. & P. 721; Doe d. Worcester (Trustees) v. Rowland, 9 C. & P. 735; Osborn v. Thompson, 2 Mo. & R. 256.

(2) By Alderson, B., in Mills v. Barber, 1 M. & W. 427.

though it may involve a negative; for it is one of the first principles of justice, not to presume that a person has acted illegally tillthe contrary is proved.(1) In a suit for tithes in the Spiritual Court, where the defendant

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(1) NOTE 221.—United States v. Hayward, 2 Gallis. 485, 498. In all cases where a party stands charged with an offence, his innocence is presumed, and the onus is upon the prosecutor, unless a different rule has been expressly provided by statute. United States v. Gooding, 12 Wheat. 460, 471; Commonwealth v. Stow, 1 Mass. Rep. 54, S. P. In the case last cited, the defendant was indicted for having given a false and fraudulent certificate of membership, under the Massachusetts law of June 12th, 1800; and, on the trial, it became a question, whether it was for the defendant to prove the certificate true; the court thought not, and so held, though it was contended that this was in effect, requiring from the prosecutor proof of a negative. Upon an indictment under the statute law of the same state, relating to hawkers and pedlars, which has a proviso, that nothing therein contained "shall prohibit any person carrying and selling, &c., goods, &c., of the produce or manufacture of the United States," &c.; it was held incumbent on the prosecutor to prove that the articles were of foreign manufacture. Commonwealth v. Samuel, 2 Pick. 103. Where the charge, however, does not consist in a criminal omission or breach of duty, the rule is otherwise. See *post*, note 224. Yet, in a case in which the plaintiff claimed a slave as forfeited by the defendant, upon the ground that the defendant, a widow, to whom the slave had been assigned as dower, removed such slave from Virginia, without the consent of the reversioner, contrary to the law of that state; it was held incumbent on the plaintiff to show that the reversioner did not consent. Hicks et ux. v. Martin, 9 Mart. Lou. Rep. 47.

Upon a question whether the vendor of property, at the time of sale, did disclose certain defects which it was proved he knew, the onus is upon the party charging the fraud, to prove that the vendor did not disclose; for fraud is never to be presumed, but must always be proved. Fleming v. Slocum, 18 John. Rep. 403. See, also, *ante*, note 177, and numerous cases there cited, illustrating this and its kindred principles of presumption. And where one gives another discretionary power to adjust a demand, and pay dues and costs, the adjustment is presumed correct, and, if the agent prosecutes for the money paid, it lies with the defendant to show an abuse of the discretion, or fraud in the adjustment. Sherman v. Crosby et al., 11 Johns. Rep. 70. And, in general, wherever a party alleges bad faith, he is held to the strictest proof, for the presumption is against him; he must not merely make his allegation probable, but must bring the weight of evidence distinctly on his side. Fort et ux. v. Metayer et al., 10 Mart. Lou. Rep. 436; Turnbull v. Martin, 10 Id. 419.

Though the law presumes the continuance of life, as will be seen, *post*, of the text, yet, in a case where this presumption comes in conflict with, and necessarily involves a presumption of crime, the former, which is the weaker, yields to the latter; and the party affirming that an individual is not dead, will be bound to prove it. Thus, on a question of settlement, where a woman, twelve months after her first husband was last heard of, married a second husband, and had children by him, it was held, on appeal to the sessions, that the onus of proving that the first husband was not dead at the time of the second marriage, lay on the party who objected to such second marriage; for the consequence of presuming life would be, that the woman had committed bigamy. Rex v. The Inhabitants of Twyning, 2 Barn. & Ald. 386. But in Doe ex dem. James v. Price (1 Mann. & Ryl. 683), where, in ejectment, the plaintiff relied on the invalidity of a second marriage, by reason of a former marriage by license, one of the parties being a minor, and the defendant had notice, previous to the trial, of the question intended to be raised (*s. c.* whether the former marriage was with the consent of the minor's parent), but on the trial gave little or no evidence negativing the fact of the parent's consent; and the entry in the register stated nothing in relation to it, but evidence was given, on the part of the plaintiff, showing that the parent knew of the former marriage; the court, after verdict for the plaintiff, refused to grant a new trial, although it was contended, upon the authority of Rex v. The Inhabitants of Twyning (*supra*), and other cases cited in the text, that the *onus* of proving express consent lay on the plaintiff. Bayley, J., delivering the opinion of the court, placed much stress upon the fact of notice having been given to the defendant of the ground intended to be taken by the plaintiff:—"And it was

his bounden duty to have procured every species of evidence that was calculated to negative the fact of the first marriage having been solemnized with the consent of parties." The decision does not conflict, in any respect, with the case of Rex v. The Inhabitants of Twyning, but goes upon the ground that it is not the duty of the court to grant a new trial, for the purpose of letting in evidence which might have been produced at the former trial.

Where a statute directs that the examination of a prisoner before a magistrate shall be reduced to writing (*e. g.* the Statutes of Phillip and Mary), the court will presume that the magistrate has done his duty; consequently no parol evidence can be given of a prisoner's declaration before a magistrate, without previous proof that it was not taken down in writing. *Ante*, note 151, and the cases there cited; in addition to which, see Rex v. Hall, Leach, 240; Rex v. Fearnshire, Id. 446; 2 Hawk. P. C., ch. 46, §§ 41, 42; 2 Starkie's Ev. 51. And so, doubtless, in New York, as to examinations under 2 Rev. Stat. 708, §§ 14, 15, 16. The rule is general, and almost without an exception, that officers acting under oath, or in whom the government reposes a trust, are presumed to have done their duty, till the contrary be proved. Thus, where it was the duty of an officer not to issue a grant until a certain warrant had been lodged with him, the court presumed that he had the warrant, from the fact of his issuing the grant. Hickman v. Boffman, Hardin's Rep. 348. This principle is equally applicable to a proceeding against the officer, and to a proceeding against the right of an individual, derived through the act of the officer. Id. That an officer, whose duty it is to search for personal property before he sells real, has so searched, will be presumed until the contrary is established. Beeler's Heirs v. Bullitt's Heirs, 3 Marsh. Ken. Rep. 280. And where an execution against C. was delivered to a deputy sheriff in December, returnable the third Tuesday of February following, and in March C. sold a pair of horses, of which he was possessed when the execution was delivered, and until its return day; the deputy sheriff afterwards took the horses, and sold them at sheriff's sale, under the execution; held, in an action of trespass against the officer by the purchaser of C., that, in the absence of any positive proof, it was fairly to be presumed that a levy had been lawfully made by the officer before the return day. Hartwell v. Root, 19 Johns. Rep. 345. So, where land is sold under a *fi. fa.*, and a deed executed by the sheriff, the court, in favor of the purchaser or those claiming under him, will presume a levy. Jackson ex dem. Sternberg et al. v. Shaffer, 11 Johns. Rep. 513. See Bliss v. Ball, 9 John. Rep. 132. And so the law presumes the sheriff to have given due notice of sale, until the contrary be shown. Topper v. Taylor et al., 6 Serg. & Rawle, 173. But when such evidence is produced as renders it probable that notice was not given, the onus changes to the person claiming under the sheriff's deed. Id An officer of the customs, duly commissioned and acting in the duties of his office, is presumed to have taken the regular oaths. United States v. Bacheldor, 2 Gall. Rep. 15. And every judgment of a court of competent jurisdiction is presumed correct; and it lies with the party seeking to impeach it to plead and prove the facts going to invalidate it. Lee v. Cooke, 1 Wash. 307. Exemplifications of the judicial proceedings of a foreign country are presumed correct; if incorrect, the *onus probandi* lies upon the party opposing their introduction as evidence. Woodbridge v. Austin, 2 Tyl Rep. 364, 366. In Massachusetts, where a field driver, chosen at an annual town meeting, was sued in trespass for taking cattle found going at large without a keeper, and impounding the same. it was held that such field driver was not bound to produce a record of a vote of the town, prescribing the time and manner of notifying town meetings, but that the notification would be presumed legal until the plaintiff should prove the contrary; or that the notice was so unreasonable as to raise a presumption of fraud on the part of those by whom the meeting was called. Gilmore v. Holt et al., 4 Pick. Rep. 258. In New York, where an objection was taken to the competency of a witness on the ground of his having been convicted of felony, and it was shown that the record of conviction was destroyed, parol evidence was held inadmissible, inasmuch as the transcript required by 1 R. L. 462 (K. & R.) to be sent to the Court of Exchequer, was the next best evidence; and it must be presumed that the district attorney had done his duty, and that the transcript had been duly filed by him. Hilts v. Colvin, 14 John. Rep. 182.

See, also, *ante*, note 177, where a considerable number of cases are cited illustrative of the same principle.

pleaded that the plaintiff had not read the thirty-nine articles, the court called on the defendant to prove the fact, though a negative: upon which he moved the Court of King's Bench for a prohibition; but it was refused, for the reason already stated.(1) In an action by the owner of a ship against the defendants for putting on board a quantity of combustible and dangerous articles, "without giving due notice thereof," the court held, that it lay upon the plaintiff to prove this negative averment.(2)

Breach of contract.

And the same principle will apply where one party charges the other with a breach of cotnract. Thus, in an action upon a contract to perform certain work in a workmanlike manner, the breach alleged being that the defendant did not perform the work in a workmanlike manner, but, on the contrary, performed it in a bad and unworkmanlike manner; where the defendant pleaded that he did perform the work in a workmanlike manner: here the affirmative allegation is made by the defendant, yet the burden of proof lies on the plaintiff;(3) for if no evidence were given on either side, the defendant would be entitled to the verdict; as the plaintiff, by the form of his breach, admits that the defendant had performed the work contracted to be done, though, as was alleged, it had been performed in an unworkmanlike manner; and as it would not be assumed that the work was badly executed, it is incumbent on the plaintiff to prove that allegation. If, on the other hand, the breach had been that the defendant had not performed the work at all, and the defendant had pleaded that he had performed the work, the burden of proof would have been shifted upon the defendant; for if no evidence had been given of the performance of the work, the plaintiff would have been entitled to the verdict.(4)

Breach of covenant stated negatively.

And in an action of covenant against a lessee, where the breach is, in the language of the covenant, that the defendant did not leave the premises well repaired at the end of the term, the proof of the breach lies upon the plaintiff:(5) this breach, though in terms it involves a negative,

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(1) Monke v. Butler, 1 Roll. Rep. 83; cited by Lord Ellenborough, C. J., 3 East, 199; Powell v. Millburn, 2 W. Bl. 851; S. C., 3 Wils. 355. See also Lord Halifax's Case, B. N. P. 298; R. v. Combs, Comb. 57; Gilb. Ev. 132; R. v. Hawkins, 10 East, 211, as to not taking the sacrament.

(2) Williams v. E. I. Company, 3 East, 193, 199.

(3) Amos v. Hughes, 1 Mo. & R. 464. In this case, as in most instances at Nisi Prius, the struggle was as to which party was *entitled* to begin, in order to have the advantage of a reply, in case the other party should call witnesses; the right to begin, however, is in point of fact an obligation, the real question always being upon which party the burden of proof is first thrown.

(4) See 1 Mo. & R. 465, note by the reporters.

(5) Soward v. Leggatt, 7 C. & P. 613.

NOTE 222.—There are many negative propositions which admit of easy and certain proof; for instance, that a man was not at a given place; this may be established by showing that he was

admits of as easy proof as if it had been expressed in the affirmative. So, where there was a covenant in a lease that the tenant should insure in some office in or near London, and the landlord insisted upon a forfeiture of the lease by reason of a breach of this covenant, it was held, that he must prove the omission to insure, as the law would not presume that the tenant had not satisfied the terms of the covenant.(1) If the landlord had wished to be relieved from this negative proof, he might have inserted a clause to that effect in the lease.(2)

In an action for a loss occasioned by barratry in the master of a ship, where it was objected by the defendant, that the plaintiff ought to prove that the master was not also the owner or freighter, and that he did not act under the direction of the person who was so (in which case barratry could not be committed), the court held, that if the master was owner or freighter, or acted under the direction of the owner, the burden of proving that fact lay on the defendant.(3) "It was not incumbent on the plain-

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at another place, so distant as to render it impossible to suppose he was at both; and in this and similar cases, the difficulty of showing a negative will have little or no weight in determining upon whom the onus lies. See Dranguet et al v. Prudhomme, 3 Miller's Lou. Rep. 184. In Wilmington v. Burlington (4 Pick. 174), the court say, "It was incumbent on the plaintiffs to show, first, that the father had not a settlement within the commonwealth; for though this is a negative in appearance, yet it is proved by showing where he resided." In an action of covenant of warranty of lands, if the plaintiff have voluntarily yielded to a dispossession, he must show want of title in the warrantor. But in case of eviction by force of a judgment, with notice of the suit to the warrantor, the judgment will be plenary evidence, unless obtained by fraud. Hamilton v. Cutts, 4 Mass. Rep. 349. Where one promised to indemnify another for doing a particular act; and the latter, on being sued for the act, gave a cognovit; on a suit by him against the former, upon the promise, it was held that the onus was upon the plaintiff, to show that the cognovit so given was not for too much. Stone v. Hooker, 9 Cowen's Rep. 154. In this case Hamilton v. Cutts (*supra*) is stated fully by the court and approved. In Lee v. Cooke (1 Wash. Rep. 306), in an action of covenant for breach of warranty respecting title to a slave, it was held incumbent on the defendant to plead and prove fraud or collusion in the judgment of eviction, if he would avoid its effect, even where the plaintiff did not attempt to prove notice of the suit to the warrantors; *sed quere*. See Blasdale v. Babcock, 1 John. Rep. 517; Barney v. Dewey, 13 Id. 224. In an action on a forthcoming bond in Virginia, it was held, that it was not incumbent on the plaintiff to prove non-performance, but that the onus lay with the defendant to show a delivery of the goods. Nichols v. Fletcher, 1 Wash. Rep. 330.

(1) Doe d. Bridger v. Whitehead, 8 A. & E. 571. As to the proof of the non-communication of material facts on the effecting of an insurance, see Elkin v. Janson, 13 M. & W. 655.

(2) For further instances, see Osborn v. Thompson, 9 C. & P. 337; S. C., 2 Mo. & R. 254; Cox v. Walker, cit. 9 C. & P. 339; Shilcock v. Passman, 7 Id. 291; Smith v. Davies, Id. 307; Ridgway v. Ewbank, 2 Mo. & R. 217; Doe d. Caldecott v. Johnson, 7 M. & G. 1047; Lambert v. Hall, 9 C. & P. 506.

(3) Ross v. Hunter, 4 T. R. 33, 38.

NOTE 223.—The law not merely requires proof from the party holding the affirmative, because it is impossible to prove the negative; but because the negative does not admit of the direct and simple proof, of which the affirmative is capable. Dranguet et al. v. Prudhomme, 3 Miller's Lou. Rep. 83, 86. See *post*, note 224, and cases there cited. Where, in Louisiana, a married woman sues to rescind her contract, on the ground that she was not legally authorized by the parish judge, or her husband, to make it, the onus is thrown on the party claiming the benefit of the contract. Dranguet et al. v. Prudhomme, 3 Miller's Lou. Rep. 74, 83. And if a person enter into

a contract to pay a sum of money, with a condition that the contract is to be void on the happening of a particular event; in an action for the money, the onus of proving that such event has happened, is on the defendant, if he would avoid the payment. Gray v. Gardner et al., 17 Mass. Rep. 188. And see Perry v. Botsford; Godefroy v. Jay; Wilbur v. Turner; Webster v. Lee; Hemenway v. Stone; Hays v. Lusk, cited in the next preceding note.

Where the plaintiff in ejectment shows the original grantee to be within the exception to the Statute of Limitations, proof that others deriving title from such grantee, are not within the exception, is unnecessary on his side. If relied upon to defeat a recovery, the proof must come from the defendant. Doe ex dem. Thompson v. Gibson, 2 Ham. Rep. 339.

Rees v. Smith (2 Starkie's N. P. C. 30), cited in the seventh edition of the text, was followed by Lacon v. Higgins (3 Stark. Rep. 178), to the same practice, where the defendant had pleaded coverture, without the general issue, in assumpsit for goods sold; but in a previous action for a similar cause, on a plea of non-joinder of one Cohen, and issue, the plaintiff being allowed, according to the then practice, to begin, and it being insisted that he should give all his testimony in respect to the non-joinder, thus replying by anticipation as in the other cases; Abbott, C. J., said: "The plaintiff does not know who Cohen is, except from the plea. He cannot meet the case till he is acquainted with it." The answer, we apprehend, would apply generally where the plaintiff begins with the burden of showing his wrong, his damages, or either; and such, we venture to say, has been generally deemed a sufficient answer in this country, beside the intrinsic difficulty of meeting an affirmative plea by negative testimony, before any evidence has been presented in support of that plea. It is farther evident, that the course laid down in the text would, in most instances, leave a great part of the plaintiff's evidence, thus given in advance, unintelligible. Beside, it seems to us that Rees v. Smith stands directly overruled, or much qualified, by the subsequent case of Browne v. Murray (Ryl. & Mood. N. P. Cas. 254). That was case for a libel, with the general issue and a justification. Held, that if the plaintiff (who was allowed to begin) would give evidence, in the first instance, in reply to the justification, he might do so; and then must give the whole of such evidence; but the plaintiff might wait for the evidence under the justification; and then produce such evidence in reply.

The slight innovations (they so appear to us) which have been made in circuit practice, upon the ancient right of beginning the cause, have, perhaps, better subserved the great purposes of a safe and speedy administration of justice. The parties have been, and still are, generally governed by the *onus probandi* as indicated by the record; the plaintiff beginning, and having the right of reply, in all cases where the defendant's pleadings, or any part of them, deny the whole or any part of the plaintiff's pleadings, so as to leave any single affirmative allegation on his side to be established by proof. Per Williams, J., in Comstock v. Hadlyme, 8 Conn. Rep. 261, and the cases there cited; per Parker, C. J., in Brooks v. Barrett, 7 Pick. 99; Browne v. Murray, 1 Ry. & Mood. N. P. Cas. 254. On the other hand, where the form of the defendant's pleadings is such as to admit all the plaintiff's averments, or leave him nothing to prove, the defendant is to begin and close the case. An instance is, where to a declaration in covenant, the defendant interposed the single plea of performance (Scott v. Hull, 8 Conn. Rep. 296, 303); or a plea of payment to a declaration upon a note. Id. 303, per Hosmer, J.

These propositions are in ordinary cases, sufficiently simple, and easily applied in practice. They are, however, not always so; or, if so, plausible grounds have been started for sometimes disregarding them. Thus, in avowry for rent arrear, the defendant stated that he had demised rooms to C. at £35 a year, for which he distrained; with four other avowries, varying in the statement of tenancies. The plaintiffs pleaded three pleas in bar to each avowry; *non tenuit*, *riens in arrere*, and *thirdly*, that C. had let other rooms to the defendant at £42 a year; and that it had been agreed between them that each rent should be set off against the other, which would, in consequence, leave the balance against the defendant. The defendant replied denying this agreement. At the circuit, Scarlett, A. G., for the defendant, insisted that the plea was merely saying *riens in arrere;* and beside, in an agreement to set off rent against rent, both parties are actors. Lord Tenterden, C. J., said he could not distinguish between replevin and any other action. Scarlett said that, in replevin, the plaintiff might always state something imaginary in a plea, which the defendant must deny; and so the plaintiff get the right to begin. Lord Tenterden, C. J.: "If these plaintiffs prove the agreement as stated in the third plea, and that the rent there mentioned is in arrear, there is an end of the action. I am afraid to make distinctions

in actions; and if there is an affirmative on the plaintiff, I think he ought to begin." And this was the course taken. Curtis v. Wheeler, 3 Carr. & Payne, 340; S. C., 1 Mood. & Malk. 493. In a subsequent case, there were five cognizances for rent in arrear, to which the plaintiff pleaded seventeen negative pleas. The eighteenth plea was to the five cognizances that the landlord and tenant had made an agreement, then abandoned it and made another, which was the demise contained in the cognizances; and this was also abandoned. The nineteenth was similar to the eighteenth plea, except in averring fraud in the second agreement. Replications denying the abandonment and the fraud. Bolland, B., said these pleas amounted very nearly to *non tenuit;* yet as, in point of form, the affirmative was on the plaintiff, he directed him to begin. Williams v. Thomas, 4 Carr. & Payne, 234. So on a plea of non-assumpsit to a declaration upon a promissory note, though the defence turn on payment, the plaintiff shall begin. *Per Cur.*, in Brooks v. Barrett, 7 Pick. 100.

Yet this right may be taken from the plaintiff, where the defendant will venture to give him a whole *prima facie* case, even on the general issue. This was conceded in ejectment by an heir. The defendant offered to admit that he was heir, and rely on a conveyance from the ancestor, which carried the title out of him. It was agreed, that if the defendant would admit the seizin of the ancestor as well as the heirship, this would entitle him to begin; but he declining to do so, the plaintiff began. Doe ex dem. Tucker v. Tucker, 1 Mood. & Malk. 536. In trespass *quare clausum fregit*, the defendants pleaded, 1. Not guilty; 2. A right of common, and 3. A right of way. The replications took issue on all these pleas, and new assigned as to the way. The defendants rejoined, taking issue on the replications, but withdrawing their plea of not guilty as to the new assignment. On a record so framed, the learned reporters remark, that the defendants would have a right to begin; and they cite a case (Rees v. Rogers) to that effect, *Cor.* Lord Tenterden, C. J., on a similar issue. Cross v. Johnson, 4 Mann. & Ryl. 290, in connection with note *a*, Id. 294, 295. On a plea of coverture to assumpsit for goods sold, the defendant consenting to admit the amount of the plaintiff's bill, was allowed to begin. Lacon v. Higgins, 3 Stark. Rep. 176.

But in trover, directed by the vice-chancellor, to try a title, with an order that the defendant should admit the finding and conversion, though the defendant offered to admit a full *prima facie* case in the plaintiff, he was not allowed to begin; for had the vice-chancellor intended such a course, he would have directed him to declare and proceed as plaintiff. Turbervill v. Patrick, 4 Carr. & Payne, 557.

As to the right of the defendant, he may begin upon a plea in justification of a libel, there being no general issue, although the plaintiff holds one affirmative there, viz: in making out his damages. Cooper v. Wakley, 3 Carr. & Payne, 470; S. C, 1 Mood. & Malk. 248. So on a plea of a right of way to an action of trespass *quare clausum fregit*, though the plea began with denying the force and arms, &c. Hodges v. Holder, 3 Campb. 366; Jackson v. Hesketh, 2 Stark. Rep. 518, S. P. So under a justification of an assault to suppress a mutiny. Bedell v. Russell, Ry. & Mood. 293. So of a justification for taking goods under proceedings upon a commission of bankruptcy. Cotton v. James, 3 Carr. & Payne, 505; S. C., 1 Mood. & Malk. 273. So on a justification in trespass, though the declaration allege special damage. Fish v. Travers, 3 Carr. & Payne, 578; per Lord Tenterden, C. J., in Fowler v. Coster, 1 Mood. & Malk. 242, 243. So on a plea of non-joinder of a defendant, in an action by indorsee against acceptor. Fowler v. Coster, 1 M. & M. 241. And see a case before Bayley, J., York summer assizes, 1821, 4 Stark. Ev. 2, note *b*, S. P.

Previous to the above more recent course of decision, the practice had fluctuated, some decisions allowing the plaintiff to hold the affirmative and begin the case, whenever he was put to prove unliquidated damages, although the defendant had met the case with a mere affirmative plea; as in assumpsit, against a money scrivener for negligence, who had pleaded the non-joinder of another, upon which issue was joined. Roby v. Howard, *Cor.* Abbott, C. J., 2 Stark. Rep. 555. Again, on a similar plea in assumpsit for goods sold, the plaintiff was allowed to show the amount of goods, and reserve his proof, as to the non-joinder, till the defendant went through with his case. Stansfield v. Levy, 3 Stark. Rep. 8. But on a plea of coverture, to a like action, Lord Abbott, C. J., told him that if he went into his case, as he had a right to do, in order to prove his damages, he must also introduce all his proof by anticipation to oppose the plea of coverture. Lacon v. Higgins, 3 Stark. 178. Other earlier cases held, on the contrary, that the defendant should begin, as we have seen in Hodges v. Holder, and Jackson v. Hesketh; though

a still earlier case is sometimes quoted as sustaining Roby v. Howard. See Young v. Bairner, 1 Esp. Rep. 103; no question as to the practice was raised.

The cases having thus conflicted on the question, when Fowler v. Coster (*supra*) came to be tried, Lord Tenterden, C. J., took occasion to remark, "It is certainly of importance that there should be a distinct general rule; but that rule need not be the same for every case, if it be such that its application is clear. No rule, probably, can be free from occasional inconvenience; but I think this is sufficiently general, and on the whole the most convenient; that wherever it appears on the record, or by the statement of the counsel engaged, that there is really no dispute about the sum to be recovered, but the damages are either nominal or else mere matter of computation, then, if the affirmative of the issue is on the defendant, he is entitled to begin. Here it is not pretended that there is any cause of action, except that on the bills of exchange; I think, therefore, that the defendant is entitled to begin." When, however, his Lordship came to the case of Cotton v. James, he admitted that he found the practice general that the defendant should begin whenever he held the affirmative on the record; though he evidently was dissatisfied with the practice as the least convenient, and therefore wanting the correct principle to support it. The learned reporters say, "This case seems to complete the series of those by which the doctrine that the plaintiff is entitled to begin where he has to prove damages sustained, have been, *for the present*, overruled." They, however, consider it doubtful whether the present doctrine will long continue, and enter into an elaborate vindication of the old practice as more convenient, more satisfactory to the bar, as avoiding all chance of a defendant's manœuvring for the general reply, on the question of damages, by putting a colorably affirmative defence on the record, and requiring each party to close his case at once. 1 Mood. & Malk. 278 to 281. The American (or, speaking according to our more limited knowledge, the New York) lawyer would doubtless prefer the more modern English practice, from the force of habit.

In proceedings where no common-law record comes into the case, and where, of course, the *onus probandi* is not technically presented, the courts still conform analogically, and, as it were, upon a mental record, to the principles which govern at common law. Thus, on an appeal from a court of probate, which decides for a will, the appellee shall open and close the case, because such would be the course on a declaration at law founded upon rights conferred by the will; and, beside, the onus of proof as to the execution of the will lies upon him who affirms that a will was made. Comstock v. Hadlyme, 8 Conn. Rep. 254; Phelps v. Hartwell, 1 Mass. Rep. 71; Buckminster v. Perry, 4 Mass. Rep. 593. Whereas, for the same reason, if the appeal be from a decree avoiding the will, the appellant shall begin. Brooks v. Barrett, 7 Pick. 94.

But in all these cases the judge exercises the right to make an exception, where anything of a peculiar character occurring on the trial, demands such a course as the most convenient. Thus, in the celebrated case of Goodtitle ex dem. Revett v. Braham (4 T. R. 497, tried at bar), the court said, if the heir (the lessor of the plaintiff) proved his pedigree and stopped, when the onus changed to the defendant, who set up a new case, he had the right to a general reply. The plaintiff's pedigree, on being stated, was admitted; and the defendant's case turned on a will, which the jury finally found to be a forgery. So, in another case, the defendants, in an action for money lent, pleaded in abatement the non-joinder of one hundred and sixty-three persons. The plaintiff proposed to show that the money was lent on the express individual credit of the defendants, he expressly refusing to lend on the credit of the others, who, with the defendants, were a club. Lord Tenterden, C. J., allowed the plaintiff, on this statement, to begin; which he did, and had a verdict upon the case thus specially made out, the defendant not being able to overcome it. He offered one of the club to contradict it; but he being interested, and not released, the attempt proved unavailing. Hare v. Munn, 1 Mood. & Malk. 241, 242, note *a*. Speaking of this case afterwards, when the same question was started before him in Fowler v. Coster (*ut supra*), Lord Tenterden said, "it was a peculiar case; and I thought the evidence which the counsel for the plaintiff opened was of such a nature, that it would be much more convenient to take it in the first instance. The counsel for the defendant did not object; and it was accordingly done; but I did not then lay down any general rule."

It is obvious, on the whole, that the right to begin and reply is a matter of discretion resting with the judge at the circuit. "It is a matter of practice, founded indeed upon the principle, that he who takes the affirmative, assumes the burden of proof; yet where there are several issues, or the burden of proof changes, as it frequently does in the course of the trial, as much

tiff," said Buller, J., "to prove that the captain was not the owner, for that would be calling on him to prove a negative; and if the captain were not the owner, it is immaterial who was: proof of that fact, which operates in discharge of the other party, lies upon him."

Value given for bill of exchange.

In an action by the indorsee against the acceptor of a bill of exchange, where the defendant pleaded that he accepted the bill for the accommodation of the drawer and without consideration, and that the drawer indorsed to the plaintiff without consideration; and the plaintiff replied that the drawer indorsed to him for good consideration; it was held, that it was not incumbent upon the plaintiff to begin and to prove that he gave value for the bill;(1) as in the case of an accommodation bill, the presumption of law is that the holder has given value for it; but the rule is otherwise, where the title of the holder is impeached upon the ground that the bill had been improperly obtained from the acceptor,—as, if it had been obtained by fraud or duress, or had been stolen or lost.(2)

Where offence, involving negative, created by statute.

Generally speaking, where an offence is created by statute, and negatives are used in the enacting part descriptive of offence, those negatives

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discretion must be allowed to the judge, as in case of a motion for a continuance, or for a new trial; and a mistake here is no more a ground for a new trial than in those cases." Per Williams, J., in Comstock v. Hadlyme, 8 Conn. Rep. 261. And with him agrees Hosmer, C. J., in the subsequent case case of Scott v. Hull, 8 Conn. Rep. 296, 303. The contrary is said in Brooks v. Barrett (*supra*), to have been adjudged in Massachusetts. 7 Pick. 98. We have seen, however, that the matter is otherwise treated in England, and held expressly otherwise in Connecticut; and there can be no doubt that an occasional departure from the general rule is often quite useful. By anticipating the proof of one party, in Hare v. Munn (*supra*), a long and idle course of testimony was probably prevented by a moment's examination on the part of the plaintiff; a course of testimony, too, which would otherwise have been *prima facie* applicable; and, in the usual order, therefore, entitled to a hearing. The editor has often witnessed this inconvenience in actions of ejectment. The defendant, perhaps, spends half a day in examining witnesses to make out an adverse possession, or a practical location, which is then overturned in a moment by showing that he is a squatter, or has taken as tenant, or he, or some one under whom he claims, has recognized the plaintiff's title, or done some act decisive of the location. The opening upon, and trying the short question in the first instance before the jury, would save delay and expense to both parties; for if the preliminary proof so heard would make the testimony on the other side obviously inapplicable or utterly unavailable, it then would cease to be competent. Hundreds of such cases might be adduced, to each of which, hours, if not days, have been unprofitably devoted. It will readily occur to the professional reader, that not only ejectment, but any other case may come within the same suggestion. A party goes on and proves a long account, to which there is known to be a decisive answer by a release, a payment, or an accounting and balance struck; a trial and determination, upon the short point of defence against the account, might save several days' examination before the referees.

(1) Mills v. Barber, 1 M. & W. 425. See also Whittaker v. Edmunds, 1 Mo. & R. 366.

(2) See 1 M. & W. 432. See also Lewis v. Parker, 4 A. & E. 838; Jacob v. Hungate, 1 Mo. & R. 445; Brown v. Philpot, 2 Id. 285; Smith v. Martin, Car. & M. 58; Bingham v. Stanley, 2 Q. B. 117; Bailey v. Bidwell, 13 M. & W. 73; Masters v. Barretts, 2 C. & K. 715.

(James v. Chalmers, 2 Selden R. 209, and cases cited in Edwards on Bills & Notes, 686–689.)

must be alleged in an indictment or information for the offence, and must be proved, for the negative there forms part of the offence; but it is different where the negative comes by way of proviso in the statute, in which case it must be insisted on by way of defence by the accused.(1) Thus, upon an indictment under the statute 42 Geo. III, c. 107, § 1,(2) which made it felony to course deer on an inclosed ground, "without the consent of the owner of the deer;" or on the statute 6 Geo. III, c. 36,(3) which made it felony to cut down trees "without the consent of the owner;" it was held, that it ought to appear, from the evidence produced on the part of the prosecution, that the owner had not given his consent.(4)

But this rule, as to the necessity of proving a negative, must be taken subject to another, namely, that the burden of proof lies on the person who has to support his case by proof of a fact which lies more peculiarly within his own knowledge, and of which he is supposed to be cognizant.(5) Thus, in an action for penalties under the old Game Laws, though the plaintiff must aver, in order to bring the defendant within the act, that he was not duly qualified, yet it is not necessary to disprove his qualification, but it will be for the defendant, if he can, to prove himself qualified.(6) And the same rule of evidence applies to proceedings on informations before magistrates: a conviction, therefore, which specifically negatives the several qualifications mentioned in the statute, is sufficient, without stating evidence to negative those qualifications.(7) If such negative evidence were necessary to support the information, it would scarcely be possible in any case to convict, in consequence of the great number of distinct heads of qualification which were enumerated in the statute. On the other hand, all the qualifications specified were peculiarly within the knowledge of the qualified person. If he were entitled to any such estate as the statute required, he might prove it by his title deeds, or by the receipt of the rents and profits; or if he were the son and heir apparent, or servant to any lord or lady of a manor, and appointed to kill game, that would be a good defence. All these qualifications were peculiarly

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(1) R. v. Jarvis, 1 East, 644, n. See also by Lord Kenyon, C. J., in R. v. Stone, 1 East, 650.

(2) Repealed by 7 & 8 Geo. IV, c. 27. See c. 29, which contains other provisions as to the offence.

(3) Repealed by 7 & 8 Geo. IV, c. 27. See c. 30, which contains other provisions as to the offence.

(4) R. v. Allen, 1 Moo. C. C. 154, overruling R. v. Rogers, 2 Camp. 654, where, upon an indictment for coursing deer, it was held to be necessary to call the owner to negative his consent. See also R. v. Hazy, 2 C. & P. 458; R. v. Mallinson, 2 Burr. 679; R. v. Corden, 4 Id. 2279.

(5) By Holroyd, J., in R. v. Burdett, 4 B. & A. 140. See also by Ashurst, J., in Dickson v. Evans, 6 T. R. 57, 60. And see 9 Price, 257; 5 M. & S. 211; 1 B. & C. 150; 3 B. & C. 242. But see Doe d. Bridger v. Whitehead, 8 & E. 571; *Supra*, p. 816.

(6) By Lord Mansfield, C. J., in Spieres v. Parker, 1 T. R. 144; by Heath, J., in Jelfs v. Ballard, 1 B. & P. 468; by Chambre, J., in Frontine v. Frost, 3 B. & P. 307. See also R. v. Stone, 1 East, 650.

(7) R. v. Turner, 5 M. & S. 206.

within the knowledge of the party himself; but the prosecutor had probably no means of proving a disqualification.(1)

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(1) By the new Game Act (1 & 2 Wm. IV, c. 32, § 42), it is expressly enacted, "that it shall not be necessary in any proceeding against any person under that act, to negative by evidence any certificate, license, &c., or other matter of exception or defence; but that the party seeking to avail himself of any such certificate, &c., shall be bound to prove the same." There are similar provisions in various modern statutes. As to proof of an apothecary's certificate, see Apoth. Co. v. Bentley, R. & M. 159.

NOTE 224.—Upon the question of jurisdiction, where the proceedings of a court of genera jurisdiction are alleged, the law presumes jurisdiction, and the onus of proving the contrary lies with the party who undertakes to question it. Lister v. Wright, 2 Hill, 320. But with respect to courts of limited and special jurisdiction, it is widely different; nothing is presumed in favor of their jurisdiction, and the party seeking to derive advantage from their proceedings is bound to show jurisdiction affirmatively. Stanian v. Davies, 2 Ld. Raym. 796; Peacock v. Bell, 1 Saund. 73, 74; Winford v. Powell, 2 Ld. Raym. 1310; Harvey v. Holland, T. Jones' Rep. 103; S. C., 3 Keble, 677; Berkley v. Paine, 1 Ventr. R. 28; Wallis v. Squire, T. Jones' Rep. 230; 1 Sid. 95; Littlebury v. Wright, 1 Ld. Raym. 63; Ladbroke v. Giles et al., Willes' Rep. 199; Sollers v. Lawrence et al., Id. 413; Moravia v. Sloper, Id. 30; Morse v. James et al., Id. 122; Mills v. Martin, 19 John. Rep. 7, 33, &c.; Bowman v. Russ, 6 Cowen's Rep. 234; Adkins v. Brewer, 3 Id. 206; M'Clung v. Ross, 5 Wheat. 116; Morgan v. Dyer, 10 John. Rep. 116; Wyman v. Mitchell, 1 Cowen's Rep. 316. The foregoing authorities clearly show, however, that after jurisdiction has once been established, every intendment is made in favor of the regularity and validity of the proceedings; and it would follow, therefore, that after proof of jurisdiction has once been introduced by the party asserting the proceedings or judgment of an inferior court, the onus of impeaching them devolves upon the other side. By pleading non-assumpsit to an action brought in a city court, wherein the plaintiff avers that this cause of action arose within the limits of the city, the defendant traverses such averment, and the burden of proving it devolves upon the plaintiff. Maples v. Wightman, 4 Conn. Rep. 376. *Vide* Wooster v. Parsons, Kirby's Rep. 27.

In Virginia, where a person visibly appearing to be *white* or an *Indian* is claimed as a slave, the presumption arising from his color is, that he is free; and the onus in such case lies upon the claimant, to show that he is a slave. But where the person claimed appears from external characteristics to be a negro, the contrary presumption prevails, and he must show his right to freedom. Hudgins v. Wrights, 1 Hen. & Munf. 133. And the court and jury may, in such instance, judge from *inspection*. Id.; Hook v. Paige, 2 Munf. Rep. 379. See also *ante*, note 177, in connection with Fox v. Lambson, 3 Halst. 275; Gibbons v. Morse, Id. 253; and Scott v. Williams, 1 Dev. 336, and *ante*, note 190.

In cases where the negative does not admit of direct proof, or the facts lie more immediately within the knowledge of the defendant, he is put to his proof of the affirmative; and where the general facts constituting a forfeiture within a statute are proved, and there are exceptions to its operation in particular cases, the better opinion is that the party who would avail himself of the exception must prove it; although, from the forms of pleading, it may be necessary for the other party to negative every exception in the indictment or information. Such negative allegation is, in such cases, to be repelled by affirmative proof on the other side. Accordingly, in a proceeding *in rem* against certain goods, under the acts of Congress of 1809 and 1814, which, together, prohibit all importations of goods from British ports, except importations in neutral vessels, it was held incumbent on the defendant to prove that the vessel was neutral, if he would avail himself of the exception contained in the act of 1814. United States v. Hayward, 2 Gallis. Rep. 485, 498, 499, 500. *Semble*, however, that if the charge against the defendants consisted in a criminal neglect of duty, it would lie on the plaintiffs to negative the exception, not only in their pleading, but by proof on the trial. Id. And see *ante*, note 221. But the court say, in this case, "the charge was not against the defendant *personally* or of a *criminal neglect* of duty, but against the goods only, of a positive act, to wit, an illegal importation." Id. 499, 500. In an action against

Fact alleged in defence.

Although, in general, it is necessary for a party who brings an action to prove all the material facts which he alleges in support of his claim, yet where the defendant pleads a fact within his own knowledge in discharge of himself, and the plaintiff still insists on the defendant's liability, alleging the same fact in his replication, there the burden of the proof lies on the defendant, not upon the plaintiff. Thus, in an action of assumpsit, where the defendant pleaded infancy, and the plaintiff replied that "the defendant, after he had attained his full age, ratified and confirmed the promise and undertaking," the court held, that the mere proof of a promise to pay was sufficient on the part of the plaintiff; and that it was for the defendant to prove the personal incapacity to contract, on which he grounded his defence, and which lay peculiarly within his own knowledge.(1)

On a trial for bigamy, the register of the first marriage being produced, which stated the marriage to be by license, without stating it to be by consent of parents or guardians, the prisoner in his defence proved that he was an infant at the time of the marriage; and it was held that this

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a carrier for loss happening at sea, by the vessel foundering, he must prove seaworthiness, before he is permitted to excuse himself on the ground of its being the act of God. If the facts of the case are such that the loss may be fairly attributed to inevitable accident, and the owner alleges that the vessel was not seaworthy at her departure, the *onus probandi* lies on him, and not upon the carrier. Bell v. Reed et al., 4 Binn. Rep. 127. In an action for a penalty, under 55 Geo. III, c. 194, against a physician for practicing "without having obtained such certificate as by the said act is required;" it was held that the onus, as to the certificate, lay with the defendant. The Apothecaries Company v. Bentley, Ry. & Mood. N. P. Rep. 159; Sheldon v. Clark, 1 John. Rep. 513, S. P., in a penal action against a physician for practicing *without license*. So on the trial of an indictment for selling spirituous liquors *without license*. Gearing v. The State, 1 M'Cord, 573, 574.

The rule, however, that the onus is on the party within whose peculiar means of information the fact lies, is not without its exceptions. Thus in ejectment, where a good title was shown in the lessor of the plaintiff, and the defendant, to show title out of the plaintiff, put in a deed from such lessor, to certain third persons, containing several exceptions or reservations; held that the burden of proving that the land in question was not within any of the excepting clauses, lay with the defendant. Greenleaf's Lessee v. Birth, 6 Peters' Rep. 302. Marshall, Ch. J., dissented from the doctrine established by this case, "because he understood it to impose on the defendant the necessity of proving a negative; and because the fact was within the knowledge of the plaintiff, and not of the defendant." Id. 315. Further, see Clarke's Lessee et al. v. Courtney et al., 5 Peters' Rep. 319. In Hawkins v. Barney's Lessee (5 Peters' Rep. 457, 469), it was decided that when the plaintiff's title, as exhibited by himself, contains an exception, and shows he has conveyed a part, and it is uncertain whether the defendants are in possession of the land not conveyed, the onus to prove the defendant on the ungranted part is on the plaintiff. See Guthrie v. Lewis's Devisees, 1 Monroe, 142.

(1) Borthwick v. Carruthers, 1 T. R. 648. See also Hartley v. Wharton, 11 A. & E. 934.

NOTE 225.—And where the plaintiff predicates his title to lands, upon a deed executed by two *femes covert*, with their husbands, the presumption is that they were of age; and if the defendant would avail himself of their infancy, he must prove it. Lessee of Battin v. Bigelow, Peters' C. C. Rep. 452. See Sherman v. Garfield, 1 Denio, 329. The plaintiff must, however, show a valid conveyance under the statute. Martin v. Dwelly, 6 Wend. 9; Knowles v. McCamly, 10 Paige, 342.

made it necessary on the part of the prosecution to give some evidence of the consent required by the Marriage Act.(1) Any subsequent countenance given by the parents or guardians, or other circumstances of a similar kind, might afford ground for presuming the necessary consent.(2)

A question very often arises at the trial as to which party is entitled to begin; and since the new rules of pleading this question has been more frequently discussed than formerly; and there have been several decisions upon the point. But although the question mainly depends upon the rule relating to the burden of proof, yet it appears to be rather dependent upon a rule of *practice* at the trial, than, strictly speaking, upon a rule of evidence. For this reason, it will not be entertained in the present work.(3)

CHAPTER XII.

OF THE RULE THAT THE SUBSTANCE ONLY OF THE ISSUE NEEDS BE PROVED.

ANOTHER general rule is, that the substance only of the issue needs be proved. This is founded on the principles of good sense and justice. If a party prove the substance of the issue, he has proved a substantial ground of action, and is entitled to his remedy. He will not be obliged to prove immaterial averments, which might be expunged from the record without affecting his right to recover. Such averments serve only to incumber the record; and the proof of them would be as immaterial as the averments themselves.

It is a general principle of evidence, that all the material facts alleged in the declaration, which are put in issue, must be established by legal proof.(4) Another principle is, that the nature and extent of the proof

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(1) R. v. Butler, R. & R. C. C. 61.

(2) Ibid. in note. As to the evidence requisite to show illegitimacy, see St. George (Parish) v. St. Margaret (Parish), 1 Salk. 123.

(3) See *supra*, p. 815, n. 3.

(4) NOTE 226.—The rule stated in the text, is one upon which all the authorities will be found to unite, whatever diversity of opinion may occasionally be found to prevail in regard to its application. It by no means requires, however, that all the matters stated in the pleadings should be proved exactly as they are alleged; for this would be not only inconvenient, to an extreme, but in the great majority of cases, to say the least, utterly impracticable. "Hence it is," says Mr. Starkie (4 Starkie's Ev. 1526), "that an artificial and legal identity must be resorted to, as the proper test of variance: that is, it is sufficient, if the proofs correspond with the allegations, in respect of those facts and circumstances which are, in point of law, essential to the charge or claim." See 9 Petersd. Abr. 152, note. The cases cited in the succeeding notes under this head, will afford ample illustrations of the above principle, with its exceptions. It should be noticed here, however, and remembered by the practitioner, that wherever a variance between the allegations and proofs is relied upon, either by the one party or the other, the objection must, in

will depend upon the manner in which the alleged facts are introduced; allegations which are merely matters of inducement, do not require such strict proof as those which are precisely put in issue between the parties.(1) Evidence, as Lord Mansfield used frequently to observe, is always to be taken with reference to the subject matter to which it is applied, and with reference to the person against whom it is used.

There are a great variety of examples, both in civil and criminal cases, which might be cited in illustration of the rule now under discussion. The object in the present chapter will be to make a selection of such examples as appear most generally useful: the nature of material and immaterial averments, and the doctrine of variances, will be also here considered.

1. Examples in civil cases.

In an action on a bond, if the defendant plead *solvit ad diem*, the issue will be maintained by proof of payment *before* the appointed day; and payment to a third person by the appointment of the plaintiff will be substantially payment to the plaintiff himself.(2)

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general, be taken at the trial of the cause, or it will not afterwards be heard. Hayden v. Nott, 9 Conn. Rep. 367; Lawrence v. Barker, 5 Wend. Rep. 301; West v. Andrews, 1 Barn. & Cress. 77; Smith v. Hicks, 1 Wend. 202. (Facts proved but not pleaded are not in general available to the party proving them; for the court pronounces its judgment *secundum allegata et probata*. 2 Comst. R. 506; Field v. The Mayor, &c., of New York, 2 Selden, 179; 20 Barb. R. 473.)

(1) By Chambre, J., 1 N. R. 210.

(2) NOTE 227.—So, a conveyance to the nominee of the defendant will support an allegation that "the defendant became the purchaser." Seaman v. Price, Ry. & Mood. 195. The question, say the court, was, substantially, whether the defendant had received the benefit of the conveyance, so as to make him liable for what he had agreed to pay the plaintiff for it. Upon a plea of payment, the defendant may prove a discharge in bank notes, negotiable notes on individuals, or a debt already due from the payee to the payor, delivered and accepted, or discounted as payment. Whittington et al. v. Roberts, 4 Monroe, 173, 174. "It is true," say the court, "that payment literally means a discharge of the obligation, according to its letter. But courts have extended the issue more to the spirit, and have not confined it to the letter." Bank notes, in conformity to common usage and understanding, are regarded as cash. Keith v. Jones, 9 John. Rep. 120; Miller v. Race, 1 Burr. 452; Grant v. Vaughan, 3 Burr. 1516. It has been held in Connecticut, that an averment of a defendant that he had sent cash, or money, to the plaintiff per mail, was not sustained by evidence that he had sent treasury notes, for "that treasury notes are not cash." Foquet v. Hoadley, 3 Conn. Rep. 534. Where the plaintiff avers performance of a condition precedent, he cannot sustain his averment by a tender, or an excuse for non-performance. Duckham v. Smith, 5 Monroe, 372. In an action by a minister of the gospel, for his salary, upon a count for services performed, it appeared that he had been prevented by the defendants from making use of the meeting-house, but that he preached in private houses to such as chose to attend; and it was held that there was no variance. Thompson v. Catholic Con. Society in Rheob., 5 Pick. 469. Proof that the defendant had a horse of the plaintiff for sale, does not support an allegation that he purchased it, and is debtor for the price. Johnson v. Crocker, 11 Mart. Lou. Rep. 617. An allegation in a real action, that the plaintiff was owner, is supported *prima facie*, by evidence, that he was in possession; for the law presumes possession to follow the title. Layton v. Menard's Syndics, 2 Mart. Lou. Rep. (N. S.) 505. Where the owner of a mill brought an action to recover damages for a diminution of the profits, occasioned by an obstruction erected by the defendant; it being alleged in the declaration that the plaintiff was possessed of the mill, and it appearing in evidence that the mill was occupied by a tenant at

In an action of covenant, when the breach assigned is, "that the defendant has not used a farm in a husbandlike manner, but on the contrary has committed waste," &c., to which the defendant pleads, "that he has not committed waste," &c., but used the farm in a good and husbandlike manner, and issue is taken upon this, the plaintiff cannot give evidence of any unhusbandlike treatment of the farm, not amounting to waste; for the issue is narrowed to this point.(1) So an allegation that the defendant as tenant used the premises in an improper manner, being a charge of voluntary waste, is not supported by evidence of permissive waste.(2)

In an action against a sheriff, where the plaintiff declared, that he had J. S. and his wife in execution, and that the defendant suffered them to escape, and a special verdict was found, that the husband alone was taken

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will at a reduced rent, on account of the obstruction, it was held that the declaration was supported by the evidence, as the injury was consequential upon an act done while the plaintiff was in possession, and also as the possession of a tenant at will is the possession of the landlord. Sumner v. Tileston et al., 7 Pick. 198. And where, in covenant, the declaration charged that *during a specified period of time*, the defendant deprived the plaintiff of the water necessary for his mill, by diverting it therefrom, and suffering it to be diverted by others; held, the plaintiff was not limited in proving acts committed by the defendant, or other persons, to the period stated in the declaration; but might prove previous acts, in consequence of which, the injury was sustained during the alleged time. Hollingsworth v. Dunbar, 5 Munf. 199. If a declaration aver that, in pursuance of an agreement, an action was discontinued; evidence that since the agreement no steps had been taken in the cause, is not sufficient to support the allegation. Fanshaw v. Heard, 3 Carr. & Payne, 190.

Where the gist of the action is negligence, the party will be confined to the species of negligence alleged (Breedlove et al. v. Turner, 9 Mart. Lou. Rep. 353); as where, in an action against an attorney, it was charged that he negligently brought a cause of a particular kind in the parish court; held, that he could not be made liable for neglect, in not introducing proof to show that the cause of action arose within the parish. Breedlove et al. v. Turner, *supra*, 343, 380. And, where issue is taken on the neglect of the postmaster, it is not admissible to show neglect in the assistant postmaster. Dunlap v. Munroe, 7 Cranch, 242. So, if the declaration alleges misfeasance, as the gist of the action, the plaintiff cannot go for non-feasance. Doane v. Badger, 12 Mass. Rep. 65, 69. In an action by a passenger in a coach, against the owner, for an injury done him in overturning; if the declaration state that the servants of the defendant negligently "drove, conducted, and managed the coach," the plaintiff cannot recover, if the negligence was in sending out an insufficient coach. Mayor v. Humphries, 1 Carr. & Payne, 25. But where the charge was that the defendants "so carelessly and negligently provided, fitted out, managed and conducted their stage coach," that while they were driving, it broke down, and injured the plaintiff; and the injury turned out to have been occasioned by the insufficiency of the coach itself, the nut, intended to secure one of the wheels, being shown unfit for that purpose, in consequence of which the wheel came off, &c.; held, that there was no variance. Ware v. Gay, 11 Pick. 106. In case, for an injury to the reversion, the plaintiff alleged the premises to be in the occupation of S. P. as tenant to him; and it was held that the allegation was sufficiently established by showing that S. P. had been let into possession by, and paid rent to, a *cestui que trust* to whom plaintiff was trustee. Vallance v. Savage, 7 Bing. 500. Under a count against a sheriff for a voluntary escape, the plaintiff is entitled to recover, if he prove a negligent one. Bonafous v. Walker, 2 T. R. 126. But in trespass, if the defendant plead a license to enter, and issue is taken thereon, evidence of a lease will not support the plea. Johnson v. Carter, 16 Mass. Rep. 442. See note 196.

(1) Harris v. Mantle, 3 T. R. 307.

(2) Martin v. Gilham, 7 A. & E. 540.

in execution (the execution being for a debt due from the wife before coverture), and that he escaped, the court held, that the substance of the issue was found, and gave judgment for the plaintiff.(1) In a similar action against the marshal, where the plea stated that the debtor returned into custody before action brought, and that thereupon the defendant before and at the time of the commencement of the suit, kept and detained, and *still did keep and detain him* in custody; it was held that evidence of a second escape after the commencement of the action, and before plea pleaded, was inadmissible on the part of the plaintiff; as the defendant would not be affected by anything which had occurred after action brought.(2)

In actions for slander, the courts used at one time to hold, that the plaintiff was bound to prove the words spoken precisely as laid; but it is now settled that it will be sufficient, if the plaintiff prove some material part of the words alleged on the record.(3) If the declaration contain several actionable words, the plaintiff will be entitled to a verdict on proving some of them.(4) But the rule is different, where the words are not actionable in themselves, and the action is brought for consequential damages arising from them: in that case, it is not sufficient to prove equivalent words of slander, though explained in the same sense by the defendant himself.(5)

In an action of replevin, where the defendant avowed taking the cattle

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(1) Roberts v. Herbert, 1 Sid. 5; S. C., cit. B. N. P. 299. And see Jones v. Clayton, 4 M. & S. 349.

(2) Davis v. Chapman, 2 M. & G. 921. And see Basan v. Arnold, 6 M. & W. 559; Bromfield v. Jones, 4 B. & C. 380.

Dexter v. Adams (2 Denio, 646), shows that if the plaintiff has used artifice to induce the debtor to escape, he cannot hold the sheriff for the escape.

(3) The witnesses must prove the words used, and will not be allowed to state the impression produced on their minds by them. Harrison v. Bevington, 8 C. & P. 708.

(4) Compagnon v. Martin, 2 W. Bl. 790. And see Willmett v. Harmer, 8 C. & P. 695.

NOTE 228.—It is sufficient, if the plaintiff proves the *substance* of the words laid in his declaration. Kennedy v. Lowry, 1 Binn. 393; Miller v. Miller, 8 John. Rep. 74; Grubbs v. Heyser, 2 M'Cord, 305; Nye v. Otis, 8 Mass. Rep. 122.

But the sense and manner of speaking, as laid in the declaration, must correspond strictly with the proof: therefore, words charged to have been spoken in the third person will not be supported by proof of words spoken in the second person. Miller v. Miller, 8 John. Rep. 74; M'Connell v. M'Coy, 7 Serg. & Rawle, 223, overruling Tracy v. Haskins, 1 Binney's Rep. 395, note; Wolf v. Rodifer, 1 Har. & John. 409.

(It is enough to prove the material words charged (Johnson v. Tait, 6 Binn. 121); but not enough to prove a general charge, as of perjury, where the complaint alleges a specific charge. Aldrich v. Brown, 11 Wend. 596; Emery v. Miller, 1 Denio, 208.)

(5) Armitage v. Dunster, 4 Doug. 291. See Maitland v. Goldney, 2 East, 434.

Nor can the plaintiff prove other words than those charged in the complaint to prove actual malice. Howard v. Sexton, 4 Comst. 157; Root v. Lowndes, 6 Hill, 519; Campbell v. Butts, 3 Comst. 174. Under the New York Code of Procedure, the defendant may allege and prove a state of facts tending to establish the truth of the words complained of as slanderous, in mitigation of damages. Brisley v. Shaw, 2 Kernan R. 67.

as damage feasant, the plaintiff pleaded in bar, that one W. was seized of a house and land, &c., whereto he had common, &c., and demised the same to him to hold from a certain day next before, for a year; the avowant traversed the lease, *modo et forma*, upon which issue was taken; the jury found a special verdict, that W. made a lease to the plaintiff on the day stated, for a year; and the plaintiff had judgment, for although this is not the same lease as pleaded (since this begins on the day, and the other not so soon), yet the court said, the substance of the issue is, whether or not the plaintiff had such a lease that by force thereof he might have common at the time, and this appeared to be the case here.(1)

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(1) Pope v. Skinner, Hob. 72; S. C., cit. B. N. P. 300. And see Forty v. Imber, 6 East, 434.

NOTE 229.—But the party will not be allowed to depart altogether from the issue, as if it had been proved that he had a right of common by lease from *another*. Pope v. Skinner, cited in the text. An averment of a demise for *three years*, in an action of replevin, is not supported by proof of a lease for one year certain, and *two years' further possession on the same terms, by consent of the landlord*. Alexander v. Harris, 4 Cranch, 299. So where the defendant, in his avowry, averred that the plaintiff, as his tenant, held and enjoyed certain premises for the space of *seven years* and six months, under a certain demise and at a certain rent, and by the evidence it appeared that the premises were held by the plaintiff only *six* years and six months, the variance was held fatal. Tice v. Norton, 4 Wend. Rep. 663.

The foregoing cases were decided upon common-law principles, which require the avowant to allege what estate he was seized of, and also the grant or demise to the tenant, with great precision and accuracy. The difficulties attending this practice, and the inconvenient length to which it has been carried, will appear by a note of Sergeant Williams to Pooly v. Longueville (3 Saund. 284 c, note 3). *Vide*, also, Wright v. Williams, 5 Cowen's R. 338, and the authorities there reviewed by Sutherland, J. Forty v. Imber, cited in the text, was decided under the more liberal provisions of 11 Geo. II, ch. 19, § 22, and expressly upon the ground that, by that statute, the rigor of the common law in this respect had been relaxed, and that, since its passage, the defendant in replevin might recover rent for a less period than he avowed for. A similar statute has been enacted in New York, which provides, that "Whenever a distress shall be made upon any lands or tenements, for any rents or services issuing out of such lands or tenements, and a replevin shall be brought for the property distrained, the defendant may avow or make cognizance generally, that the plaintiff in replevin, or other tenant of the lands or tenements whereon such distress was made, enjoyed the same under a grant or demise, or by any other title, at a certain rent, or by certain services during the time wherein the rent distrained for was incurred, which rent was then and still remains due; or that the place where the distress was taken was parcel of certain tenements for which the rent or service distrained for was, at the same time of such distress, and still remains, due; without further setting forth the grant, tenure, demise or title of the landlord or lessor; and without naming any person certain as the tenant of such lands or tenements." 2 R. S. 529, § 41. And by § 42, it is further provided, that "In an action of replevin for beasts distrained for doing damage, it shall be a good justification for the defendant to plead, avow or make cognizance that he, or the person by whose command he acted, was lawfully possessed of the lands and tenements upon which the distress was made; and that the beasts or chattels distrained were, at the time of such distress, doing damage therein; without setting forth a title to such lands and tenements."

How far these provisions will relieve the avowant from proving precisely what he alleges, should he, instead of avowing generally according to the statute, set out his title, &c., as at common law, remains to be settled by judicial construction. Under the English statute above referred to, it has been held, that although the defendant in replevin may avow generally, yet the contract for letting must be truly stated and proved. Thus, where the defendant avowed as bailiff of one Tate, for rent due from the plaintiff, as tenant of certain premises, to the avowant by virtue of a demise, &c.; and, on the trial, it turned out that the premises had been devised by

To a declaration in trespass the defendant pleaded generally that he had enjoyed as of right for thirty years *next before* the commencement of the action ;(1) the plaintiff replied that a life estate was outstanding for twenty-seven of the said thirty years; the defendant rejoined that such estate did not continue during any part of the said thirty years; and issue was thereupon joined. The defendant proved enjoyment during two periods, amounting together to thirty years, one period before, and one after the life estate; and it was held that the issue on his part was supported.(2)

In an action by a commoner for disturbing his common by putting on cattle, the defendant pleaded a right of common appurtenant for cattle levant and couchant; that the cattle in the declaration mentioned were the defendant's own commonable cattle levant and couchant, and that he put them on to use the common. The plaintiff replied that "all the said cattle in the declaration mentioned" were not the defendant's own commonable cattle levant and couchant, in manner, &c. It was held that the defendant maintained his issue by showing that on the occasion of every alleged disturbance, some of the cattle put on were levant and couchant; and that upon that issue the plaintiff could not insist on a surcharge:(3) as the word "all" was interpreted to mean that the levancy and couchancy was untruly alleged as to all the cattle; not that it was truly alleged of some, and falsely of others.

If the issue joined between the parties is, whether A. and B. were churchwardens, proof that one was, and not the other, would not be sufficient.(4) Where the declaration averred, that the plaintiff was constable of a particular parish, and that he was assaulted in the execution of his office as constable, and it appeared on the evidence, that he had been sworn in to serve for a whole liberty, of which the parish formed a part, this was held to be a material variance.(5)

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one Bradney to three trustees to sell; that, after the death of Bradney, the three trustees became parties to deeds of lease and release, by which the property was conveyed to Tate; but these deeds were executed by only two of the three trustees: under these circumstances, it was held, that as the defendant had alleged a title to the whole rent, and only proved a right to two-thirds of it, the variance was fatal. Philpott v. Dobbinson, 6 Bing. 104. But where the defendant avowed for rent in arrear, for a dwelling-house with the appurtenances, and it appeared that the plaintiff merely occupied the upper part of the house, and that the shop and yard were in the occupation of other tenants, it was held no variance. Page v. Chuck, 10 Moore, 264. And so, where the defendant avowed for rent, stating that the plaintiff held the closes, &c., at and under a certain yearly rent; and on the trial it turned out that the tenant held the closes mentioned in the declaration, and two others also, at the rent mentioned in the avowry; this evidence, it was decided, supported the avowry, inasmuch as each part of the land was liable for the entire rent; and the defendant might well say, that the closes in which the distress was taken were held under the whole rent, payable for all the closes. Hargrave v. Shewin et al., 6 Barn. & Cress. 34.

(1) Under 2 & 3 Wm. IV, c. 71, §§ 1, 4, 7.

(2) Clayton v. Corby, 2 Q. B. 813.

(3) Bowen v. Jenkin, 6 A. & E. 911. See Barnes v. Hunt, 11 East, 451.

(4) B. N. P. 299.

(5) Goodes v. Wheatly, 1 Camp. 231.

A plea of tender will be supported by proof of a tender of a larger sum than that named in the plea;(1) but if the plaintiff reply to such a plea, that, before the cause of action and after the tender, he demanded the sum tendered, he will be obliged to prove, under the issue joined upon this replication, a demand of that specific sum. The proof of a demand of a *larger* sum would not support the issue.(2) A plea of payment in accord and satisfaction will be sustained by proof of the payment of a sum sufficient to cover the plaintiff's real demand, and it will not be necessary to show payment of the whole sum stated in the plea.(3)

2. Examples in criminal cases.

The same general rule of evidence applies, if possible, still more strongly to the case of criminal prosecutions than to civil suits; as it is an universal principle, which runs through the whole of the criminal law, that it will be sufficient to prove so much of the indictment as charges the defendant with a substantive crime.(4)

If the indictment charges that the defendant did, and caused to be done, a particular act, it is enough to prove either one or the other. If the defendant is charged with composing, printing, and publishing a libel, he may be convicted only of the printing and publishing.(5)

On an indictment for obtaining money under false pretences, it is not necessary to prove the whole of the pretences charged; proof of part of the pretences, and that the money was obtained by such part,(6) is suffi-

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(1) Dean v. James, 4 B. & Ad. 546.

(2) Rivers v. Griffiths, 5 B. & A. 634; Spybey v. Hide, 1 Camp. 181; Brandon v. Newington, 3 Q. B. 915, overruling Tyler v. Bland, 9 M. & W. 338. See Cotton v. Godwin, 7 M. & W. 147; Hesketh v. Fawcett, 11 M. & W. 356.

(3) Falcon v. Benn, 2 Q. B. 314.

(4) By Lord Ellenborough, C. J., in R. v. Hunt, 2 Camp. 583.

(5) R. v. Hunt, 2 Camp. 583; R. v. Williams, Id. 646; R. v. Middlehurst, 1 Burr. 400. See, also, cases in 2 East P. C. 515, 516, and in 2 Russ., Cr. & M., by Greaves, bk. 6, ch. 2, § 3, p. 786, *et seq.*

(6) R. v. Hill, R. & R. Cr. C. 190.

NOTE 230.—But where an indictment for obtaining money by false pretences, alleged that the false pretence consisted in the defendant's having said that he had paid a sum of money into the bank, and the proof was, of his having said that a sum had been paid into the bank, without saying by whom, the variance was held fatal. Rex v. Plestow, 1 Camp. 494. The case goes upon the ground that there was a difference in substance between the two assertions. It is not essential, however, to prove that the prisoner used the identical words which are alleged; acts and conduct, which virtually amount to the false pretence charged, will be enough. 4 Starkie's Ev. 563, 564.

The rule that all the pretences charged in the indictment need not be proved, unless indeed all are necessary to constitute the offence charged, has been recently recognized in New York (The People v. Haynes, 11 Wend. 557); and in this case it is laid down, that where the false pretences proved are, *per se*, sufficient to constitute the offence, the accused will be convicted; and those not proved may be regarded as surplusage. See also Rex v. Perrott, 2 Maule & Selw. 379, S. P. Nor is it necessary that the pretences charged should be the sole inducement to the credit or delivery of the property; it is enough if they had so material an effect in procuring the credit or inducing the delivery, that without their influence the party defrauded would not have

cient; unless the false pretences were so connected as to be incapable of separation.(1)

On an indictment for burglary and stealing goods, if it appear that no burglary was committed, as where the breaking and entering were not in the night—or on a charge of robbery, where the property was not taken from the person by violence, or by putting him in fear—the prisoner may be found guilty only of the simple larceny, or stealing.(2)

On the trial of an indictment for murder, the jury may find the prisoner guilty of manslaughter only; for the principal matter is the unlawful killing, and the malice is only a circumstance in aggravation.(3) And if the manner or means of the death, proved at the trial, agree in substance with the means charged in the indictment, it will be sufficient; as where the indictment is for killing with a dagger, and the evidence proves the killing with a staff; or if the indictment be for killing with one sort of poison, and the evidence proves the killing with another; such evidence maintains the indictment, because the proof of the identical instrument is not absolutely necessary to the proof of the fact itself;(4) but if the charge is for poisoning, and the death is proved to have been caused by striking or starving, this evidence would not support the indictment, as the species of death in the one case is totally different from that in the other.(5)

If the indictment charges that A. gave the mortal blow, and that B. and C. were present, aiding and abetting, &c., but on the evidence it appears that B. struck, and that A. and C. were present, aiding, &c., this is not a material variance, for the stroke is adjudged in law to be the stroke of every one of them, and is as strongly the act of the others, as if they all three had held the weapon and had struck the deceased.(6) The identity of the person supposed to have given the stroke, says Foster, J., is but a

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given the credit, or parted with the property. The People v. Haynes, *supra*. Where several act in concert, the pretence conveyed by the words of one, in the presence of the rest, will support an allegation of false pretence by all. Young v. The King, 3 T. R. 98. So if the others be not present, provided what is said by one be in pursuance of a previous confederacy among all. Livermore v. Herschell, 3 Pick. 33.

(1) R v. Wickham, 10 A. & E. 34.

(2) 2 Hale P. C. 302; 2 East P. C. 784. And see R. v. Withal, 1 Lea. 88.

(3) Mackalley's Case, 9 Rep. 67 b; Co. Lit. 282 a; Gilb. Ev. 233. So upon a trial for petit treason, the prisoner might have been found guilty of murder only. Case of Swan and Jefferys, Fost. Disc. 104.

(4) Mackalley's Case, *ut supra;* Gilb. Ev. 231; 1 East P. C. 341; Donellan's Case, 2 Hale P. C. 185. And see R. v. Clark, 1 B. & B. 473; R. v. Jackson, 18 How. St. Tr. 1075; 3 Inst. 135; R. v. Grounsell, 7 C. & P. 788; People v. Colt, 3 Hill, 432.

(5) See the authorities cited last note, and 2 Inst. 319. By a bill "for further improving the administration of criminal justice," recently introduced by Lord Campbell into the House of Lords and ordered to be printed 13th February, 1851, it is proposed to be enacted (by § 2), that in indictments for murder or manslaughter, the means by which the injury was inflicted need not be specified, but that it shall be sufficient to say that the person accused did "kill and murder," or "kill and slay" the deceased.

(6) Mackalley's Case, 9 Rep. 61 b; 1 Plowd. 98; Wallis's Case, 1 Salk. 334; Fost. Disc. 351; Towle's Case, on stat. 43 Geo. III, c. 58, 3 Pri. 145.

circumstance, and in this case a very immaterial one. The stroke of one is, in consideration of law, and in sound reason too, the stroke of all. They are all principals in law, and principals in deed.(1)

On the other hand, if two persons are indicted as principals, and one is proved to be only accessory, he must be discharged on this indictment,(2) for in consideration of law their offences are quite different. And one indicted as accessory before the fact cannot be convicted upon evidence proving him to have been (principal in the second degree) present, aiding and abetting, at the fact.(3)

In Mackalley's Case,(4) where the prisoner was tried for the murder of a serjeant at-mace in London, the indictment charged that the sheriff made a precept to the serjeant for the arrest, and it appeared upon the evidence that there was no such precept, but that the serjeant made the arrest *ex officio* at the plaintiff's request, on the entry of the plaint according to the custom of the city; and all the judges held, that the variance between the indictment and the evidence was not material, because the warrant to arrest was only a circumstance, and the substance of the matter had been found, which was, that the prisoner killed an officer in the lawful execution of legal process. The judges were also of opinion that the indictment might have been general (that the prisoner feloniously and of his malice prepense killed, &c.), and that the special matter might have been given in evidence; and since the indictment contained such an averment, they held that the charge of murder had been proved, notwithstanding that the special matter given in evidence might vary in substance from the special matter contained in the indictment.(5)

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(1) NOTE 231.—So where A. was named in the indictment as principal for maiming, and D. as aiding and abetting, the court charged that if both were present and one only committed the offence, and the other was aiding and abetting, "both are equally guilty," both may be said to have done the act, and both are answerable for it as principals;" and further, that even if the jury found "that D. was principal, and A. accessory, the indictment would be sustained." The State v. Mairs, 1 Coxe's Rep. 453, 457. This must, of course, mean where the punishment is the same.

(2) Gilb. Ev. 232. See Fost. Disc. 361.

(3) R. v. Gordon, 1 East. P. C. 352.

NOTE 232.—In New York (2 R. S. 698, § 6), persons who are principals in the second degree in the commission of felony, or who are accessory to a murder or felony before the fact, are amenable to the same punishment as principals in the second degree. Accessories after the fact, however, are liable to a milder punishment. Id. 699, § 7.

(4) 9 Rep. 61 b.

NOTE 233.—In order to make killing a bailiff, by resisting the execution of mesne process in a civil action, amount to murder, *it seems* necessary to prove the *writ* as well as the sheriff's warrant to the bailiff. Rex v. Mead, 2 Stark. Rep. 205, and see note *a*, 207; also Rex v. Meade, 1 Holt's N. P. Rep. 593, S. P.

(5) NOTE 234.—As the result of the cases cited in the text, and others, relating to the same subject, Mr. Chitty, in a very lucid dissertation on the rules of proceeding in criminal cases, gives the following: "The jury may acquit the defendant of a part, and find him guilty of the residue. Thus, they may convict him upon one count of the indictment, and acquit him of the charge contained in another; or upon one part of a count capable of division, and not guilty of the other

part; as on a count for composing and publishing a libel, the defendant may be found guilty of publishing only. And, in general, where, from the evidence, it appears that the defendant has not been guilty to the extent of the charge specified, he may be found guilty, as far as the evidence warrants, and be acquitted as to the residue; as, where he is charged with engrossing 1,000 quarters of wheat, and the evidence amounts to but 700 (Hawk. b. 2, c. 26, § 75); but if a contract be described, it must be proved as laid, and the jury cannot find a variant contract. 2 Hawk. b. 2, c. 26, § 75; Lane, 19, 59, 60. And where the accusation includes an offence of inferior degree, the jury may discharge the defendant of a higher crime, and convict him of the less atrocious. Thus, upon an indictment for burglariously stealing, the prisoner may be convicted of the theft, and acquitted of the nocturnal entry (1 Leach, 36, 88; 2 East P. C. 516; 1 Hale, 559, 560; Hawk b. 2, c. 47, § 6; 1 Hale, 560; Com. 478; 2 Hale, 302); upon an indictment of murder, he may be convicted of manslaughter (Co. Litt. 282 a; 2 Rol. Rep. 460; Cro. Eliz. 296; 3 Dyer, 261 a; 2 Hale, 302, 292, 293; Hawk. b. 2, c. 47, § 4); on an indictment on the statute of stabbing (1 Jac. I, c. 8), he may be acquitted of the statutable offence, and found guilty of felonious homicide. Style, 86; 2 Hale, 302; Hawk. b. 2, c. 47, § 6. On an indictment for stealing privately from the person, he may be found guilty of the larceny only. 1 Leach, 240; 2 Hale, 302; Hawk. b. 2, c. 47, § 6. On an indictment for grand, the offence may be reduced to petit larceny. 2 Hale, 302; 2 Str. 1134; Hawk. b. 2, c. 47, § 6. Robbery may be softened into felonious theft (2 Hale, 302; Hawk. b. 2, c. 47, § 6); and petit treason lessened to murder, or any description of less atrocious homicide. 1 Leach, 457; 2 Hale, 302, 292; 1 East P. C. 339, 356; Fost. 104; Hawk. b. 2, c. 47, § 6. And on an indictment founded on a statute, the defendant may be found guilty at common law. Hawk. b. 2, c. 46, § 178.

The only exception to this rule seems to be, where the prisoner, by being originally indicted for a different offence, would be deprived of any advantage which he would otherwise be entitled to claim; in which case the prosecutor is not permitted to oppress the defendant, by altering the mode of proceedings. A defendant, therefore, cannot be found guilty of a misdemeanor on an indictment for felony, because he would by that means lose the benefit of having a copy of the indictment, a special jury, and of making his full defence by counsel. Str. 1137; Kel. 29, 30; 12 Mod. 520, n. b; Cro. Car. 332; Hawk. b. 2, c. 47, § 6. And though it was formerly thought that if, after conviction of felony, the fact appeared to be a mere trespass, judgment might be given for the latter (Hawk. b. 2, c. 47, § 12; Cro. J., 497, 498; 2 Str. 1137), the contrary is now established, and the prisoner is entitled to have the judgment altogether corrected. 1 Leach, 12; 2 Str. 1137. Upon the same principle, no one can be convicted of petit treason on an indictment of common murder, because he would thereby lose the benefit of the larger number of peremptory challenges (Fost. 304, 328); but, in an indictment for the former, he may be properly convicted of the latter, because he thereby enjoys a higher benefit, instead of losing any privilege to which he may be entitled. 1 Leach, 437; 2 Hale, 302; 1 East P. C. 339, 356; Fost. 104; Hawk. b. 2, c. 47, § 6. Where the offence appears from the evidence to be of a higher degree than is alleged in the indictment, it is in the discretion of the court to discharge the jury, and direct another indictment to be preferred. Fost. 327, 328, 104. Thus, where a prisoner is accused of murder, and the crime amounts to petit treason, the court will not direct an acquittal, but discharge the jury of that indictment, and direct a fresh bill to be preferred, lest he should avail himself of the previous acquittal." Id.; 1 Chitty's Crim. Law, 637, 638, 639. Upon an indictment for burglary and larceny against two, one may be found guilty of the burglary and larceny, and the other of the larceny only. Rex v. Butterworth, Russ. & Ryan, 344. On an indictment against two, charging them with a joint larceny; one was found guilty of a capital offence, and the other of a simple larceny; thus presenting the question, whether sentence of death could be passed upon the one capitally convicted, or whether the verdict of the jury was not virtually an acquittal of both. The case coming to be considered by the judges, they were of opinion that judgment could not be given against both; but that on pardon being granted, or a *nolle prosequi* entered, as to the one convicted of a simple larceny, judgment might be given against the other. Rex v. Hempstead, Russ. & Ryan, 334.

The American cases will be found substantially accordant with the doctrine stated above. On an indictment for a forcible entry and detainer, the jury may acquit, as to the entry, and convict of the detainer. The People v. Anthony, 4 John. Rep. 198; Commonwealth v. Rogers, 1 Serg. & Rawle, 124. So, on an indictment for grand larceny, the jury may convict of petit larceny.

The State v. Wood, 1 Rep. Const. Court, 29. And proof of a rape will sustain an indictment for a mere attempt to commit one. State of Connecticut v. Shepherd, 7 Conn. Rep. 54; Commonwealth v. Cooper, 15 Mass. Rep. 187. So, under an information for an assault, with intent to commit manslaughter, it has been held, the defendant might be convicted of the offence charged, though the proof was of an assault, with intent to murder. State of Connecticut v. Parmelee, 9 Conn. Rep. 259.

By the Revised Statutes of New York, several crimes are distributed into degrees; as first second and third degrees of manslaughter, burglary, forgery, &c., and different punishments are affixed to these degrees respectively, wherefore it becomes necessary to state the degree in the indictment. The same statutes (Vol. 2, 702, § 56), provide, that on trial of an indictment for actually committing a crime, there shall not be a conviction of an assault with intent, or an attempt to commit the crime; though (by Id. § 27), where the offence consists of different statute degrees, the jury may acquit, as to the degree charged, and convict of any inferior degree of the same offence, or of an attempt to commit the offence. Under a previous provision (Id. 665, § 36), Quoteau was indicted for an assault and battery, with a deadly weapon, upon Meigs, with intent to murder. In proof, it turned out to be a mere assault, but no battery; which is made an independent crime by a subsequent section. Id. p. 66, § 39. An objection was therefore taken, that the case not coming within the Revised Statutes respecting convictions of inferior degrees, the defendant must be acquitted. Held otherwise, and that the above common-law doctrine applied. People v. Quoteau, Franklin O. & T., Feb. 1834, Cowen, C. Judge, presiding.

It is proper to observe here, that the rules of evidence in criminal cases are, in most respects, the same as in civil cases; the chief distinction which prevails will be found to originate in that caution which is always observed when life or liberty is in question, and in those benign presumptions with which the law meets every accusation involving moral turpitude. See United States v. Porter, 3 Day's Rep. 283, per Livingston, J. See also 2 Hale's P. C. 193; 4 Burr. 2082. The prosecutor must prove all the facts alleged in the indictment, entering into the substance of the charge; and all the distinctions between material and immaterial averments are equally well settled in criminal as in civil cases. See *post*, note 239. As to allegations respecting *time*, in an indictment, see *post*, note 248, and *place*, see *post*, note 249.

In The State v. Mairs (1 Coxe's Rep. 453), the prisoner was indicted for maiming, by feloniously cutting off the nose of a man with a knife; upon the trial, some observations having been made as to the manner in which the act was done, Kinsey, C. J., in charging the jury, remarked: "That the substance of the crime charged is the willful and deliberately cutting off the nose, and whether this is effected by one instrument or another is perfectly immaterial. I think I may go further, and say, if the party deliberately and with the intention of biting off the nose of another, watches his opportunity and effects his purpose, the nose may be said to be cut off, and the jury would be bound to find so. It is not necessary to prove to have been done with a knife, as laid in the indictment."

A variance as to an allegation of number, magnitude or value, is in general unimportant; provided that what is proved in respect to these particulars is sufficient to constitute the offence charged (Rex v. Jenks, 2 East's P. C. 514; 1 Hale, 513; 1 Holt, 595; 2 Campb. 264); and so of sums of money. Rex v. Gilham, 6 T. R. 265. In treason, a variance between the proof and indictment, as to the number of insurgents, is not material. United States v. Vigol, 2 Dall. 347. Where an indictment for a nuisance to a highway alleged it to be a way for all the liege subjects, &c., to go with their horses, coaches, carts, and carriages; and the evidence was, that carts of a particular description, and loaded in a particular manner, could not pass; held, not a misdescription, it not being laid as a highway for *all carts, carriages*, &c. Rex v. Lyon, Ryan & Moody, 150. But if an indictment allege that a bridge was a public carriage bridge, and also for the king's subjects to pass, &c., on foot; and it appear that it had been used by passengers on horseback and on foot, and not with carriages, the defendant cannot be convicted of any part of the charge. Per Bayley, J., in Rex v. Inhabitants of Lancashire, Lancaster Summer Assizes, 1820, 4 Starkie's Ev. 316. And whenever the allegation is an essential ingredient of the offence charged, or where it goes merely to describe or qualify that which is material, the proof must correspond with it. Hence, writings produced in evidence must not vary from the statements they are intended to sustain, and very slight discrepancies have been occasionally held fatal in such cases. The strictness, however, with which this principle applies, depends much

3. Of material and immaterial averments in civil suits.

A great variety of cases occurs in the books with respect to the necessity of proving averments in pleading. Material averments must be proved. If a variance occurs between a material averment and the proof, the party upon whom the burden lies of establishing such averment will be defeated. On the other hand, immaterial averments need not be proved. It is a general rule, that a variance between the allegation and the proof will not defeat a party, unless it be in respect of matter which, if pleaded, would

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upon whether the indictment purports to set out the writing according to its *legal effect*, or in the *very words*. In the former case, it will suffice if there be no variance in substance, while in the latter, the prosecutor is held to an accurate recital. But even in the latter instance, a mere literal variance in the spelling of a word, where the word is not changed to another of different meaning, will not be fatal. See 10 Petersd. Abr. 508, 509, note, and cases there cited, and *post*, note 247. Where the indictment was for forging a note, and the note produced had an indorsement upon it, which was likewise forged, the court held the indorsement no part of the instrument; and, therefore, not necessary to be set out. Commonwealth v. Ward, 2 Mass. Rep. 397. So where the indictment was for forging a bank bill, and purported to set forth the bill in "words and figures," in which case a strict recital was admitted to be necessary; held, that the number of the bill, and the figures in the margin marking its amount, were not parts of the bill, and the omission to set them out constituted no variance. Commonwealth v. Bailey, 1 Mass. Rep. 62; Commonwealth v. Stevens, 1 Mass. Rep. 203, S. P. And it is not necessary in such cases to set out the ornamental parts of the bill, as the devices, mottoes, &c. Commonwealth v. Searle, 2 Binn. 332; Commonwealth v. Bailey, Commonwealth v. Stevens, *supra*. The above cases go upon the ground, that it is only necessary to set out so much of the bill as contains the evidence of the contract. If other parts of the bill, however, are set out, the allegations and proofs must agree. The name of the bank, in such cases, must be truly set out; and a variance in this respect will be fatal. Knight v. Mitchell, 2 Const. Rep. 668.

The intention of a party at the time of committing the offence alleged is often an essential ingredient in it; and when so, it must be proved. 10 Petersdorf's Abr. 509, note. An indictment, however, for perjury, with an intent to defraud A., will be sustained by proof of an intent to defraud A. & B. Veazie's Case, 7 Greenl. 131. So if the allegation is, of an assault upon a female child, with intent to abuse and carnally know her, the defendant may be convicted of the assault with intent to abuse her, though the jury negative the rest of the intention. Rex v. Dawson, *Cor.* Holroyd, J., York Summer Ass. 1821, 4 Stark. Ev. 1586. And if a libel be alleged to have been published with intent to bring the administration of justice into contempt, and also to defame particular persons, the defendant may be convicted if either intent is proved. Rex v. Evans, *Cor.* Bayley, J., Lanc. Spr. Ass. 1821, 4 Stark. Ev. 1586. Where words are of the gist of the offence, they must be proved as laid; and if there be any particular variance between the words proved and those laid, even if laid as spoken in the third person, and proved to have been spoken in the second, or laid as spoken affirmatively, and proved to have been spoken by way of interrogation, or the like, the defendant will be acquitted. Rex v. Berry, 4 T. R. 217; 10 Petersd. Abr. 509, note. Where, however, an indictment for perjury stated all the evidence charged as perjury, but other statements not altering the sense intervened between the matters set out; it was held to be no variance, though in the indictment the evidence appeared to have been given continuously. Rex v. Solomon, Ryan & Mood. 252. In an indictment for perjury in an answer to a bill in chancery, the bill was described as exhibited against three persons only, A., B. and C.; and, upon being produced, was found to be against four, A., B., C., and D.; held, that "if the indictment had professed to set forth the title of the bill, such a variance would have been fatal, but that the bill was substantially described, and that is sufficient." Rex v. Powell, Ryan & Mood. 101. As to allegations in respect to matters of inducement, see note 236; and of surplusage, see note 239.

be material. If the variance be in respect of matter not essential to maintain the action or the plea, it is of no importance.(1)

Many of the variances in civil suits, of the kind mentioned in the course of this chapter, might now be corrected by an amendment under the statutes which will be presently noticed; and some of them would be remedied by the general rules of the courts under those amending acts; but it will, nevertheless, be useful to refer to them, as illustrative of the principle under consideration.

In an action of tort.

The general rule in actions of tort is, that it will be sufficient if part

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(1) By Abbott, C. J., 3 B. & C. 122. As to the distiction between material and immaterial averments, see Steph. Plead. 93, *et seq.*; 2 Wms. Saund. 199, n.; 1 Smith Lea. Ca. 328, n.

NOTE 235.—Where the priority of facts in point of time is wholly immaterial, though the facts themselves are not so, a variance from the priority as alleged will not be fatal. Thus, if a declaration on a policy of insurance allege that *after* the making of the policy the ship sailed, when in fact she sailed before. Peppin v. Solomons, 5 Term R. 496, cited in the text, *post.* Otherwise where the priority is rendered material by being descriptive of the injury sustained: thus, in an action on a policy of insurance at and from Mogadore to London, the declaration averred, that after the loading of the goods on board, the ship with goods departed; and afterwards, while the ship was in the course of her voyage, they were destroyed by perils of the sea; and the proof was, that before the ship had half her cargo on board, she was driven from her moorings and lost. Per Gibbs, C. J.: "I agree with the principle that where immaterial averments are connected with material averments, though the immaterial averments are not proved, yet if the material ones are proved, the plaintiff is entitled to recover. I subscribe likewise to the authority of the case of Peppin v. Solomons; for whether the ship sailed before or after the making of the policy was perfectly immaterial. The material question was, whether she sailed on the voyage. I subscribe likewise to the propriety of that decision in Rhind v. Wilkinson (2 Taunt. 237), that an averment of interest, at the time of effecting the policy, and also at the time of the loss, was satisfied by proof of interest at the time of the loss; because the stating that would be sufficient, and the allegation of more does not throw on the plaintiff the necessity of proving that allegation. But this is a very different case. This is a policy at and from Mogadore, and embraces as well losses happening at Magadore, as losses occurring while the ship might be on her voyage home; but the two cases demand very different consideration. While the ship is on her voyage home, she must be fully rigged, victualed, manned and equipped; while she is at Mogadore, she need have no other men on board than such as are necessary to prevent fire or the like accidents: no sails, provisions or equipments are necessary. The averment, therefore, of a loss on the voyage would lead the underwriter to inquire whether her state, at the time of the loss, was adapted for such a voyage. Therefore, though both losses are within the policy, each requires a very different state of facts, and different declaration; and therefore, though we are very sorry to give way to such an objection, I think the verdict must be set aside, and there must be a nonsuit." Dallas, J., and Park, J., concurred. Abithol v. Bristow, 6 Taunt. 464; S. C., 2 Marsh. 157.

(For an example of variances in pleading which have been held fatal, see Rockfeller v. Hoysradt, 2 Hill, 616; Wilbur v. Brown, 3 Denio, 356. Under the Code of New York, no variance between the allegation in a pleading and the proof is deemed material, unless it *actually* misleads the adverse party to his prejudice. § 169. The pleading may be amended on trial, or the fact found according to the evidence; or if the adverse party has been misled, the court may order an amendment on proof that he has been misled, and on terms that shall appear just. In other cases the variance will not be considered material. §§ 170, 171; Catlin v. Gunter, 1 Kernan R. 368; 2 Selden, 97; 22 Barb. 321; 11 How. Pr. 197. See, also, as to the recent rule in England, Metzner v. Bolton, 24 Eng. Law & Eq. Rep. 537.)

only of the allegations stated in the declaration be proved, provided that what is proved affords a ground for maintaining the action, supposing it to have been correctly stated as proved ;(1) or, in other words, it is quite enough, if the same ground of action is proved as is laid in the declaration, although not to the extent there stated.(2) There is an exception, however, to this rule, when the allegation contains matter of description. There, if the proof given be different from the statement, the variance is fatal.(3)

In action on contract.

In the case of a contract the rule is different. Unless the whole of the contract is proved, as stated in the declaration, a different contract is proved, and a different ground of action; the party, therefore, cannot be entitled to the judgment of the court.(4) So, in the case of a prescriptive right, when a prescription is alleged in bar, it is an entire thing, and must be proved to the extent laid.(5)

An averment, which is merely matter of inducement to the action, need not be proved with the utmost strictness and precision.(6) Thus, where an action was brought to recover double the value of goods, which had been removed for the purpose of preventing a distress, and the declaration stated a certain sum to be in arrear for rent, it was decided that the plaintiff was entitled to recover, although the notice of distress was for a less sum.(7) Here, whether the particular sum stated in the declaration was in arrear, must be perfectly immaterial; the damages were not to be measured by the quantity of rent, but by the value of the goods which had been removed.(8)

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(1) By Abbott, C. J., 2 B. & A. 363. See Kemp v. King, Car. & M. 396.

(2) By Holroyd, J., 2 B. & A. 366.

(3) By Abbott, C. J., *ut supra.*

(4) See Hughes v. Parker, 8 M. & W. 244; Beech v. White, 12 A. & E. 668.

(5) By Holroyd, J., *ut supra.*

(6) See Fradley v. Fradley, 8 C. & P. 572.

(7) Gwinnet v. Phillips, 3 T. R. 643. See also Stoddart v. Palmer, 3 B. & C. 2.

(8) As to the effect of a misstatement of the premises in a notice to quit, see Doe d. Armstrong v. Wilkinson, 12 A. & E. 743.

NOTE 236.—The rule has been laid down in some of the cases with respect to allegations of inducement, that they do not call for the same accuracy and degree of proof as those which are the gist of the action. Thus, in Repsher v. Shane (3 Yeates, 575), the plaintiff, in an action for indemnity, set forth a recovery against him, varying materially in amount from the recovery proved ; and held that inasmuch as the recovery was not alleged as the direct foundation of the plaintiff's suit, but only by way of inducement, the variance was immaterial. See this and other like cases in note 247. Where the plaintiff, in an action for a libel, alleged that he was state printer and president of the Mechanics' Bank, it was held that parol proof of these facts was sufficient, without producing the higher evidence existing. "Those facts," say the court, "were only inducement, and introduced as collateral matter, and not as matter in issue ; and the practice is not to require such strict proof as if they were facts in issue. It is every day's practice to give parol proof in such cases, of matters of fact susceptible even of proof of the most solemn kind." Southwick v. Stevens, 10 Johns. R. 442. We apprehend, however, notwithstanding what is said in the fore-

An averment that cannot be struck out must be proved.

If an averment may be struck out without destroying the plaintiff's right of action, it will not be necessary to prove it; but it is otherwise if the averment cannot be struck out without getting rid of a part essential

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going and other cases, that when the point comes to be critically examined there will be found little or no difference between allegations of inducement and any other. This distinction, which has its foundation in what was said by Buller, J., in Gwinnet v. Phillips, cited in the text, is more nominal than substantial, and serves rather to perplex than enlighten. The principle, judicially determined by this case, was simply that the *exact amount* of rent, alleged to be in arrear, need not be proved; not that the general fact of *rent being due* was unimportant, for that was obviously of the very gist of the action, so much so, indeed, that the plaintiff must have failed without establishing it, but because the *exact amount* was immaterial. And the case would have been decided in the same way, had the very allegation been made in an action directly against the tenant, to recover the rent in arrear; there the plaintiff would have been bound by the sum alleged, nor is it necessary, in any case, to prove the exact amount alleged, unless, from the very nature of the claim or charge, it is material. "So, on the other hand, it is certain that whenever an allegation is material and essential, whether it fall within the scope of the term *inducement* or not, or whatever its connection may be, in the order of time or otherwise, with the other essential averments, it must be proved, according to the precise and particular, though superfluous description with which it is incumbered." 4 Starkie's Ev. 1551, 2, n. *x*. Thus, if the terms of a contract be stated, though unnecessarily, by way of inducement, they must be proved as laid. Bristow v. Wright, 2 Doug. 665. And where a contract was alleged in the declaration as having been made in reference to a mortgage executed to A., and on the trial the mortgage turned out to have been executed to A. and B., the variance was held fatal. It was urged in this case that the mortgage was mere inducement, but the court thought it made no difference, so long as it was material. Hess v. Fox, 10 Wend. Rep. 436, stated *ante*. And so in all cases of tort where the contract is alleged, though but by way of inducement. Weall v. King, 12 East, 452; Green v. Greenbank, 2 Marsh. Rep. 485; Lopes v. De Tastet, 1 Brod. & Bing. 538; Snell et al. v. Moses et al., 1 John. Rep. 96; Perry v. Aaron, 1 John. Rep. 129; Walcott v. Canfield, 3 Conn. Rep. 194. See *post*, notes 240, 241. Where an information was filed for a seditious libel, which alleged in an introductory averment, that outrages had been committed in, and in the neighborhood of Nottingham; it was held sufficient for the prosecutor to show that outrages had been committed in the neighborhood of Nottingham. Rex v. Sutton, 4 Maule & Selw. 532. But this was upon the ground that the averment was divisible, and that it was not necessary to prove outrages in both places. See *ante*, note 234, and the cases there cited; also *post*, note 239. The case of Stoddart v. Palmer (3 Barn. & Cress. 2), cited in the text, turned upon the distinction between impertinent averments, which may be regarded as surplusage, and those which, though immaterial and unnecessary, are yet descriptive, and hence are to be proved as laid. Indeed it is expressly admitted by Abbott, C. J., who delivered the opinion, that if the allegation there, respecting the judgment, was to be understood as one of description, it would be "necessary to prove a judgment corresponding in time and all other circumstances with that stated in the declaration."

It is believed, therefore, that the precision with which allegations are to be proved, must in all cases be determined by reference to their materiality under the particular state of the pleadings; and that any rule made to depend upon the circumstance of their being *inducement* merely, as contradistinguished from what is essential to the action, will be found liable to too many exceptions for the purposes of practical utility. We venture to suggest also, with deference, that what is said by the court in Southwick v. Stevens (*supra*), with respect to secondary evidence of matters of inducement, can hardly be considered as law; for if such allegations become material, or the party will prove them to enhance his damages, we are acquainted with no case sanctioning a departure from the ordinary rule requiring the best evidence. The decision itself is sustainable upon the obvious ground that the official character of an individual may be proved by acts and reputation.

to the cause of action; for then, though the averment be more particular than it need have been, the whole must be proved, or the plaintiff cannot recover.(1) The distinction is between an averment, the whole of which can be got rid of without injury to the pleading, and an averment of circumstances essential to the cause of action or defence, which are stated with needless particularity. In the latter case, the whole averment must be proved as pleaded. In the former case, either in civil or criminal pleadings, the whole may be considered as struck out, and therefore need not be proved.(2) Thus, in the case of Bristow agt. Wright,(3) which was an action against the sheriff for taking the goods of a lodger without leaving a year's rent, the declaration stated some particulars of the demise relative to the payment of the rent, which were negatived by the evidence, and the court held that the variance was fatal. There it was necessary for the plaintiff, in order to show that he was landlord, to set forth a contract between himself and the tenant, and no part of the contract alleged could be struck out, because it was in its nature entire; though it was admitted that the part of the contract relating to the time of payment need not have been averred.(4)

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(1) By Lawrence, J., 2 East, 452.

So, in an action against the drawer or indorser of a bill of exchange, dishonored by non-payment, the plaintiff need not prove an allegation that the bill was accepted, unless that be necessary to show the dishonor of the bill; which it is not, in the case of bill payable a certain time after date. Tanner v. Bean, 4 Barn. & Cress. 312.

(2) Coleridge, J., 10 A. & E. 596.

(3) 2 Doug. 664, explained by Buller, J., in Peppin v. Solomons, 5 T. R. 497, 498; and by Lord Ellenborough, C. J., in Williamson v. Allison, 2 East, 450. See, also, Savage v. Smith, 2 W. Bl. 1101; Hoar v. Mill, 4 M. & S. 478; Turner v. Hardey, 9 M. & W. 770; Alexander v. Bonnin, Arn. Rep. C. P. 337; S. C., 4 N. C. 799.

(4) NOTE 237.—Mr. Gould, in his excellent work on pleading, recently published, has pointed out the distinction alluded to in the text, in a very clear manner. The following are his remarks upon it: "There is an important distinction to be observed between immaterial and impertinent averments, viz: that the former must, in many cases, be precisely proved; whereas, the latter require no proof in any case. For the purpose of explaining this distinction, it must be premised that an *impertinent* averment is a statement of matter altogether *foreign* to the merits of the cause, and which might, therefore, be *entirely struck out* without injury to the pleadings. An *immaterial* averment (as contradistinguished from an *impertinent* one) has been variously described; but not always with sufficient precision. In the case of Bristow v. Wright (Doug. 665), Lord *Mansfield*, in commenting upon the distinction between these two species of averments, observes, 'The distinction is between that which may be rejected as *surplusage*, and which might have been *struck out* on motion, and what cannot. Where the declaration contains *impertinent matter*, *foreign* to the cause, and which the master, on reference to him, would strike out, that will be rejected by the court, and need not be proved. But if the *very ground* of action is misstated, as where you undertake to recite that part of a deed, on which an action is founded, and it is mis-recited, that will be fatal.'

"This language, though sufficiently descriptive of an *impertinent* averment, affords rather a particular *example* than a general definition or description of an *immaterial* one. The following is therefore submitted as a substantially correct description of the latter:—An *immaterial* averment is one, alleging, with *needless particularity* or *unnecessary circumstances*, what is material and necessary, and which might properly have been stated *more generally* and without such circum-

stances or particulars; or in other other words, it is a statement of *unnecessary particulars* in *connection with, and as descriptive of, what is material.*" Gould's Pl. 160, 161, 162. The author then proceeds to illustrate his observations by an accurate and concise review of Bristow v. Wright, after which he further says: "The same rule, in regard to immaterial averments, was recognized in the case of Savage, q. t. v. Smith (2 Bl. Rep. 1101, 1104). This was an action of debt against a bailiff, for extorting illegal fees, on a writ of *fieri facias.* The declaration described the *fi. fa.* as having been issued, on a judgment recovered in B. R. at a specified term, £51, 12, 0, debt, and £6, 10, 0, costs. But the plaintiff having failed, on the trial, to prove such a judgment, the court held that, admitting it to have been *unnecessary* for the plaintiff to state any judgment (Id. 1104, and *vid.* 5 T. R. 498), that is to say, admitting the statement, in that particular, to have been *immaterial*, yet being made *as descriptive of the foundation* of the *fi. fa.*, it was necessary to be proved as made." Gould's Pl. 163.

"The rule that immaterial averments must be strictly proved, is, however, by no means universal, though it appears to have been formerly so understood: The *principle* of the rule manifestly embraces (it is conceived) no other averments of that class than those of which a *variance* may be predicated. And the rule itself is now to be understood as limited by that principle. Id. 164, 165.

"The rule, then, as limited by the more modern authorities, appears to be that no immaterial averment requires precise proof, unless the failure of such proof would occasion a *variance* between the pleading and the proof: or (in different language), strict proof of such averment is not, at this day, necessary, unless the subject of the averment is a *record*—a *written instrument*—or (as I conceive) an *express contract.* Inasmuch as these are in strictness, the only subjects of variance (properly so called) when the mistake in the pleading is in a point *not in itself material.*" Id. 164.

The decisions relating to the subject of the foregoing extract, both American and English, will be found to exhibit considerable want of uniformity; and this has probably arisen in some measure from not attending to the reason of the distinction taken in Bristow v. Wright, and Williams v. Allison, cited in the text. See the cases cited *post*, notes 240 and 241. Where the plaintiff declared upon a special contract, alleging that he was indebted to the defendant's testator in a certain sum secured to the testator by bond and mortgage executed by *the plaintiff;* and that it was agreed the plaintiff should convey the mortgaged premises to the testator—the latter to discharge the plaintiff from his indebtedness, to sell the premises, and after deducting the amount due him, pay the surplus to the plaintiff; and on the trial it turned out that the bond and mortgage were executed by the plaintiff and another; the court, in relation to the variance, adopted the rule as stated by Mr. Chitty (1 Chitty's Pl. 295), that every allegation in an inducement which is material, and not impertinent, or foreign to the cause, and which cannot be rejected as surplusage, must be proved as alleged. And it is added: "This is particularly true in setting forth written instruments. As this count is framed, the allegation which respects the existence and canceling the mortgage, cannot be stricken out as surplusage; and if not, it should have been truly stated." Hess v. Fox, 10 Wend. 436, 437. It has been held that, in an action on a bill or note, payable at a particular time and place, if the plaintiff aver specifically that a demand was made at the time and place, he will be bound to prove it. Conn's Adm'r v. Gano's Ex'r, 1 Hamm. Rep. 483. The court concede that it was wholly unnecessary to make this averment; but they say, "being made, it must be proved: in an action against the drawer or indorser of a bill, it is not necessary to state that the drawee accepted it; but Chitty says, if it be stated, it must, in an action against the drawer, be proved;" and they cite Chitty on Bills, 459. Pease, J., dissenting in the above case, states his views as follows: "The true distinction between an immaterial averment, which it is necessary to prove, and one which it is not, I consider to be this: when the plaintiff avers in his declaration a fact, the converse of which being pleaded or proved by the defendant, would be a defence to the action, then the averment ought to be proved. But if the fact averred be every way immaterial—if it form no part of the plaintiff's right to recover, and if the converse would constitute no defence to the action, then it would be not only useless to prove it, but would be an unnecessary waste of time and money, and a trifling with the administration of justice." This test is, perhaps, a true one in the main, but admits of qualification. Instances are of frequent occurrence, where, through the inadvertence of the pleader, an averment has been made of unnecessary particulars, "in connection with, and as de-

Averment that may be struck out needs not be proved.

The case of Williamson agt. Allison(1) illustrates the other part of the rule, namely, that where an averment may be struck out it need not be proved. That was an action on the case in tort, for the breach of a warranty in selling goods unfit for sale, and the declaration averred that the defendant knew the goods to be in an unfit state, of which fact there was no evidence at the trial; but the court held that such proof was unnecessary; for if the whole averment respecting the defendant's knowledge of the unfitness for sale were struck out, the declaration would still be sufficient to entitle the plaintiff to recover upon the breach of the warranty proved.

In like manner, in the case of Gladwell agt. Steggall,(2) where the

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scriptive of, what is material," and where a failure to prove such particulars resulted fatally. And yet, it would be hard to perceive how those particulars can be said to form an essential part of the plaintiff's right to recover; or the converse of them to constitute a defence. Where a declaration on a bill of exchange, by the indorsees against the acceptor, alleged that it was indorsed to the plaintiffs, as surviving assignees of A. B., after his bankruptcy; it was held that the plaintiffs were bound to establish both points, viz: that the bill was indorsed after the bankruptcy of A. B., and to the plaintiffs as surviving assignees, &c.; though if the declaration had been general, in the names of the plaintiffs, "the possession of the bills by them would have done." Bernasconi v. The Duke of Argyle, 3 Carr. & Payne, 39.

It may not be improper, in connection with the above cases, to introduce the following, though they have no very intimate bearing upon the subject we have been considering. In an action on a bill of exchange, by indorsee against drawer, if the plaintiff aver actual notice of dishonor, he will not be allowed to recover on proof of due diligence merely. Bakely v. Grant, 6 Mass. Rep. 386. An averment of actual notice, however, will be satisfied by proof that notice was given before action brought; although, from the fact that the party could not be found, it was not given at the proper time. Harris v. Richardson, 4 Carr. & Payne, 522. And proof of a waiver of notice will support the allegation of actual notice. Taunton Bank v. Richardson, 5 Pick. 436; Norton v. Lewis, 2 Conn. Rep. 476; Williams v. Matthews, 3 Cowen's Rep. 252.

(1) 2 East, 446. See also Bromfield v. Jones, 4 B. & C. 380; Jackson v. Alloway, 6 M. & G. 942; Tempest v. Kilner, 2 C. B. 300; Att. Gen. v. Clerc, 12 M. & W. 640; Cooper v. Blick, 2 Q. B. 915.

(2) 5 N. C. 733.

NOTE 238.—From what has been stated in the next preceding (American) note, we may venture to lay down the rule thus: the omission to prove circumstances alleged, not essential to the claim or charge, and which might have been wholly omitted, is not material, provided the circumstances so alleged do not operate by way of description of others which are essential. See 4 Starkie's Ev. 1534; Stevens v. Bigelow, 12 Mass. Rep. 434. Accordingly, where a declaration for an injury to the reversionary interest of the plaintiff in land, contained an averment that the premises at the time of, &c., *and still were*, in the occupation of A. B.; whereas the occupation of A. B. had ceased before the commencement of the suit; held, that the variance was immaterial; the possession of A. B. at the time of the injury being properly described. Vowles v. Miller, 3 Taunt. 137. In an action on a promise to indemnify against a particular act done at the request of the defendant, the plaintiff, by way of showing that he had been damnified, set forth a judgment obtained against him, and alleged that the suit was commenced by "a writ commonly called an attachment of privilege;" the allegation as to the writ was held surplusage, and not necessary to be proved. Allaire v. Ouland, 2 John. Cas. 52. Kent, J., dissenting, considered the averment of the writ an immaterial one, and not impertinent. He says, the rule requiring immaterial averments to be proved was intended to inculcate brevity and precision in pleading, and to serve as a rod over counsel who should incumber the record; that the writ was

connected with the cause of action, and as it was alleged, the plaintiff should be held to prove it. Id. And where the action was against a sheriff, for taking insufficient sureties in replevin, and it was alleged that the party replevying levied his plaint at the next County Court, to wit: at a county court holden, &c., before A., B., &c., &c.; and the evidence was, that the court was holden before other persons; held, the material allegation being that the party levied his plaint at the next County Court, the residue, as to the names of the suitors, was surplusage, and therefore the variance might be disregarded. Draper v. Garratt, 2 Barn. & Cress. 2. See Judge v. Morgan, 13 East, 547; and see *post*, note 247. Where the plaintiff's declaration was upon a contract for the sale of the whole of his crop of tobacco, and averred a delivery of a given quantity, and readiness and an offer to deliver the residue: held, that proof of his having delivered *the whole* crop, save a small quantity not merchantable, sustained the declaration; the only material averment, say the court, was the quantity delivered, and that was proved; the other part of the averment taken separately was immaterial, and not calculated to mislead. Cabiness v. Brown, 1 Alab. Rep. 41. Likewise, where the declaration stated that the defendant sold to the plaintiff certain premises, which were held by one F. under an agreement with the defendant for four years, by which agreement F. was bound, among other things, to leave the premises in good tenant-like order and condition; and that the defendant agreed to do all such other tenantable repairs as should not be done by F.; concluding with an averment, that F. did not leave the premises in good repair *at the expiration of her tenancy*, but neglected, &c., in consequence of which the defendant was called upon to repair, and refused, &c. Best, J., was of opinion that the words, "at the expiration of her tenancy," might be rejected as surplusage, and need not be proved; because it was immaterial when F. left the premises; whenever it was, whether before or after the term fixed by F.'s lease, the defendant should then have made the repairs, and might have entered for that purpose. Goodson v. Gouldsmith, 2 Carr. & Payne, 555. In a special action on the case, the plaintiffs declared that the defendant contriving, and *willfully and maliciously intending*, &c., dug up the soil of a certain lot, whereby the foundation of the plaintiff's house was injured; it was held, that evidence of negligence merely, on the part of the defendant, would support the declaration, the allegation of malice being surplusage. Panton v. Holland, 17 John. Rep. 92. So, in an action for an infringement of the plaintiff's right to the use of certain water, the declaration alleged that the acts complained of were done maliciously, wantonly, &c., and it was held, that as there was a perfect cause of action, independent of the malice alleged, proof of it was not necessary. Twiss v. Baldwin, 9 Conn. Rep. 291. And in an action for a libel, where the plaintiff alleged, that before the publication of the libel, the plaintiff's carriage came in contact with a carriage in which E. S. was riding; and that the accident happened without any default on the part of the plaintiff, and then alleged a publication of the libel of and concerning the accident; upon the trial it appeared that the accident did happen through the plaintiff's default; yet held to be no variance, so as to bar the plaintiff from recovering, in respect to part of the libel not justified; the allegations being divisible, and the averment that the accident happened without the plaintiff's default, being an immaterial circumstance. Churchill v. Hunt, 2 Barn. & Ald. 685. So, in trespass, for driving against the plaintiff's cart, an allegation in the declaration that the plaintiff was in the cart, was held immaterial, and not necessary to be proved. Howard v. Peete, 2 Chitty's Rep. 315.

In Wilson v. Codman's Ex'r (3 Cranch, 193), the plaintiff declared on a note assigned to him by a writing indorsed thereon, and alleged the assignment to have been made for value received; the court held that this averment was not descriptive of the indorsement, but related to a fact dehors the instrument, and being altogether immaterial, need not be proved. M'Williams v. Smith, 1 Call's Rep. 106, S. P. Where, however, the averment of value received in a declaration is descriptive of a writing which, when produced, is found not to contain those words, the variance will be fatal. See Saxton v. Johnson, 10 John. Rep. 418, cited *post*, note 247, and several other cases there stated, sustaining the same principle; and see that note as to the doctrine of surplusage in its application to averments descriptive of written instruments generally. In a declaration on a note payable by installments, the plaintiff averred that two installments had elapsed, and that the whole note was due; on demurrer, it was held, that the averment of the whole note being due, might be rejected as surplusage, and judgment given for the amount of the two installments. Tucker v. Randall, 2 Mass. Rep. 283. And where, upon a note payable in chattels, the declaration concluded with the words ordinarily used in declaring upon negotia-

declaration stated that the plaintiff, an infant suing by her *porchein ami*, had employed the defendant, a surgeon, to cure her, and then claimed damages for neglect, it was held to be immaterial by whom the defendant was employed, though the defendant by his plea had traversed that allegation; and even if it were material, the plaintiff's having submitted to the defendant's treatment was sufficient proof of the allegation of employment by her.

4. Of material and immaterial averments in indictments.

The same rule is applicable to averments in an indictment. If an averment may be entirely omitted, without affecting the charge against the prisoner, and without detriment to the indictment, it will be considered as surplusage, and may be disregarded in evidence.(1)

Thus, where the prisoner was charged with a robbery near the highway, and the robbery was proved, but not near the highway(2)—where a robbery was averred to have been committed in the house of a certain person named, and the name of the owner was not proved(3)—and where the offence of arson was stated in the indictment to have been committed in the night time, and was proved not to have been in the night time,(4) in these cases, all the judges were of opinion that the convictions were proper.(5) So, where an indictment for perjury alleged that F. C. A. exhibited his bill in the Exchequer, and that the defendant put in his answer, intituled "The answer of A. B. to the bill of complaint of J. C. A.," the court refused to arrest the judgment.(6) And in a similar indictment against B. for perjury committed in an answer to a bill in chancery, where the bill was stated to have been filed by A. against B. and another, though in fact it was filed against him and two others, the variance was held to

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ble promissory notes, "whereby and by force of the statute," &c.; on motion in arrest of judgment, held, that the reference to the statute might be rejected as surplusage. Thomas v. Roosa, 7 John. Rep. 461. In Drown v. Smith (3 N. Hamp. Rep. 299), the objection was taken at the trial, under a declaration upon a similar instrument, alleging that the defendant promised "by his certain note," &c.; and the court held, that those words might be rejected, and so the count would stand upon the contract evidence by the written instrument. Also, where a defendant was described in the declaration as trader and administrator, and the bond upon which the action was founded, when produced on oyer, appeared to have been given by the defendant in his individual capacity; held, on demurrer, that the description of him as administrator, might be regarded as surplusage. Clark v. Lowe, 15 Mass. Rep. 476.

(An allegation in respect to time, though not material, may be taken as an admission. Andrews v. Chadbourne, 19 Barb. 149. But, in general, the time at which plaintiff or defendant alleges an act to have been done, is not material; and it may be shown to have been performed at an earlier day. Lyon v. Clark, 4 Selden, 148; Lester v. Jewett, 1 Kernan, 460. But there are cases in which both the time and place stated are material, and must be proved. Thatcher v. Morris, Id. 440; 6 Barb. 429.)

(1) See by Coleridge, J., 10 A. & E. 596, *supra*, p. 839. See also R. v. Holt, 2 Lea. 593.

(2) R. v. Wardle, 2 East P. C. 785; S. C., R. & R. Cr. C. 9. See also R. v. Sumner, Id.

(3) R. v. Pye, 2 East P. C. 785, 786; R. v. Johnstone, Id.

(4) R. v. Minton, 2 East P. C. 1021.

(5) For other examples, see 2 Russ., Cr. & M., by Greaves, bk. 6, ch. 2, § 3, p. 786, *et seq.*

(6) R. v. Roper, 6 M. & S. 327; S. C., 1 Stark. R. 518.

be immaterial, as the perjury was assigned on a part of the answer which was material between A. and B.(1)

Material averments.

But where the averment in the indictment is sensible and material, or is descriptive of the identity of that which is legally essential to the charge, it ought to be regularly proved; thus, upon an indictment for stealing four live tame turkeys, the judges held, that the word "live" was a description of the quality of the thing stolen, and that the prisoner could not be convicted upon proof of stealing dead turkeys.(2) So, where the prisoner was indicted for a burglary in the house of J. D. with intent to steal the goods of J. W., and it appeared in evidence that no such person had any goods in the house, but that the name of J. W. was put by mistake for J. D., the judges held, that it was material to state truly the property of the goods, as without such statement the description of the offence would be incomplete; and on account of this variance the prisoner was acquitted.(3)

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(1) R. v. Benson, 2 Camp. 509. See also R. v. Powell, R. & M. N. P. R. 101; R. v. Bailey, 7 C. & P. 264; R. v. Pearse, 3 B. & A. 579.

(2) R. v. Edwards, R. & R. Cr. C. 497.

(3) R. v. Jenk, 2 East P. C. 514.

NOTE 239.—There is no distinction between civil and criminal proceedings in respect to the general doctrine of surplusage, except, perhaps, that in the latter, courts will be more strict in requiring proof of matters alleged than in the former. Per Livingston, J., United States v. Porter, 3 Day's Rep. 286. We shall, therefore, merely refer the reader to our two next preceding notes, and introduce a few additional illustrations particularly bearing upon the present subject. We have seen (*ante*, note 230) that, in an indictment for obtaining goods by false pretences, it is not necessary to prove all the pretences alleged; and if more pretences are set out than can be proved, or than are material to establish the offence, they may be rejected as surplusage. The People v. Haynes, 11 Wend. 557, 565. Where an indictment alleged that the defendant, in and upon one P. *Harvey*, did make an assault, and her the said P. *Hunt* then and there did beat, wound and ill treat, with intent her the said P. *Harvey* to ravish; it was the court's opinion that the whole clause relating to the beating might be regarded as surplusage. Commonwealth v. Hunt, 4 Pick. 252. The ground of this opinion, though it is not stated in the report, was probably the inconsistency of the passage with the other parts of the indictment. The rule in such cases is, that an inconsistency in material allegations vitiates the indictment, but not so if the *entire allegation*, in which the discrepancy consists, might have been omitted; for then, upon the maxim, "*utile per inutile non vitiatur*," the allegation may be considered as surplusage, and disregarded. Starkie's Cr. Pl. 274, 275.

It was the ancient doctrine that no indictment, concluding *contra formam statuti*, could be maintained as an indictment at common law; but this has long since been exploded; and now, if an offence be charged as having been committed contrary to the statute, and there is either no such statute or the offence is not embraced within it, the accused, provided enough is charged, may be convicted on proof of an offence at common law, and the reference to the statute will be treated as surplusage. Respublica v. Newell, 3 Yeates, 407, 414; Knowles v. The State of Connecticut, 3 Day's Rep. 103; Commonwealth v. Hoxey, 16 Mass. Rep. 385; Pennsylvania v. Bell, Addis. Rep. 156; 1 Chitty's Cr. Law, 289; 1 Saund. 135, n. 3. And the general rule is, that all allegations which are *wholly* superfluous need not be established, but may be thrown out of the question altogether. 1 Chitty's Cr. Law, 557.

But if the averment be material—that is, if it be connected with the charge—it must be

5. Of variances in civil suits.

Where the action is brought upon a contract, the contract ought to be stated correctly, and proved as laid; and if any part of the contract proved vary materially from that stated in the pleadings, the whole foundation of the action fails, since the contract is entire and indivisible.(1) If the contract, therefore, for the breach of which the action is brought, was in the *alternative* at the option of the defendant (as to deliver *this* or *that* quantity of goods at one time, and the remainder at another), it ought to be so stated; for if the declaration states an *absolute* contract, and the proof is of a contract in the *alternative*, the plaintiff cannot recover, although the defendant may have determined his option.(2) In an

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proved. 1 Chitty's Cr. Law, 557. Thus, in an indictment for a riot in pulling down a house, the name of the owner is material; and therefore, where the indictment charged that it was the dwelling-house of A., and it turned out that A. was a *feme covert*, held that the conviction was erroneous. The State v. Martin, 3 Murph. 533. See Queen v. Soley, 2 Salk. 595. So, in an indictment for larceny of goods, the owner's name must be proved as alleged; and where they were laid as the property of H., and turned out to be the property of H. & E., partners, the variance was admitted to be fatal. Commonwealth v. Trimmer, 1 Mass. Rep. 476. In New York, however, it is expressly provided by statute, that, in an indictment for any offence committed upon personal property belonging to several owners or partners, it shall be sufficient to allege such property to belong to any one or more of such partners or owners, without naming all. 2 R. S. 727, § 46. Whether, if the name of the owner be not laid with an *alius dictus*, it is sufficient to prove that he is commonly known by the name alleged, where it appears his name of baptism is different; *quere*. State v. France, 1 Tenn. Rep. 434. An indictment for perjury, alleged to have been committed before A., is not sustained by proof of perjury before A. & T. The State v. Mayson, 1 Const. Rep. 200.

And allegations which are not impertinent or foreign to the cause must be proved, although a prosecution for the offence charged might be maintained without such allegations. Thus, an indictment for stopping the mail, which alleged a contract between the postmaster-general and the mail carrier, was held not supported without proof of such contract. United States v. Porter, 3 Day's Rep. 283.

(So, where the indictment alleges the commission of the crime—arson—in a certain ward of a city, the place is thereby rendered material. The People v. Slater, 5 Hill, 401. But, on the trial of an indictment for larceny, it is not necessary to prove that the property was taken from the actual owner; the crime may be committed by taking it feloniously from a bailee, and the owner may be convicted for stealing his own goods. The People v. Wiley, 3 Hill, 194. See, also, Ward v. People, 3 Hill, 395.)

(1) 1 T. R. 240; 3 T. R. 645. The following are the principal modern cases on this subject: Bristow v. Wright, 2 Doug. 664; Carlisle v. Trears, Cowp. 671; Churchill v. Wilkins, 1 T. R. 447; Durston v. Tuthan, cit. 3 Id. 67; Littler v. Holland, Id. 590; Hockin v. Cooke, 4 Id. 314; Leery v. Goodson, Id. 687; White v. Wilson, 2 B. & P. 116; Penny v. Porter, 2 East, 2; Brown v. Sayce, 4 Taunt. 320; Pool v. Court, Id. 700; Cohen v. Hannam, 5 Id. 101; Arnfield v. Bate, 3 M. & S. 173; Sequier v. Hunt, 3 Pri. 68; Wildmon v. Glossop, 1 B. & A. 9; Tucker v. Cracklin, 2 Stark. R. 385; Parker v. Palmer, 4 B. & A. 387; Strong v. Rule, 3 Bing. 315; Hughes v. Parker, 8 M. & W. 244. The following are cases on promissory notes and bills of exchange:—Whitwell v. Bennet, 3 B. & P. 559; Gordon v. Austin, 4 T. R. 611; Young v. Wright, 1 Camp. 139; Jones v. Mars, 2 Id. 305; Roche v. Campbell, 3 Id. 247; Hodge v. Fillis, Id. 463; Hutchinson v. Piper, 4 Taunt. 810; Exon v. Russell, 4 M. & S. 505; Mountstephen v. Brooke, 1 B. & A. 224.

(2) Penny v. Porter, 2 East, 2. And see Id. 134; Cooke v. Munstone, 1 N. R. 351.

action against a carrier on a general undertaking to carry safely, proof of a contract to carry safely, *fire and robbery excepted*, is a variance.(1)

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(1) Latham v. Rutley, 2 B. & C. 20.

NOTE 240.—The doctrine of the text has been almost universally recognized; and the occasional diversity exhibited by the cases, will be found to result mainly from the different views which courts have entertained of its application, rather than from any doubts as to its existence. "That the *allegata* and *probata* should correspond, is a rule as sound in principle, as it is well established in precedent. To permit the plaintiff in an action to recover on evidence materially variant from his allegations, would defeat the purposes of pleading. The defendant could neither be enabled to rebut such proof, nor plead a recovery in bar, in a future action for the same demand; and though the privity and intercourse between the parties, may often enable them to know, without having recourse to pleadings, what is the nature of the claim or defence, yet a departure from a rule of general utility cannot be justified, because in particular instances it has no practical effect. But if the parties themselves could be presumed, from their privity, to know the true cause of action, to avail themselves of a judgment, as a bar of a future action for the same cause, they must be able by legal averments to make the identity of the cause of action known to a judicial tribunal, who are strangers to their transactions." Query v. Brindlinger, Litt. Sel. Cas. 87, *per Cur.* But it is sufficient, in general, if the contract given in evidence agree in substance and legal effect with that stated in the declaration; and though the proof disclose circumstances beyond what is contained in the declaration, the variance will not be regarded, provided the matter omitted do not qualify or alter in any respect those which are alleged as the foundation of the action. Thus, a declaration for not delivering a quantity of gum senegal, is sustained by proof of a contract to deliver rough gum senegal; it appearing that all gum senegal on its arrival is called rough. Silver v. Hesseltine, 1 Chitty's Rep. 38. And where, in an action upon a contract of warranty in the sale of a quantity of oil, the declaration alleged that the defendant undertook, that the oil was of a "good and superior quality, to wit, prime quality winter oil;" and the evidence offered was, that the defendant warranted the oil to be prime quality winter oil; it was held, that there was no variance between the contract as alleged, and the evidence, because the words under the scilicet were to be regarded as the substantial averment. Hastings v. Lowring, 2 Pick. 214. So where the plaintiffs declared setting forth an exchange of vessels, between them and the defendants, and alleging that the defendants agreed to pay $6,500, as the difference; proof that the agreement was to pay in notes at four, six and eight months, the suit being brought after the notes fell due, was deemed to be no variance. Porter v. Talcott, 1 Cowen's Rep. 359, 380, per Woodworth, J. These qualifications respecting the mode of payment, are introduced for the benefit of the purchaser, and during the time to which they relate, the seller must sue on the special contract; when that time is expired, the money is actually due. Per Woodworth, J., Id. And see Brook v. White, 4 Bos. & Pul. 330, 332, per Chambre, J. And where the promise alleged was, to pay certain arrearages, and it turned out in proof that the promise was to pay arrearages, and also what the plaintiff had to pay a certain company; it was held, there was no material variance, for "proof of a promise beyond what is averred," say the court, "but embracing that also, cannot prejudice the defendant. It is not setting forth a different promise, but failing to set forth the whole, to the prejudice of the plaintiff only." Alvord v. Smith, 5 Pick. 232, 235. See *post* of the text, and the cases there cited; and Henry v. Clelland, 14 John. Rep. 400, cited *post*, note 247.

But the legal effect and identity of the contract must be cautiously kept in view, and any variance in this respect, relating to the promise or undertaking upon which the action is predicated, or the consideration thereof, will be fatal. Thus, an allegation of a promise to pay absolutely, on the death of J. S., cannot be sustained by proof of a promise to pay on the death of J. S., provided he left the promisor sufficient, or he was able to pay it. Roberts v. Peak, 1 Burr. 325. So, if the declaration allege a promise by the defendant, to sell his tallow to the plaintiff, at four shillings per stone, and the proof is, that he promised to sell at that price, but, that if the plaintiff gave more to any one else, he should give the same to the defendant; the variance will not be overlooked. Churchill v. Wilkins, 1 T. R. 447, cited in the text. And a declaration on a note with a proviso or condition, should set forth the condition, or the variance will be fatal. Whita-

ker v. Smith, 4 Pick. 83. The case of a bond, which undoubtedly may be declared on without setting forth the condition, is different; for the defendant in such case is entitled to oyer, both of the bond and the condition; but there is no such right in relation to simple contracts, and this shows the necessity of setting out the whole. The defendant is entitled to know the whole of the contract on which he is sued, in order that he may determine how to defend himself. Id. per Parker, C. J. And where the declaration was upon a promise to pay $100, for improvements upon lands, and the promise proved, was to pay so much, if the promisor obtained a contract for the land from the landlord, the variance was held fatal. Lower v. Winters, 7 Cowen's Rep. 263. So a promise in the alternative will not sustain a declaration upon a promise absolutely. Per Hosmer, C. J., in Curley v. Dean, 4 Conn. Rep. 259, 265. See also the cases cited in the text. Thus, where the contract was alleged as absolute to transport twenty tons, and the one proved was, to transport fifteen or twenty tons, the variance was held fatal. Stone v. Knowlton, 3 Wend. Rep. 374. So where the plaintiff's declaration contained counts upon an *indebitatus assumpsit and quantum valebant*, for meat, lodging, nursing, &c., furnished by the plaintiff for the defendant's infant daughter; and he proved a contract in the alternative, by which the defendant agreed to bind his deughter to him, or pay so much for boarding, nursing, and clothing her, as her board, &c., were worth; held a fatal variance. Williams v. Kinnard, 1 Alabama Rep. 196.

Where the plaintiff averred a demise for three years, held that such an averment could not be sustained by proof of a lease for one year certain, and two years' further possession on the same terms, by consent of the landlord. Alexander v. Harris, 4 Cranch, 299. See this case and others cited *ante*. So an allegation that the defendant undertook to transport certain goods to C., at his own risk against all danger, except dangers of the seas, is not supported by proof that the defendant took on himself all risks, except dangers of the seas; for a liability for the risk of transportation, except that of the seas, is materially different from liability for all risks, with the same exception. Bridge v. Austin, 4 Mass. Rep. 115. And the statement of a general warranty as to the soundness of a horse is not supported by proof of a warranty, except a kick on the leg. Jones v. Cowley, 4 Barn. & Cress. 445. A declaration that certain machines were warranted to be good and merchantable, is not sustained by proof that they were warranted to be equal to any in America. Goulding et al. v. Skinner, 1 Pick. 162. A contract to deliver soil cannot be declared on as a contract to deliver soil or breeze, if it appear that soil and breeze are different articles. Clark v. Manstone, 5 Esp. Rep. 239. Nor will a declaration for the sale and delivery of pine timber, be supported by proof of the sale and delivery of spruce timber. Robbins v. Otis, 1 Pick. 368. Nor a declaration on a promise to pay money, by proof of a promise to deliver certificates of debenture. Baylies et al. v. Fettyplace et al., 7 Mass. R. 325. So a declaration, on a promise to deliver cloth to the plaintiff, is not supported by evidence of a promise to deliver cloth to him at the defendant's factory. Clark v. Todd, 1 Chip. R. 213. And an allegation of a promise to pay $1,000 in a reasonable time, is essentially different from a promise that if the plaintiffs shall reconvey certain land, the defendant will pay them the purchase money, which was $1,100, or so much thereof as he shall have received. Bunnel v. Taintor's Adm'r, 5 Conn. Rep. 273. Proof of a promise to pay as soon as A. came, will not sustain a declaration upon a promise to pay in March or April. Victoire v. Moulin, 8 Mart. Lou. Rep 400. So a promise to pay the coming week will not support an allegation of a promise to pay when requested. Lawrence v. Barker, 5 Wend. Rep. 301; Query v. Brindlinger, Litt. Sel. Cas. 84. And an allegation that rent was to be paid on demand, is not supported by proof that it was to be paid at the end of the year. Taylor v. Hickman, Litt. Sel. Cas. 434. Nor will a promise to pay on a particular day, sustain an allegation of a promise to pay in a reasonable time. Willoughby v. Raymond, 4 Conn. Rep. 130. And proof of a promise to an executor, varies from an allegation of a promise to the testator. Glenn's Ex'rs v. M'Cullough, 2 M'Cord's Rep. 212. So a promise to a husband and wife jointly, will not sustain an allegation of a promise to the wife before marriage. Bunnel v. Taintor's Adm'r, 5 Conn. Rep. 273. Where the declaration stated that the defendant was to pay the plaintiff £90, one-half in cash and the other in whiskey and horse flesh, to be between the value of twenty-one pounds and twenty-five pounds; and the agreement proved was, that the £90 were to be paid one-half in cash and the other in whiskey and horse flesh, to be between the value of twenty and twenty-five pounds; the variance was held fatal. Rogers v. Estis, Litt. Sel. Cas. 2. Under a declaration in assumpsit, upon a promise by a consignee or bailiff to render a reasonable account, the plaintiff cannot give in evidence a

contract to account in a special manner; if the undertaking be special, it must be so laid, or the variance will be fatal. Pope et al. v. Barret, 1 Mason, 117. Otherwise, however, it seems, in actions of account. Id. And see Robert v. Andrews, Cro. Eliz. 82; Godfrey v. Saunders, 3 Wils. 73. In Louisiana, where the petition stated that the plaintiff sold the defendant one hundred barrels of flour, half fine and half superfine, at thirteen dollars per barrel, &c.; evidence that the defendant purchased 100 barrels of flour of the plaintiffs, which were worth thirteen dollars per barrel, was held sufficient to sustain the allegation. Gilly et al. v. Henry, 8 Mart. Lou. Rep. 402. And see Boyd et al. v. Howard, 3 Mart. Lou. Rep. (N. S.) 286; S. C., 4 Mart. Lou. Rep. (N. S.) 178, in which the general rule is laid down, that a vendor who alleges a stipulated and certain sum as the price of the sale, may give evidence of the value of the objects sold. Where the plaintiff declared upon a contract, by which he was to have the use and occupation of a clothier's shop, for a period commencing in October, 1818, and ending at the expiration of the season for dressing cloth, to wit, on the 1st of May, 1819; and the period proved was, during the season for dressing cloth; held a fatal variance. Curley v. Dean, 4 Conn. Rep. 259. So the plaintiff having alleged a contract, by which the defendant was to receive all the accounts contracted by the plaintiff in a certain business during a specified period, and the proof was that the defendant was to receive the first moneys accruing from the business, and resort to the account for the balance only, the variance was held fatal. Id.

In actions upon a contract of warranty, though it is usual to allege an express and formal promise and undertaking in a declaration, it is not necessary that the proof should literally correspond with what is set out; for any affirmation at the time of the sale, intended as a warranty by the affirmant, and relied upon as such by the purchaser, will support the allegation. Thus, where the declaration averred that the defendant undertook that the horse he sold to the plaintiff was quiet, &c.; held, that proof that the defendant said, at the time of sale, "You may depend upon it that the horse is perfectly quiet, &c, will support the averment. Cave v. Coleman, 3 Mann. & Ryl. 2. And see Chapman v. Murch, 19 John. R. 290; Sweet v. Colgate, 20 John. R. 203; Bacon v. Brown, 3 Bibb, 35; Jackson v. Witherell, 7 Serg. & Rawle, 482; Cramer v. Bradshaw, 10 John R. 484; Gilchrist v. Mann, 2 Car. Law Repos. 667; Erwin v. Maxwell, 2 Murph. 245; Roberts v. Morgan, 2 Cowen's Rep. 438. And an allegation that the defendant warranted a horse to be not over seven years old sustained in substance by proof of a warranty that he was seven years old the spring next after the sale. Henry v. Henry, 1 Chip. Rep. 265.

Not only must the promise, for the breach of which the action is brought, be truly stated, and proved as alleged, but the entire consideration for the promise must be set out; and if there be any material variance between the consideration as averred and the proof, it will be fatal. See *post*, of the text, and the cases there cited; also Brooks v. Lowrie, 1 Nott & M'Cord, 342. Accordingly, where the declaration alleged a contract by the defendant, in consideration of an undertaking by the plaintiff, to *build* a ship, and the evidence was of a contract to *finish* a ship partly built, and sell it to the defendant, the variance was held fatal. Smith v. Barker, 3 Day's Rep. 312. And where the plaintiff declared on a contract, alleging it as one by which the defendant agreed to pay him a specified sum, for *half* the land taken for a certain road; and the contract proved was, that the defendant was to pay for all the land, the variance was held fatal. Crawford et al. v. Morrell, 8 John. Rep. 253. So, where an agent sold to A. in one lot, and at an entire price, two horses; one belonging to B., and another to C., warranting both to be sound, it was held that A. could not maintain assumpsit against B., for the unsoundness of the horse belonging to the latter, declaring as upon the sale of one horse; for the contract concerning the two horses was entire, and the whole consideration for the warranty was not set forth. Symonds v. Carr, 1 Campb. 361, 362, and *vide* note *a*. And a declaration for the price of *pine* timber, sold and delivered, is not supported by proof of a sale and delivery of *spruce* timber. Robbins v. Otis, 1 Pick. 368, *supra*.

In an action to recover damages for not performing a contract to convey land, a variance respecting the locality of the land, between the consideration of the contract as laid and proved, has been held fatal. Obert v. Whitehead, 6 Halst. 293. And where the declaration alleged, that in consideration the plaintiff would deliver a certain note to a third person, there to remain until the defendant should pay a note given by the plaintiff to A., the defendant promised the plaintiff to save him harmless, &c.; and the evidence was, that the plaintiff agreed to deliver the note to a third person, and let it remain till he should return from a journey, and that in con-

Where contract stated in action of tort.

This rule is not confined to actions *ex contractu*. In an action of tort also, where a contract is necessary to be stated in order to maintain the ground of action as laid in the record, the contract ought to be proved as stated. Thus, in an action against two defendants for deceit, charged in

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sideration thereof the defendant promised, &c.; the variance was held fatal. Colt v. Root, 17 Mass. Rep. 229. And so, where the declaration alleged a promise, that in consideration the plaintiff *would indorse* a note, &c.; and the evidence was of a promise, in consideration of the plaintiff's *having indorsed* a note. Bulkley v. Landon, 2 Conn. Rep. 404. And where the contract stated in the declaration was alleged to be on a past consideration for the delivery of goods, without mentioning the place of delivery, and in the alternative as to time; and the contract proved was on an executory consideration to deliver goods at a particular day and place; the variance was held fatal. Robertson v. Lynch, 18 John. Rep. 451. So, if money paid is alleged to be the consideration of a promise, such allegation is not supported by evidence of payment, after the promise was made. Bender v. Manning, 2 N. H. Rep. 289. And in Lees v. Whitcomb (3 Carr. & Payne, 289), it was held, that an agreement by which A. agreed to remain with C. for two years from the date, for the purpose of learning a particular trade, would not support a declaration stating the consideration to be that C. "would receive A. into his service." In an action against an ecclesiastical society, on a contract relating to the funds of the society, the plaintiff alleged the consideration of the defendant's undertaking to be, the delivering up the fund, and a subscription paper, into the hands and control of the society; and it appeared from the proof, that these acts constituted but a part of the consideration; held, that the variance was fatal. Russell v. South Britain Society, 9 Conn. Rep. 508. So, the plaintiff having set forth the names of the subscribers to such fund, and averred that they were all original subscribers; and it appeared from the proof that five of them were not so, but became subscribers at a subsequent period, the variance was adjudged fatal. Id. And where the plaintiff stated, as part of the consideration of the defendant's undertaking, that he contracted to employ the defendant's son, so long as he should wish, and the proof was of a contract to employ him during the season; it was held that the variance was fatal. Curley v. Dean, 4 Conn. Rep. 259. If the declaration allege a consideration for the promise, *additional* to the true one, the plaintiff will fail on the ground of variance. Stone v. Knowlton, 3 Wend. Rep. 374. See also, Lansing v. M'Killip, 3 Cain. Rep. 286. But in Wroe v. Washington et al. (1 Wash. Rep. 357), the declaration alleged a promise in consideration of the appellant's having undertaken to rent and furnish a house, and board the defendant; and the proof was of a promise, in consideration that the appellant would board the defendant merely; and the variance was disregarded. The statement of a *frivolous*, with a sufficient consideration, will not vitiate. Lowry v. Brooks, 2 M'Cord, 421. So a frivolous consideration may be safely omitted in the declaration, but not a valid one. Brooks v. Lowrie, 1 Nott & M'Cord, 342, *supra*. Where the declaration averred the consideration for the purchase of a horse to be, that the buyer should give a large price, to wit, £105; proof that the buyer was to give 100 guineas, and £10 more if the horse suited him, was held no variance. Cave v. Coleman, 3 Mann. & Ryl. 2. Either way, say the court, it was a large price, and that is the important part; the words laid under the videlicet may be rejected, and then there is no variance. Further, see the next note, and *post*, note 247, as to variance respecting written instruments. Also *ante*, note 237, relative to the doctrine of immaterial averments, in setting out express contracts. With respect to variance between the evidence and bills of particulars, see *ante*, note 224.

(Many of the foregoing cases in which the variance between the allegation and the proof was held fatal, would not be considered at all material under the present rules of pleading. Code of N. Y., §§ 169, 170. To render the variance material, it must appear to have actually misled the adverse party, to his prejudice, in maintaining his action or defence on the merits. In all other cases, the pleadings may be amended without costs, or the fact may be found according to the evidence. If the allegation of the cause of action or defence fails in its entire scope and meaning, it is not deemed a case of variance, but a failure of proof. § 171.)

the declaration to have been committed by them in a joint sale of their joint property, the Court of King's Bench held, as there was no evidence against one of the defendants, that the action could not be maintained against the other.(1) The joint contract here described, said Lord Ellenborough, C. J., in delivering the judgment of the court, is the foundation of the joint warranty laid in the declaration, and essential to its legal existence and validity; and it is a rule of law, that the proof of the contract must correspond with the description of it in all material respects.(2)

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(1) Weall v. King, 12 East, 452. And see Green v. Greenbank, 2 Marsh. 485; Lopes v. De Tastet, 1 B. & B. 538.

See Carter v. Hope, 10 Barb. 180.

(1) NOTE 241.—In an action on the case, alleging that the defendants, being joint proprietors of a line of stages from H. to A., undertook, in consideration, &c., to transport the plaintiff and his baggage from, &c., within a certain time, and neglected and failed to perform their undertaking, leaving the baggage behind them on the road; upon *not guilty* pleaded, it was held, that the plaintiff could not recover, without proving a joint undertaking against all. Walcott v. Canfield, 3 Conn. Rep. 194. Hosmer, J., delivering the opinion in this case, after reviewing most of the cases cited in the text, comes to the following conclusion: "that in actions founded on agreement, the plaintiff, in every essential particular, must prove the contract as he has alleged it; and it matters not, whether the breach of the contract resulted from the omission to perform some act, which the defendants ought to perform, or from the improper performance of the act, or from the doing what ought not to be done." The rule, in general, respecting actions of fraud as well as warranty, is, that the contract set out must accord with the one proved upon the trial, or the variance will be fatal. Perry v. Aaron, 1 John. Rep. 129; Silver v. Kendrick, 2 N. H. Rep. 160. If the declaration, however, in such cases, only purports to set forth the contract according to its legal effect, a substantial accordance will suffice. Silver v. Kendrick, *supra*. Where the plaintiffs, in an action alleging deceit, set forth that the defendants promised to deliver them eight bales of *blue guineas*, of the usual length and breadth, and of the value of $5.50 each, but instead thereof, &c., it was held, that proof of a promise to deliver the specified number of bales, without establishing the contract as to the length, breadth, and value, according to the declaration, would not be sufficient. Snell v. Moses, 1 John. Rep. 96. But in Cunningham v. Kimball (7 Mass. Rep. 65), it was held, in an action for a false affirmation in the sale of property, that a variance between the contract, as set forth in the declaration, and as proved, was immaterial; the whole gist of the plaintiff's action being the defendant's fraudulent affirmation. *Aliter*, if the action be founded upon contract, and the gravamen be the non-performance thereof by the defendant. Id. In an action for injury to a horse, by immoderate and careless driving; proof that the defendant, on being charged with driving it from London to Chatham instead of to Dartford, according to his undertaking, stated, that in fact he only drove to Dartford, has been adjudged sufficient to support an allegation that the contract was to drive only to Dartford. Ware v. Juda, 2 Carr. & Payne, 351. And in this case it was held, that an allegation that the plaintiff lent a *horse* to the defendant, was supported by proof that what he lent was a *mare*. In trover, for a promissory note, the declaration alleged it to be for $180, and when produced, it appeared to be for $360, held, a fatal variance. Bissel v. Drake, 19 John. Rep. 66. If the plaintiff in such case cannot state the precise amount of the note, he should say it was of great value, to wit, &c., laying the sum under a videlicet. Id. See also Hoffnagle v. Leavitt, 7 Cowen's Rep. 517. And in an action for fraudulently putting off the bills of a broken bank, where the declaration described the bill as "one ten dollar bank bill, and ten five dollar bank bills, all of *Farmer's Bank*, in *Belchertown*;" it was held, that the plaintiff could not recover, without proving that the bills put off were of the denominations specified. Watson v. Osborne, 8 Conn. Rep. 363. So, it seems, though the specification of the bills be laid under a videlicet. Id. In actions *qui tam* upon the statutes against usury, if the plaintiff undertake to set out the usurious contract, he must prove it precisely as laid, or the variance will be fatal. And where an usurious contract was alleged

What part of contracts need be stated.

It will not be necessary for the plaintiff to state all the several parts of a contract, which consists of distinct and collateral provisions; but it is sufficient to state so much of the contract as contains the entire consideration for the act, and the entire act to be done in virtue of such consideration, including the time, manner and other circumstances of its performance. Thus, if there is a provision in the contract to discharge the party from all liability, in case a particular condition is not complied with, it ought to be set out and strictly proved: but it is otherwise, where the provision respects only the liquidation of damages on a breach of the contract; such a provision need not be stated in the pleadings.(1) In an action on the case upon the warranty of a horse, if the plaintiff states truly the whole of the consideration for the promise of the defendant (which in the case referred to, was the redelivery of the horse to the defendant), and then states truly the substantive parts of the warranty, the breach of which he complains of, this will be sufficient, without averring other parts of the warranty entirely collateral and irrelevant to those stated.(2) Where the contract stated was for the purchase of a certain quantity of goods, "to wit, eight tons," and the contract proved was for the purchase of "*about* eight tons," the exact amount not being known at the time of making the contract, but being ascertained before the action was brought; it was held, that the variance was not material.(3)

Joint contracts.

In all cases of joint contracts, in writing or by parol, or *ex quasi contractu*, and in all cases of joint obligation, it seems now to be settled, that if one only be *sued*, he may plead the matter in abatement, but cannot take advantage of it afterwards upon any other plea, or in arrest of judg-

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to have been made with A. and B. (who were partners) jointly, but the proof was of a note given by *A. alone*, the variance was held fatal. Musgrove q. t. v. Gibbs, 1 Dallas, 216. So where the *date* of the usurious contract differed from the one set forth, it was held a fatal variance. Evert q. t. v. Barr, 4 Yeates, 99. And the day from which forbearance was to commence is material, and must be truly stated. Partridge v. Coates, 1 Carr. & Payne, 534. A variance respecting the time for which the loan was made, is in such cases fatal (Wilmot v. Munson, 4 Day's Rep. 114); or the amount of the loan. Drake v. Watson, 4 Day's Rep. 37. So, in a plea of usury to a bond, where the defendant alleged the usury to consist in including in the bond $183.72 for forbearance, and it turned out that a horse valued at $100 made part of the sum of $183.72; held, a fatal variance. Smith v. Brush, 8 John. Rep. 84. See notes 247, 240.)

(Under the Code, the pleading may be amended on the trial, where the opposite party has not been misled. Corning v. Corning, 2 Selden, 97. Or the trial may proceed, with leave to the party to move for an amendment on such terms as may be just (Gettman v. Ritz, 3 Sand. 734); it being a case where the opposite party has not been misled. And though there be no amendment, the fact may be found according to the evidence. § 170.

(1) Clarke v. Gray, 6 East, 564, 569. And see Thornton v. Jones, 2 Marsh. 287; Parker v. Palmer, 4 B. & A. 387.)

(2) Miles v. Sheward, 8 East, 7. And see Cotterell v. Cuff, 4 Taunt. 285; Sequier v. Hunt, 3 Pri. 68; Handford v. Palmer, 2 B. & B. 359; Blyth v. Bampton, 3 Bing. 472.

(3) Gladstone v. Neale, 13 East, 410. And see Crispin v. Williamson, 8 Taunt. 107.

ment, or give it in evidence under the general issue. Thus, in an action against the defendant as drawer of a bill of exchange, who pleaded non-assumpsit, and it appeared in evidence at the trial, that the bill was drawn by the defendant and another jointly; on a motion to set aside the verdict (which had been found for the plaintiff), upon the ground of this supposed variance, the Court of Exchequer was clearly of opinion, that there was no variance between the bill of exchange proved, and that which was declared upon.(1) The same rule holds when the action is brought against one of several partners; the defendant must plead in abatement, and cannot give the partnership in evidence under the general issue.(2) Formerly, a different rule was adopted, on the ground of a supposed variance.(3) But with respect to the party suing, the rule is still the same; namely, that if an action of assumpsit is brought by one only of several parties to a contract, who ought to join, the defendant may take advantage of it upon the general issue of non-assumpsit.(4)

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(1) Evans v. Lewis, cit. 1 Wms. Saund. 291 d; Germain v. Frederick, cit. Id.; Rees v. Abbott, Cowp. 832; Powell v. Layton, 2 N. R. 365.

(2) Rice v. Shute, 5 Burr. 2611; Abbott v. Smith, 2 W. Bl. 947.

(3) Boson v. Sandford, 2 Salk. 440.

(4) Leglise v. Champante, 2 Str. 820; Graham v. Robertson, 2 T. R. 282; Teed v. Elworthy, 14 East, 210; 1 Wms. Saund. 291 f.

NOTE 242.—Abbott, C. J., in Snellgrove v. Hunt (1 Chitty's Rep. 71, 75), commenting on the remarks of Sergeant Williams (1 Saund. 291 g, note 2), thus concisely gives the reason of the distinction pointed out in the text: "The plaintiff knows, or ought to know, who are his partners in a transaction—but he may not be able to ascertain how many persons are liable to be jointly sued; consequently the omission of a party, who ought to have been made a co-plaintiff, is a ground of nonsuit; but the omission to make a party a defendant can only be taken advantage of by plea in abatement." And this doctrine will be found recognized and sustained by all the cases. Dob v. Halsey, 16 John. Rep. 34; Graham's Pr. 62; Bird v. Pierpoint, 1 John. Rep. 118, 122; Tom v. Goodrich, 2 John. Rep. 213; Foster v. Hooper, 2 Mass. Rep. 572; Ziele v. Campbell's Ex'rs, 2 John. Cas. 382; Bradley v. Camp, Kirby's Rep. 77; Robinson v. Fisher, 3 Cain. Rep. 99; Barstow v. Fossett, 11 Mass. Rep. 250; Ruggles v. Patten, 8 Mass. Rep. 480; Brown v. Belches, 1 Wash. Rep. 9; Robertson v. Smith, 18 John. Rep. 459; Wilson v. Wallace, 8 Serg. & Rawle, 53. If the defendant, however, has promised to pay each of several partners his specific proportion of their debt, he cannot, in an action by one of them for his proportion, object to the non-joinder of the others. Bunn v. Morris, 3 Cain. Rep. 54. So if he has settled with one, the cause of action is severed, and he shall answer the rest. Baker v. Jewell, 6 Mass. Rep. 460. See, also, Austin v. Walsh, 2 Mass. Rep. 401. In North Carolina, where the assignees of a bankrupt partner bring a suit for a partnership demand, and there is no plea in abatement, they may recover a moiety. Barclay's Assignees v. Carson, 2 Hayw. 243. In an action by executors, whether *ex contractu* or *ex delicto*, if all the executors named in the will do not join, the defendant should crave oyer of the probate, and plead the non-joinder in abatement; he cannot take advantage of it in any other way. Graham's Pr. 62, 63; 1 Saund. 291 g, note 4; Archb. Pl. 61. In assumpsit, upon a policy of insurance, if the plaintiff aver an individual interest in the property insured, he will not be permitted to give in evidence a joint interest with others; nor will an averment of an interest with others be supported by proof of a sole interest. Graves v. The Boston Mar. Ins. Co., 2 Cranch, 419; Catlett v. Pacific Ins. Co., 1 Paine's Rep. 594. And where a cargo was insured for A., "for himself and for others concerned," and it appeared that A.'s interest was fully insured by a prior policy; held, that A. could not recover jointly with the others, nor for them in the manner stated in his declaration. He should have brought the action ex-

Joint torts.

A distinction, however, has been made, in this respect, between actions founded on contract, and actions of tort; and, in the latter case, if one only of several persons, who ought to join, bring the action, the defendant cannot avail himself of the variance under the general issue, but must plead it in abatement.(1) There is a distinction also between these forms of action, with respect to the party sued. For if several persons jointly commit a tort, the plaintiff has his election to sue all or any number of the parties, a tort being in its nature the separate act of each individual; and, therefore, in actions *ex delicto* against one only (such as trover, trespass, case for malfeasance, and the like), for a tort committed by several, the defendant cannot plead such matter in abatement or in bar, nor give it in evidence on the general issue.(2)

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pressly as agent, stating the interest of the others; or it should have been brought in their names, as upon a policy made for their benefit by their agent; accordingly, A. was nonsuited at the trial upon the general issue pleaded. Gardner v. The Bedford Ins. Co., 17 Mass. Rep. 613.

In debt on bond, where the bond is joint, all the obligors should be sued; but an omission in this respect cannot be taken advantage of as a ground of nonsuit on the trial; it should be pleaded in abatement; or, if it appear on the face of the pleadings of the plaintiff that *there is another person living, who executed the bond with the defendant jointly*, it is good ground for arresting the judgment. South v. Tanner, 2 Taunt. 254; 1 Saund. 281 b, note 4; ——— v. Kenon's Adm'rs, 1 Hayw. 216. It seems that, in such case, if no plea in abatement be interposed, the court, after verdict, will presume in favor of the judgment, that the person omitted is dead. See marginal note to Winslow v. The Commonwealth, 2 Hen. & Munf. 459. And see, also, 1 Saund. 291 b, c, note 4.

In 1 Saund. 291 e, Sergeant Williams says, that if an action be brought against two of three joint and several obligors, the defendant can only avail himself of the omission by plea in abatement. But, in Leftwich v. Berkley (1 Hen. & Munf. 62), it was held, that an error in this respect, if it appear on the record, is a ground for reversing the judgment, though it was not pleaded in abatement.

(Where the plaintiff sues several defendants as makers of a joint and several promissory note, he must prove the contract as alleged; and he will fail, if it appears that only two of the defendants executed the note, and that the other defendant signed the note subsequently, without the knowledge or consent of the others. Gardner v. Walsh, 22 Eng. Law & Eq. 162; Chappell v. Spencer, 23 Barb. 584; Mott v. Petrie, 15 Wend. 317.)

(1) Dockwray v. Dickinson, Skin. 640; Leglise v. Champante, *ut supra;* Addison v. Overend, 6 T. R. 766; Sedgworth v. Overend, 7 Id. 279; Bloxam v. Hubbard, 5 East, 420.

(2) Mitchell v. Tarbutt, 5 T. R. 21.

NOTE 243.—The same rule, stated in the next preceding note, with respect to actions *ex contractu*, applies where the action is founded upon matter *ex quasi contractu*; and hence, if an action be brought against one only, of several persons, upon a matter founded in contract, though the form of the action be case for mal-feasance, or non-feasance, the defendant can avail himself of the non-joinder by plea in abatement, and in that way only. 1 Saund. 291 d, note 4; Graham's Pr. 63. But if several persons jointly commit a *tort*, the plaintiff has his election to sue all, or any number of the parties, because a tort is, in its nature, the separate act of each individual; and, therefore, in actions *ex delicto*, such as trespass, trover, case for mal-feasance, or the like, against one only, for a tort committed by several, he cannot plead it in abatement, or give it in evidence on the trial. For a plea in abatement can only be in those cases where, regularly, all the parties *ought* to be joined, and not where they *may* be joined or not, at pleasure. 1 Saund. 291 d, note 4. And see Wright v. Cooper, 1 Tyl. Rep. 425; Rose v. Oliver, 2 John. Rep. 365; Lansing v. Montgomery, 2 Id. 382; Bishop v. Ely, 9 Id. 294; Low v. Mumford, 14 Id. 426;

Proof of time.

It will not be necessary to prove the time precisely as laid in the pleadings, unless that particular time is material. Thus, where a declaration stated that the defendant on such a day made his promissory note, proof that he made it on a different day would be sufficient. So in an action for assault, battery, taking of goods, &c., where the defendant pleads the general issue, the plaintiff will not be confined to the day stated in the declaration, but may prove the assault, &c., on any other day before the commencement of the action.(1) If, however, the defendant justifies by *son assault* on the same day, and the plaintiff traverses the cause of justification, and at the trial the defendant proves the trespass on the same day, there the plaintiff cannot give evidence of an assault on another day.(2) And though the defendant should prove the assault of the plaintiff on

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Knox v. Work, 1 Browne's Rep. 101, 103; Ammonett v. Harris, 1 Hen. & Munf. 488; Wilkes v. Jackson, 2 Id. 355; Livingston v. Bishop, 1 John. Rep. 290, S. P. There is a distinction, however, between mere personal actions of tort and such actions where they concern real property. Therefore, if one tenant in common only, be sued in trespass, trover, or case, for anything respecting the land held in common, he may avail himself of the non-joinder; but he can only do this by plea in abatement. 1 Saund. 291 *e*, note 4. See, also, Converse v. Symmes, 10 Mass. Rep. 377. And in Low v. Mumford (14 John. Rep. 426), it is said, that in actions for torts relating to lands of the defendants, there seems to be ground for this further distinction, viz: between nuisances arising from acts of mal-feasance and those which arise from mere omission or non-feasance. "The case of the Abbot of Stratford (7 Hen. IV, 8), was that of a nuisance, arising from a neglect of duty in not repairing a wall, which was, by law, enjoined on the proprietor or proprietors of the land, on which the wall stood. The *gist* of the action, therefore, was, that the defendant was such proprietor, and had neglected a duty incident to his title. The title to the land on which the nuisance existed, was, therefore, directly in question; for if the abbot was not the owner of the land, he was not liable for the neglect, nor liable for the nuisance." Platt, J., who delivered the opinion of the court, then proceeds to show that the principal case was one of naked mal-feasance, and, therefore, that inasmuch as it was perfectly immaterial whether the defendants owned the land or not, the plaintiff had a right to sue all, or any of the parties who were guilty of the tortious act. He concludes that "unless the title comes in question, there is no difference, in this respect, in actions arising *ex delicto*, between actions merely personal and those which concern the realty."

As to plaintiffs in an action arising *ex delicto*, the doctrine of the text has been uniformly recognized; one joint owner of a chattel ought, indeed, to join his co-proprietors in an action of trover or trespass for taking or converting it; but if he do not, the defendant can only avail himself of the irregularity, by pleading it in abatement; he cannot show the omission on the trial to defeat the action, but may prove it, to prevent the plaintiff from recovering more than his aliquot share or interest. Wheelwright v. Depeyster, 1 John. Rep. 471, 486. So, where there are several tenants in common, and all do not join in *trespass quare clausum fregit*, the same rule prevails. Brotherson v. Hodges, 6 John. Rep. 108; Austin v. Hall, 13 Id. 286; Bradish v. Schenck, 8 Id. 151; Decker v. Livingston, 15 Id. 479; Thompson v. Hoskins, 11 Mass. Rep. 419. In South Carolina, it has been held that if one joint tenant, or tenant in common, sues for a whole tract of land, he may have his verdict for any portion of it to which he shows himself entitled. M'Fadden v. Hayley, 2 Bay, 457; Perry v. Walker, Id. 461.

(1) Co. Lit. 182 a, b; 2 Roll. Ab. 687, tit. Verdict N; Com. Dig. tit. Pleader S 12.

Lester v. Jewett, 1 Kernan R. 460; Lyon v. Clark, 4 Selden, 148: Potter v. Thompson, 22 Barb. 87; The People v. Ryder, 2 Kernan, 439.

(2) Downes v. Skrymsher, Brownl. 233; S. C., 2 Roll. Ab. 687, l. 30.

another day, yet the plaintiff, after having made such a traverse, cannot prove another assault on a different day.(1)

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(1) 2 Roll. Ab. 680, tit. Evidence C, art. 3, Thornton v. Lyster, Cro. Car. 514, *contra* (Jones, J., doubting). See 2 Saund. 5, n. 3.

NOTE 244.—(The order in which two events have occurred is frequently material in the statement of a cause of action or defence. Martin v. Kanouse, 2 Abb. Pr. 331; Brown v. Harmon, 21 Barb. 510.) But in general, the precise day on which an alleged fact took place is not material, and need not be proved precisely as laid. Stout v. Rassel, 2 Yeates, 334; Cheetham v. Lewis, 3 John. Rep. 42, 43; Tiffany v. Driggs, 13 John. Rep. 253; Gould's Pl. 89; Dunlap's Pr. 287; Perry v. Botsford, 5 Pick. 189. This extends to all actions, whether they arise *ex contractu* or *ex delicto* (Gould's Pl. 90); and as the plaintiff is not confined usually to the time stated in the declaration, so neither is the defendant, when the time on his part is immaterial, confined to that which is laid in his plea: and the same rule obtains throughout the subsequent pleadings. Id.

An exception is, where the day or time alleged is descriptive of a written instrument, in which case the authorities seem agreed, that the evidence must correspond with the allegations, or the variance will be fatal. Gould's Pl. 91, 99. And see *ante*, note 247, where a number of cases will be found illustrative of this doctrine.

And though an unwritten contract has in strictness no date, and consequently the time of making it is not as such material, yet, if time enters into the terms of a contract, or is involved in any of its essential parts, it must be proved as alleged. Hence, in an action on the statute of usury, in which the plaintiff stated a corrupt agreement made on the 21st of December, 1774, for forbearance from that time to the 23d of December, 1776, it was held that proof of an agreement made on the 23d of December, 1774, for forbearance for two years, did not support the declaration. Gould's Pl. 90, 91; Carlisle v. Trears, Cowp. 671; Harris v. Hudson, 4 Esp. Rep. 152. See also Partridge v. Coates, 1 Carr. & Payne, 534, cited *ante*, note 241, p. 851, in connection with other cases sustaining the same principle. These authorities do not go upon the ground that the day upon which the contract was *made* is material, but upon the ground that the *time of forbearance*, being necessary to ascertain the nature of the transaction, is material; and therefore a misstatement of such time, either with respect to its commencement, termination or extent, is so far a variance from the legal identity of the contract, and fatal. See notes 240, 241.

Sometimes the day of performing a contract or covenant becomes material; and when so, it must be proved as alleged. Thus, where a declaration set forth articles of agreement, by which the plaintiff covenanted to convey land to the defendant; for which the defendant was to pay a certain sum on the 27th of May, 1812, the residue to be paid on the 1st of May, 1813; and on the first payment being made, the plaintiff was to deliver a deed of conveyance; and then averred, that *the plaintiff did deliver a deed on the 27th of May*, 1812, which the defendant then and there accepted; but the defendant, although he made the first payment on the 27th of May, 1812, failed in paying the residue on the 1st of May, 1813; held (Duncan, J., dissenting), that the time of making the conveyance was material, and therefore, that under the declaration, evidence of a deed, executed and delivered to the defendant on the 3*d of May*, 1813, was inadmissible, although the plaintiff offered to prove by parol testimony, that such deed was accepted by the defendant and recorded at his instance. Jordan v. Cooper et al., 3 Serg. & Rawle, 564. If the plaintiff has not performed at the day, his allegation should conform to the fact; when the contract has been changed, and the time of performance enlarged, he must declare accordingly, averring performance within the time fixed by the subsequent agreement; but if, instead thereof, he declare upon the original agreement, and allege performance at the day, he will fail on the ground of variance. This doctrine has been recognized in several cases, and all of them obviously proceed upon the assumption that the time of performance is material. Phillips et al. v. Rose, 8 John. Rep. 392; Baldwin v. Munn, 2 Wend. Rep. 399; Freeman v. Adams, 9 John. Rep. 115; Little v. Holland, 3 T. R. 590; Brown v. Goodwin, Id., note; Hasbrouck v. Tappan, 15 John. Rep. 204; Jewell v. Schroeppel, 4 Cowen's Rep. 566. And the time alleged may be rendered material by the state of the pleadings; thus, in an action for negligence in protesting a

note, where the declaration averred a demand and notice on the 3d day of August, which was the right day; and on the trial, the plaintiff sought to charge the defendant on the ground of demand, &c., having been made on the 2d day of August, which being the day before the last day of grace, was inoperative; held that the time was material, and that the plaintiff could not sustain his action by proof so variant from his allegations. "Though in personal actions generally," say the court, "the day is immaterial, it may nevertheless be rendered material by the pleadings. And such is the case here; the declaration gave no notice that the negligence complained of referred to the day of giving notice. The defendant could not come prepared to repel that which the plaintiff averred; yet this he must do, if, upon the proof offered, the plaintiff could recover. House v. Young, 1 Hamm. Rep. 504. So where a declaration on a bill of exchange, by the indorsees against the acceptor, alleged that the bill was indorsed to the plaintiffs as the surviving assignees of A. B. after his bankruptcy; a witness on the trial proved the handwriting of the drawer, the acceptance and indorsement, and the commission of bankrupt, with the proceedings thereon, were put in. Lord Tenterden, C. J.: "If you had declared generally in the names of the plaintiffs, the possession of the bills by them would have done; but here you state especially that they were indorsed after the bankruptcy to them, as surviving assignees, and you have given no evidence of either of those circumstances." Hutchinson, counsel for the plaintiff, remarked that the bills were dated after the bankruptcy; Lord T.: "That alters the case, but you must still show the plaintiffs to be surviving assignees, and that the bills were indorsed to them as such." Bernasconi v. The Duke of Argyle, 3 Carr. & Payne, 29. And wherever the priority of facts in point of time becomes material, they must be proved in their order as laid. See *ante*, note 235.

In trespass, the day laid in the declaration is seldom material. See Charles v. Delpux, 2 Browne's Rep. 319. Originally, every declaration in trespass seems to have been confined to one single act of trespass. When the injury was of a kind that could be continued without intermission from time to time, the plaintiff was permitted to declare with a *continuando*, and the whole was considered as one trespass. In more modern times, in order to save the trouble and expense of a distinct writ or count for every different act, the plaintiff is permitted to declare for a trespass committed on divers days and times between one day and another; and such a declaration is considered as if it contained a distinct count for every different trespass. But as this is for the advantage and ease of the plaintiff, he is not obliged to avail himself of the privilege, and may still consider his declaration as containing one count only, and as confined to a single trespass; in which case the time becomes immaterial. As it would give the plaintiff an undue advantage, if he could avail himself of the declaration in both those modes, and might operate as a surprise on the defendant, the plaintiff must make his election before he begins to introduce his evidence. Pierce v. Pickens, 16 Mass. Rep. 470, per Jackson, J. Accordingly, in trespass *quare clausum fregit* alleged to have been committed, *diversis diebus et vicibus*, it was held, that if the plaintiff gave evidence of one or more acts of trespass within the days specified, he shall not be permitted to prove an act done at any other time; but if he choose, he may waive his right to prove any act within the days mentioned in his declaration, and prove one done at any time before the commencement of the action, and within the time prescribed by the Statute of Limitations. Pierce v. Pickens, *supra*, 1 Saund. 24 a, note 1; Gould's Pl. 106, 107. And where the trespass is laid with a *continuando*, according to the ancient mode, the same rule prevails. 1 Saund. 24 a, note 1; Haak v. Breidenbach, 3 Serg. & Rawle, 206. But if the plaintiff travels out of the *continuando*, he must select one trespass, and rest upon that. Joralimon v. Pierpont, Anth. N. P. 42, per Van Ness, J. And see note *a;* also Gould's Pl. 106, 107.

There are many acts of trespass which, when executed, cannot be done again, but terminate upon the commission of them, and therefore cannot be continued; as where a man cuts down trees, or kills horses, &c., or takes away goods. In these, and similar cases, if the trespasses were repeated, they cannot be laid with a *continuando*, but must be declared on as done, *diversis diebus et vicibus*, between such and such a time. If the former mode is adopted, the plaintiff will not be permitted to give evidence of more than one act of trespass. He is not, however, confined to the precise time laid, but may prove a trespass committed at any time before the commencement of the suit. 1 Saund. 24 a, note 1; Sanders v. Palmer, 1 M'Cord, 165, 167.

If a declaration in trespass allege an injury to have been committed on the same day upon a horse and cow, proof that a trespass was committed on the horse in 1817, and on the cow in

Of place.

The same certainty of description, as to the place or parish, is not so necessary in transitory as in local actions. In an action for non-residence, where the parish was described as St. Ethelburgh, and proved to be St. Ethelburga, it was held, that the variance was material.(1) So, in an

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1820, will not support the declaration. Sanders v. Palmer, 1 M'Cord, *supra*. Further in relation to trespass, see *post*, Vol. III, of the text. In ejectment, the averment of title is so far material, that it must be laid at or before the time when it actually accrued. And if it appear to have accrued subsequent to the day alleged, the variance will be fatal; but not, if it appear to have accrued at any prior period. Siglar v. Van Riper, 10 Wend. Rep. 414, 417; Van Alen v. Rogers, 1 John. Cas. 281. See also Bailey v. Fairplay, 6 Binney, 454; Noakes v. Shaw, Cam. & Nor. 457; Brown v. Lutterloh, Id. 425.

(1) Wilson v. Gilbert, 2 B. & P. 281.

NOTE 245.—The allegation of a place is either merely formal or it is descriptive; where it is merely formal, proof is said to be unnecessary, and even on indictments upon criminal charges, and in actions for local offences, it is sufficient to prove the offence to have been committed within the county. 4 Starkie's Ev. 1570. And see note 249.

But wherever the allegation of place is descriptive, the proof must correspond with the averment; thus, in an action against a carrier, if the contract alleged be to carry from A. to C., a variance as to the termini is material. Tucker v. Cracklin, 2 Starkie's Rep. 385. See also Lopes v. De Tastet, 1 Brod. & Bing. 538. And where the declaration laid a promise to pay at A., and the evidence was of a promise to pay at B., the variance was held fatal. Umbehocker v. Russell, 2 Yeates, 339. And see *ante*, notes 240, 241. But in the case of Frith v. Gray (4 T. R. 561, n.), cited in the text, in an action for not procuring the plaintiff a booth at a horse race, to be run on Barnet common, in the county of Middlesex, where it was proved that the whole of Barnet common was in the county of Hertford; Lord Mansfield and the rest of the court, on a motion for a new trial, upon the ground of variance, held, that as it was perfectly immaterial whether Barnet common was in Middlesex or not, those words might be rejected as surplusage.

Where, in a declaration upon an instrument in writing, no venue was stated in the body of the declaration, but only in the margin, and no place was alleged where the instrument was executed, held not a variance, though the instrument produced in evidence bore date at a different place from that in which the venue was laid. Alder v. Griner, 13 John. Rep. 449. But the court say in this case, that had the declaration alleged the instrument as having been made at the place where the venue was laid, they would probably have been bound by authority to have decided otherwise. See *post*, note 247. An action for a nuisance to the plaintiff's real property, whether corporeal or incorporeal, is local, and the action must be brought in the county where the property is situate. Mersey and Irwell Nav. Co. v. Douglass, 2 East, 497, cited in the text. But it is not necessary to describe the precise local situation, either of the property injured, or of the gravamen. Id. And unless a precise local situation be given, the place mentioned will be ascribed to venue, and not regarded as descriptive. Id. If, however, in such case a precise local description be given, it must be proved as laid, and a variance will be fatal. See Shaw v. Wrigley, cited *arguendo*, 2 East, 500; 4 Starkie's Ev. 1574. Where the nuisance was alleged to consist in obstructing the waters of D. creek, and the evidence was of obstructions in the water near the mouth of D. creek, the variance was held fatal. Funk v. Arnold, 3 Yeates, 428. So, in trespass, if the close is described, the plaintiff will be held to proof of injury within the description. Thus, where the allegation was that the defendants broke, &c., the plaintiff's *mill lot*, and destroyed their mill dam extending across Agawam river, &c.; and on the trial, it appeared that the mill lot and mill stream were on the north side of the river, the dam extending across; the plaintiffs offered to prove that the defendants pulled up the dam on the south side of the river, and that one of them, who did not cross the river, stood on the mill lot, giving directions to the others while they were engaged; to this evidence, as it related to the destruction of the dam south of the thread of the river, the defendants objected, because it was not within the description contained in the declaration. The evidence was rejected, and the jury gave their verdict for

action of ejectment, where the premises were described as situate in the *united parishes of A. and B.*, but were proved to be in *the parish of A.*, and

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a trespass committed on the north side of the river; held, that the decision of the judge at the trial, excluding the evidence, was correct. White v. Mosely, 5 Pick. 230. Where the premises were described as abutting on the close of the defendant, and there were three defendants, A., H. and C., it appearing that the premises abutted on the close of A., but not of the other defendants, held, that this was ambiguity merely, and not a variance. Walford v. Anthony, 8 Bing. 75. Under the 6th section of the Patent Law of February 21st, 1793, ch. 156 (2 Bior. 348), the defendant pleaded the general issue, and gave notice that he would prove, on the trial, that the machine (for using which without license the suit was brought) had been used previous to the alleged invention of the plaintiff, at several places which were specified in the notice, "and also at sundry other places in Pennsylvania, Maryland, and elsewhere in the United States." The defendant having given evidence as to some of the places specified, held, that evidenc eas to other places not specified was admissible; but that the court possess the power which will be exercised, to prevent the plaintiff from being injured by surprise. Evans v. Eaton, 3 Wheat. 454.

Where it is doubtful whether the allegation of place be merely formal, or whether it be descriptive, the allegation will be referred to venue, rather than to description. See Jeffries v. Duncomb, cited in the text; 4 Starkie's Ev. 1570. And where the place of doing an act is precisely alleged, if the description be *wholly immaterial*, it may be rejected as surplusage. 4 Starkie's Ev. 1571. Thus, in an action for running down the plaintiff's boat in the Thames, near the Halfway Reach, proof that it was done in the Halfway Reach is sufficient, the place being entirely immaterial. Drewry v. Twiss, 4 T. R. 558, cited in the text. Proof that the place is usually known by the name or description set forth in the declaration, is sufficient; as where, in an action for a nuisance to the plaintiff's house, "at Sheerness, in the county of Kent," it was proved that the house was situated in the adjacent parish of Minster, but that both places were usually known by the name of Sheerness. Burbridge v. Jakes, 1 Bos. & Pull. 225. And where the premises were described as in the parish of Westbury, it appearing that there were two parishes by that name (Westbury on Trym, and the other Westbury on Severn), it was held no variance. Doe v. Harris, 5 Maule & Selw. 326. In a penal action on the statute 3 H. VIII, ch. 11, § 2, against Dr. Leigh, for practicing physic in the parish of St. George's in the East, within seven miles of the city of London, it apeared that the name of the parish was St. George's, in the county of Middlesex, and Lee, Ch. J., held it was well enough, for it was more generally known by the name of St. George's in the East, than by the name of St. George's in the county of Middlesex. Cited by Best, Serg't, *arguendo*, 3 Taunt. 128. And where the plaintiff sued *qui tam*, alleging a loss at the game of *rouge et noir*, at the parish of St. James, in the county of Middlesex; held sufficient in error, although in Middlesex there are the parishes of St. James, Clerkenwell, and St. James in the liberty of Westminster. Taylor v. Williams, 3 Bing. 449. The latter parish, it seems, was sometimes called St. James. But in trespass for breaking and entering a house, where the premises were laid in the parish of Clerkenwell; it was proved that Clerkenwell consisted of two parishes, the one known by the name of St. John, the other by the name of St. James, and the whole was generally known by the name of Clerkenwell; the description was held insufficient. Taylor v. Homan, 1 Moore, 161. In an action for an excessive distress, the premises were laid to be in the parish of St. George the Martyr, and were proved to be in the parish of St. George, Bloomsbury; held an improper description. Harris v. Cooke, 2 Moore, 587; S. C., 2 Taunt. 539. *Per Cur.*: "The parish should have been described by its known and popular, and not by its general description. St. George, Bloomsbury, was dedicated to George the First, and St. George the Martyr is quite a distinct parish." Id. And see further, Taylor v. Brooke, 3 Maule & Selw. 169. Where the declaration described premises for which rent was claimed, as situate in the parish of B. and M.; and the deed produced described the premises as situated in two distinct parishes, the one B. and the other M.; held, that the variance was fatal. Morgan v. Edwards, 6 Taunt. 394. In an action to try a right of way, it was alleged to be from a certain highway leading from the parish of L. to B., and the highway turned out to be at that part within the parish; held no variance. Phillips v. Davies, 2 Anst. 572.

the two parishes were united only for the single purpose of maintaining the poor,(1) the variance was thought to be material. So also in a case where the premises were described as being in the parish of St. George the Martyr, Bloomsbury, and were proved to be in the parish of St. George, Bloomsbury, the variance was held to be fatal.(2) In these and similar cases, the variance might now be corrected, by amending the record.

Statement of prescriptive right.

The rule above laid down with respect to contracts applies equally to the case of a prescription: a prescriptive right is one entire thing, and, when put in issue, must be proved as stated.(3) It ought to be proved, therefore, to the full extent to which it is claimed. Thus, in replevin, if the defendant avow taking the cattle as damage-feasant, and the plaintiff plead in bar a right of common, and aver that the cattle were levant and couchant, on which averment issue is joined, proof only for part of the cattle will not support the averment, for the issue is upon the whole.(4) But though the party must prove a prescriptive right commensurate with the right claimed, he will not be precluded from recovering because he proves a more ample right than what he claims. Evidence of a right of common for sheep and cows will support a plea prescribing for common only for sheep.(5)

A distinction is to be made between the case of a prescriptive right of common alleged in bar, on which issue is taken, and a possessory right of common claimed in an action of tort for disturbance of the right. In the latter case it is sufficient to prove the same ground of action as is laid in the declaration, although not to the extent there stated.(6) If the allegation is, that the plaintiff was entitled to the right of common in respect of a certain quantity of land, and the proof is in respect of a part only of that land, it will be sufficient;(7) so, if it is claimed in respect of a messuage and a certain number of acres of land, and proved to be in respect

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(1) Goodtitle d. Pensent v. Lammiman, 2 Camp. 274.

(2) Harris v. Cook, 8 Taunt. 539. And see Guest v. Caumont, 3 Camp. 235; 6 East, 352. The following are instances in which variances in the description of parishes, &c., were held to be immaterial:—Goodtitle d. Bremridge v. Walter, 4 Taunt. 671; Doe d. Tollet v. Salter, 13 East, 9; R. v. Glossop, 4 B. & A. 616; Taylor v. Hooman, 1 B. Moore, 161; Kirtland v. Pounsett, 1 Taunt. 570.

(3) *Supra*, p. 837.

(4) Sloper v. Allen, 2 Roll. Ab. 706, tit. Trial, c. 41, cit. B. N. P. 299; Gray's Case, 5 Rep. 79; Down's Case, 4 Id. 29 b; Rogers v. Allen, 1 Camp. 313. See Brook v. Willett, 2 H. Bl. 225; Bowen v. Jenkin, 6 A. & E. 911; *Supra*, p. 829.

(5) Bushwood v. Bond, Cro El. 722; Tewkesbury (Bailiffs, &c.) v. Bricknell, 1 Taunt. 142; West v. Andrews, 5 B. & A. 328.

(6) See by Coleridge, J., in Bailey v. Appleyard, 8 A. & E. 167. And see Duncan v. Louch, 6 Q. B. 904, 914; Higham v. Rabett, 6 N. C. 622.

(7) Eardley v. Turnock, Cro. Jac. 629; S. C., Palmer, 269.

only of land.(1) The proof, in these cases, is not of a different allegation, but of the same allegation in part; and that is sufficient.(2)

But the right proved, though it may be less extensive than that alleged, must be of the same nature with it and included in it. Thus, a claim of a right of way on foot, and also to *lead* and carry away *manure*, is not supported by proof of a right of way on foot, and for horses, oxen, cattle and sheep; as the term "lead" implies drawing in a carriage.(3)

Rule of court as to amendment of variances.

Many variances between the prescriptive right claimed and the right proved, have been remedied by the following rule: Hil., 4 Wm. IV,(4) "When, in an action of trespass *quare clausum fregit*, the defendant pleads a right of way with carriages, and cattle, and on foot, in the same plea, and issue is taken thereon, the plea shall be taken distributively; and if a right of way with cattle or on foot only shall be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of way so found, and for the plaintiff in respect of such of the trespasses as shall not be so justified.(5)

"And where, in an action of trespass *quare clausum fregit*, the defendant pleads a right of pasture for divers kind of cattle (*e. g.*, horses, sheep, oxen, and cows), and issue is taken thereon; if a right of common for some particular kind of commonable cattle only be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of common so found; and for the plaintiff, in respect of the trespasses which shall not be so justified.

"And in all actions in which such right of way or common as aforesaid, or other similar right, is so pleaded, that the allegations as to the extent of the right are capable of being taken distributively, they shall be construed distributively."(6)

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(1) Ricketts v. Salwey, 2 B. & A. 360; Manifold v. Pennington, 4 B. & C. 161.

(2) 2 B. & A. 366.

NOTE 246.—Where the declaration set forth a right to use and employ certain waters, and that the same should flow, without interruption, over and through the plaintiff's land, in a convenient and customary manner, according to the natural and usual flow of the stream; it was held, that this did not bind the plaintiffs to proof of a right by *prescription*. Twiss v. Baldwin, 9 Conn. Rep. 291. And held, likewise, that the burden of complaint being the unreasonable detention of the water by the defendants, proof of the allegations respecting the *natural course of the stream*, and the right to use it *without interruption*, was not essential to a recovery. The court found their opinion upon Ricketts v. Salwey, cited in the text, and Williams, J., uses the same reasoning adopted by Holroyd, J., in that case. "The plaintiffs," he remarks, "have not proved all that they have alleged; they do not prove their right to the extent they have stated it; but they prove a right, and that they have been disturbed in the enjoyment of it. The proof, then, is not of a different allegation, but of the same allegation in part."

(3) Brunton v. Hall, 1 Q. B. 792. See, also, Beadsworth v. Torkington, Id. 782.

(4) 5 B. & Ad. x.

(5) See Higham v. Rabett, *ut supra*.

(6) See Knight v. Woore, 3 N. C. 3, 534; Phythian v. White, 1 M. & W. 216.

Variance as to documents stated in pleadings.

It would be quite unnecessary and superfluous to refer here to the numerous instances of variances, which were formerly fatal, between the averment of records, deeds or other writings in the record of the action, and the documents produced in evidence; as, in those cases, under the remedial statutes which will immediately be noticed, the variances might now be corrected and cured by an amendment of the record. It will be sufficient, with a view to show the inconveniences and failure of justice in former times, and the improvements in the administration of justice in the present day, to observe generally that, according to the settled practice, till within a few years, where a document was declared upon, and it appeared, on comparing and reading the record with the instrument produced, that some of the words, stated in the pleadings as descriptive of the document (and which could not be rejected as surplusage), varied from those contained in the document produced in evidence, the variance was fatal;(1) and though it might not have been necessary to state some parts of the document which the declaration purported to set out at length, or only necessary to state those shortly according to their legal effect and operation,(2) yet, if they were set out at length, and were descriptive of the document, they were required to be proved as laid, and in case of a variance the plaintiff failed. If a covenant was set out in the declaration as a general covenant, and on reading the deed in evidence it appeared to be subject to an exception or limitation, the variance was fatal.(3)

If, however, the declaration did not profess to describe a deed or to set it out according to its tenor, but stated it correctly in substance and in its legal effect, a variance would be immaterial. In an action against a tenant for breach of covenant, proof of a lease from the plaintiff and his wife to the defendant was held to support an averment of a lease from the plaintiff alone, at least, where the wife had only a chattel interest in the lands before marriage, or they were the property of the husband; for the covenants made to husband and wife may, in legal effect, be deemed coven-

(1) The following may be referred to as the principal cases relating to such variances: Sands v. Ledger, 2 Ld. Raym. 792; Pitt v. Green, 9 East, 188; Bowditch v. Mawley, 1 Camp. 195; Howell v. Richards, 11 East, 633; Waugh v. Russell, 5 Taunt. 707; Morgan v. Edwards, 2 Marsh. 96; Hoar v. Mill, 4 M. & S. 470; Weeks v. Maillardet, 14 East, 568; Gordon v. Gordon, 1 Stark. R. 294; Horsefall v. Testar, 7 Taunt. 385; Cartridge v. Griffiths, 1 B. & A. 57; Swallow v. Beaumont, 2 Id. 765; Brown v. Knill, 2 B. & B. 395. Cases of variances between a record averred in the pleadings and the record in the action, where formerly the variance was fatal:— Green v. Rennett, 1 T. R. 656; 9 East, 161, 163; Brown v. Jacobs, 2 Esp. 726; R. v. Taylor, 1 Camp. 404. See, also, Com. Dig. tit. Record C, D; R. v. Leefe, 2 Camp. 141; Woodford v. Ashley, Id. 193; R. v. Bellamy, 1 Ry. & Mo. 171; Sheldon v. Whitaker, Id. 266; Bevan v. Jones, 4 B. & C. 403; Edwards v. Lucas, 5 Id. 339.

(2) Dundas v. Weymouth (Ld.), Cowp. 665; Price v. Fletcher, Id. 727; Roulston v. Clarke, 2 H. Bl. 563.

(3) Howell v. Richards, 11 East, 633; Tempany v. Bernard, 4 Camp. 20.

ants made to the husband alone.(1) So, bonds and promissory notes, given to the wife, may be declared upon as having been given to the husband, in a suit by him.(2) In such cases, where the variance is immaterial, an amendment of the record would be unnecessary.

Record set out in the pleadings *in substance.*

The same rule extends to averments of records in pleadings. Where the pleadings do not undertake to set out the tenor of the record, and the substance only of the record is stated, a variance between the allegation and the record will not be material, provided the allegation is substantially proved. Thus, on a prosecution for perjury,(3) where the objection was, that the indictment stated a bill in chancery to be directed to Robert Lord Henley, &c., and it appeared in evidence to have been directed to Sir Robert Henley, Knight, &c., the court overruled the objection, and held it to be sufficient that the complaint had preferred a bill before the person who held the great seal, by whichever title he was styled.(3)

So, in an action for a malicious prosecution,(4) where the allegation was that the defendant prosecuted an indictment against the plaintiff, until afterwards, to wit, on a certain day named, the plaintiff was in due manner acquitted, &c.; and to prove this allegation, the record of acquittal was produced, which showed that the acquittal was on a different day from the one named; the court held that the variance was not material, and that the averment had been substantially proved. Here the day was not alleged as part of the description of the record; but the substance of the allegation was, that the plaintiff had been acquitted on the prosecution.

So in an action against a sheriff for a false return,(5) the declaration

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(1) Arnold v. Revoult, 1 B. & B. 442; S. P., Beaver v. Lane, 2 Mod. 217.

(2) 1 B. & B. 443; Ankerstein v. Clarke, 4 T. R. 616. In this case the bond was given to the husband and wife as administratrix.

(3) R. v. Lookup, cit. 1 T. R. 240; 9 East, 163. See, also, R. v. Pippett, 1 T. R. 235; R. v. Payne, cit. 9 East, 158; R. v. Leefe, 2 Camp. 139; Byne v. Moore, 5 Taunt. 187; Cousins v. Brown, 1 Ry. & Moo. 291.

(4) Purcell v. Macnamara, 9 East, 157. See, also, Phillips v. Bacon, 9 East, 298; Phillips v. Shaw, 4 B. & A. 435.

(5) Stoddart v. Palmer, 3 B. & C. 2.

NOTE 247.—VARIANCE, WEN MATERIAL AND WHEN IMMATERIAL.—The general doctrine we are to consider is nearly the same, whether the particular instance of variance be in respect to a record, specialty, or any inferior species of written evidence; and it will therefore avoid the necessity of a frequent recurrence to the same authorities, by disposing of the entire subject in a single note. An instrument used upon the trial is either *set forth in the pleadings by its tenor*, or it is *described according to its substance and effect*, or it is simply *brought forward to sustain allegations which do not expressly refer to it in any manner whatever.*

1. It is well settled, that if a party undertakes to set forth a written instrument by its tenor, or in *hæc verba*, as it is ordinarily expressed, his proof and averments must correspond most strictly; and if, in the recital, he varies in a word or letter, so as thereby to create a different word, it is fatal. 4 Starkle's Ev. 1587. The State v. Caffey, Murph. 321; Sheehy v. Maned-

ville, 7 Cranch, 208, 217; Ferguson v. Harwood, Id. 408, 413; Commonwealth v. Stow, 1 Mass. Rep. 54; Olin v. Chipman, 2 Tyl. Rep. 148; Harris v. Lawrence, 1 Tyler's Rep. 156. And it will be found that the phrase "to the tenor following," or "as follows," or "in the words and figures following," or the like, preceding an allegation of the instrument, has usually been held to bind the party to exact proof. 4 Starkie's Ev. 1587; Harris v. Lawrence, 1 Tyl. Rep. 156; Olin v. Chipman, 2 Tyl. Rep. 148; Commonwealth v. Stow, 1 Mass. Rep. 54. Not so, however, where the words are "in manner and form following." Rex v. May, Doug. 193. Yet, whatever may be the peculiar mode in which an instrument is alleged, if it be apparent from the whole aspect of the pleading that the party intended to set it forth in the precise words, slight inaccuracies will be fatal. Olin v. Chipman, 2 Tyl. Rep. 148. But should it still remain doubtful, after recurrence to these circumstances, whether the instrument was designed to be set out in this manner, or merely described by its substance and effect, our courts would, doubtless, be in favor of extending to the party the benefits of the latter alternative. See Ferguson v. Harwood, and Silver v. Kendrick, cited *supra;* also, the remarks of Marshall, C. J., in Wilson v. Codman's Ex'r, 3 Cranch, 193, 208. Instances of the application of the rule we are considering will occur most frequently in the case of actions for libels, as to which, see the text, *post* and *ante*. By way of showing the extent to which it has been carried, it may be proper, in addition to what we have above stated, to remark that, where the instrument is set out by the tenor, the most trivial mistakes, even in a single word, as the substitution of *nec* for *non*, *atr* for *heir*, have been held fatal (Drake's Case, 2 Salk. 660; 4 Starkie's Ev. 1587); but a mere literal variance in the spelling of a word, *abby* for *abbey*, *undertood* for *understood*, or any similar slip of the pen, not changing the word to one of a different signification, will be overlooked. Aleberry v. Walby, 1 Strange, 229, 231; 4 Starkie's Ev. 1587. So, a mis-spelling of the name of an individual will not vitiate, if the sound be not altered; as where one is *Segrave*, and the other *Seagrave*. Williams v. Ogle, 2 Str. 889. And where the declaration alleged a note drawn by the defendant, by the name of *Christopher Bulkley*, and a note produced was signed *Christ. Bulkley*, it appearing that the defendant usually signed his name in that manner, the court held there was no variance. Wood v. Bulkley, 13 John. R. 486. So, where a single bill was declared on as signed by *Philip Taylor*, and the one produced was signed *Pilip Taylor*, it was held that as these names are similar in sound, there was no variance. Taylor v. Rogers, 1 Alab. Rep. 197. In Pennsylvania, the general rule is, that a small variance in setting out a written instrument is fatal; but the rule is not applicable where the opposite party, by trick or artifice, withholds the original, or where the party averring the instrument cannot by due exertions obtain it; as where the action was founded upon a contract under seal, and the defendant prayed oyer, whereupon the court allowed the plaintiff, upon satisfactory proof that he had not the original in his possession, and by due search was unable to obtain it, to give a copy from the records as oyer; and it appeared that, at the time of demanding oyer, the defendant had both parts of the instrument in his possession, and being charged therewith, positively denied it, but produced the same in court upon the trial; under these circumstances, it was held that after this improper conduct on the part of the defendant, it did not lie in his mouth to insist on a variance, however fatal it might be in common cases. Dunbar v. Jumper, 2 Yeates, 74. In debt on a bond, the declaration, purporting to set it forth in *hæc verba*, charged that *R.* and *B. acknowledged themselves* to be indebted, &c.; held, that a writing, beginning, "Know all men, &c., that I, *R., am* held and firmly bound," and running throughout in the name of *R. alone*, did not support the declaration, notwithstanding the name of B. was signed under that of R., and issue was joined merely upon payment by B. Bell v. Allen's Adm'r, 3 Munf. Rep. 118.

If the condition of a bond be set out on oyer, it has been held that a slight variance from the tenor will not be fatal. Thus, where, in the oyer, the words were "or delay, and in the original "or other delay," this was disregarded, because it did not alter the sense. Henry v. Brown, 19 Johns. Rep. 49. But where, in the oyer, the condition was, that if the defendant should pay the plaintiff the full sum of £100, and under the plea of *non est factum*, the evidence was that the word "hundred" had been omitted in the bond, and had been interlined after execution, the variance was held to be fatal; although it was clear from the context that the word hundred was intended. Waugh v. Bussell, 5 Taunt, 707; S. C., 1 Marsh. 214. The basis of the decision in Henry v. Brown (*supra*), appears to have been Holman v. Borough (Salk. 658), and Cull v. Sarmine (cited in 5 Comyn's Dig. 125, b. 4); both were cases of demurrer, on the ground of variance

between the declaration and the deed set out on oyer; and in Waugh v. Bussell (*supra*), Gibbs, C. J., who delivered the opinion of the court, referring to them, says: "This is not a question for lawyers on the construction of the bond; the cases cited are good law, but not applicable. In those cases the declaration may be right, and yet may not contain a single word that is contained in the bond; it is only necessary to state the legal claim which arises by reason of the bond. But after *oyer* and *non est factum* pleaded, the question is, whether the tenor set out is the same as the tenor of the bond executed; and I do not apprehend it would suffice that it should agree in substance. The case in *Levicz* (viz: Cull v. Sarmine, *supra*), when examined, is only because the plaintiff added an *e* final to the name of the widow *Sarmine;* and the court say, mis-spelling will not vitiate an obligation. Chief Baron Comyns has certainly misunderstood that case. Consider the reason of the distinction. In a declaration, it is only necessary to state the legal effect of the instrument; but on oyer, the plaintiff professes to produce a copy of it, as of the deed by which he asserts that the defendant is bound; and if it is not the true copy, the defendant may say, that it is not the deed he executed. We should be glad to relieve the plaintiff, but it is not in our power. The defendant has a right to see the instrument exactly as it is, and to make the most of the errors therein contained." The supposed error of Chief Baron Comyns consists in stating Cull v. Sarmine as maintaining, that "if the declaration be upon a bill, *that he will pay*, and the bill says, *if he will pay*, the variance will be immaterial." As reported in 3 Lev. 66, to which Comyns refers, the case is very obscure; though, from the reason there given for the decision, viz: that "mis-spelling will not vitiate an obligation," we should incline to think the remarks of Gibbs, C. J., respecting it, not unwarranted. It is worth observing, that the attention of the Supreme Court in Henry v. Brown (*supra*), does not seem to have been directed to this circumstance, nor do they appear to have noticed, in any way, the distinction taken in Waugh v. Bussell (*supra*), as to instances of variance between the declaration and oyer, and those where the variance is between the oyer and evidence.

2. When the pleading, however, does not purport to set out the instrument in *hæc verba*, but it is merely described by its substance and effect, the rule is more liberal, and better calculated to attain the ends of justice. And, in such case, it is ordinarily enough, if the legal identity of the instrument has been adhered to; or, in other words, there will be no variance, if the instrument proved, and the one alleged, correspond in all essential particulars. Accordingly, in debt against a sheriff for an escape, where the declaration alleged a judgment recovered in the Court of Common Pleas, held at Salem, in Washington county; and in the record produced on the trial, the place or town in which the court was held did not appear, the variance was disregarded. Page v. Woods, 9 John. Rep. 82. And on an indictment for perjury in swearing to an affidavit, where the assignment was, that the prisoner swore he did not know a writ was returned against him in a particular *suit*, and the affidavit, when produced, contained the word *case* instead of suit; held, that as the indictment only purported to set forth the affidavit in substance, the variance was not fatal. The State v. Caffey, 2 Murph. Rep. 321. And in an action for a libel, the defendant gave notice, with the general issue, that he would give in evidence a record of a trial upon an indictment, of the term of June, 1810: when produced, it appeared to be in 1809; held, that the time was not material, and as the notice did not affect to set forth the record according to its tenor, or with a *prout patet*, &c., the variance was unimportant. Brooks v. Bemiss, 8 John. Rep. 455. And see per Woodworth, J., McKinley v. Rob, 29 John. Rep. 351, 355; Rodman v. Forman, 8 John. Rep. 26. And even an averment, with a *prout patet per recordum*, will not render proof by record necessary, where, from the nature of the fact as averred, it appears that there is no record. Walker v. Witter, Doug. 1. And see Wigley v. Jones, 5 East, 440. But see Turner v. Eyles, 3 Bos. & Pull. 456. In one case, the plaintiff having alleged that the defendant permitted his bill to be discontinued, for want of prosecution thereof, and that thereupon it was considered that the defendant take nothing, &c., *prout patet per recordum*, whereby it was wholly ended and determined; held, that this was not proved by the production of the rule for discontinuance, though, had the allegation been general, it would have been satisfied by the production of the rule, and evidence of the payment of costs. Gadd v. Bennet, 5 Price, 540. See Fanshaw v. Heard, 1 Moore & Payne, 191. Where the plaintiff sued for a malicious prosecution, and in one count of his declaration alleged that the defendant went before a magistrate and entered a complaint, charging the plaintiff with committing an offence on —— day of ——, 1824, and in the other that he so charged the plaintiff with committing an offence *on or about* the

20th day of May, 1824; it was held, that an affidavit taken before the magistrate, charging the plaintiff with having committed the offence on or about the 16th of May, 1824, was admissible; for, say the court, "the declaration did not profess to set out in so many words, the original affidavit of the defendant. It only stated the substance in general terms. This was sufficient for all the purposes of justice. The particular day upon which it was alleged the offence was committed, was not material for the defendant's defence, and the paper offered in evidence comported substantially with the allegations in the declaration. It was not a case of technical nicety, but of substantial accordance." Richards v. Foulks, 3 Hamm. Rep. 66, 70.

And so where writs and process are set out according to their substance, slight variances, or indeed any variance which does not affect their legal identity, will be disregarded. As where, in debt for an escape, the declaration set forth a *ca. sa.* with the usual words, "and him safely keep," and the *ca. sa.* produced omitted the word "keep;" it was held no fatal variance. Jones v. Cook, 1 Cowen's Rep. 309. So where the variance was in amount, and trifling. Bissell v. Kip, 5 John. Rep. 89. And where the declaration alleged that the direction in an execution was to levy a specific amount, without mentioning interest; and, by the execution, the sheriff was directed to levy the amount, with interest; held no material variance. Crane v. Dygert, 4 Wend. Rep. 675. See Stiles v. Rawlins, 5 Esp. Rep. 133. But in an action on a bond executed to the plaintiff as sheriff, conditioned that B., being confined in jail on an execution in favor of C. for $68.46, should not depart the limits; where the declaration alleged as a breach that B., being legally committed on the execution described in the bond, escaped, after which C. sued A. and recovered, and in support of these allegations, the plaintiff offered in evidence the record of the recovery by C. against him, wherein the execution on which B. was committed, was described as one for $58.46; and also the execution itself, which was for the same sum; held, that the evidence was inadmissible, as not conducive to prove, but as disproving such allegations. (Rossiter v. Downs, 4 Conn. Rep. 292. And where, in a plea of justification, a justice's execution was described as returnable in ninety days, and when produced, it turned out to be returnable in sixty days, the variance was held fatal (Toof v. Bentley, 5 Wend. Rep. 276); so, also, in an action for maliciously bringing a civil suit, and demanding excessive bail; the plaintiff's declaration alleged that the writ, upon which he was held to bail, was returnable on the first Monday in December, 1809, whereas it was, in truth, returnable on the first Monday of March. Munns v. Dupont, 3 Wash. C. C. Rep. 31. But in an action against a sheriff for the escape of a party taken under a *ca. sa.*, where the plaintiff alleged a certain writ of the king called, &c.; also the judgment as rendered in the seventh year of our lord, the now king (Geo. IVth); and on production of the writ, it was found to contain the name of George III; held, that as the judgment was in the time of George IV, and as the plaintiff had alleged that the writ was issued on the 8th of May, 1826, the variance was not fatal. Elvin v. Drummond, 12 Moore, 525. So where, in a similar action, the declaration alleged that an attachment of privilege was sued out by the plaintiff, by which the defendant was commanded to attach, &c., to answer, &c., of a plea of trespass on the case *to the damage of said plaintiffs of thirty pounds*, and the writ produced did not contain the words, "*to the damage of said plaintiffs*," &c.; yet held, that the variance was immaterial, as the declaration did not undertake to set out the writ by its tenor, but only according to its legal effect. Cousins v. Brown, Ry. & Mood. 291. And in a proceeding against bail, on *nul tiel record* pleaded to a replication, which alleged a *ca. sa.* returnable *Coram Rege apud Westm.* where a *ca. sa.* was produced, returnable *Coram rege ubicunque*, &c., the variance was disregarded. Roberts v. Price, 1 Lord Raym. 702. See Shuttleworth v. Pilkington, 2 Str. 1155, cited by Buller, J., in 1 T. R. 240. So where, in action for bribery, the declaration alleged a precept to the mayor, and the evidence was of a precept directed to the mayor and burgesses, the variance was held immaterial, for the substance was proved; and the mayor being the proper returning officer, the precept should have been directed to him. Cumming v. Sibley, cited 1 T. R. 239; Dickson v. Fisher, 4 Burr. 2267: Ware v. Harbin, 2 H. Bl. 113. For other cases of a similar nature, see Rex v. Morris, Str. 909; Wilson v. Mawson, *Cor.* Lee, C. J., cited 1 T. R. 237; Hendray v. Spencer, cited 1 T. R. 229; 4 Starkie's Ev. 1589, *et seq.* In an action, however, against the sheriff on the statute (8 Anne, c. 14), for taking goods off the premises without paying rent, the declaration stated, that "by virtue of, and under pretence of a certain writ of our said lord the king, before the king himself," before that time sued forth, the defendant took, &c.; it was held, that a writ issuing from the *Common Pleas* did not

sustain the averment. Sheldon v. Whittaker, Ry. & Mood. 266. And see Impey v. Taylor, 3 Maule & Selw. 166.

The same principles are equally applicable where a deed of any kind is set out. Thus, in debt on bond, the plaintiff alleged that the defendant acknowledged himself to be bound to Richard Bishop; on oyer, it appeared that the defendant acknowledged himself bound to Richard ———, to be paid to the said Richard Bishop; and, upon demurrer, held that there was no variance, for the word *said* pointed out the relation of the names, and it was impossible to doubt but that the bond was made to the person to whom the money was payable. Bishop v. Morgan, 12 Mood. 275. And where the bond described the defendants as "of the county of Essex," which words were omitted in the declaration, the variance was held immaterial. Evans v. Smith, 1 Wash. Rep. 72. So where the plaintiff declared upon a bond given to him *for, or on account* of, another, and so expressed in the bond; and neglected to set forth that part of the instrument which manifested the use, it was held that the variance was immaterial; "even if it had been stated," say the court, "it would have been mere surplusage." Peter v. Cocke, 1 Wash. Rep. 257. And if a bond be payable to James Whitlock, jun., and the declaration describe it as payable to the plaintiff, after naming him as *James Whitlow*, jun., alias *James Whitlock;* this is not such a variance as should prevent it from being received as evidence in support of the declaration on *a plea of payment.* Whitlock v. Ramsey's Adm'x, 2 Munf. Rep. 510. And where a bond was described as payable on or before the first day of April ensuing the date, with interest thereon from the first day of January next ensuing the same date; and the bond was "payable, with interest from the first day of January, on the first day of April next;" it was held there was no variance, as the sense and legal meaning of the instrument were truly alleged. Hammitt v. Bullitt's Ex'rs, 1 Call, 567. So, where a declaration alleged a bond to be payable to the plaintiff, and on oyer it turned out to be payable to his attorney or assigns—the court, on demurrer, held the variance immaterial, for payment to the plaintiff or to his attorney was the same thing; the *teneri* made it a debt to the plaintiff, and a *solvend* to any one else would be repugnant. Roberts v. Harnage, 2 Salk. 659. In an action by the husband alone, on a bond alleged to be given to him, he gave evidence of a bond to himself and his wife; held no variance, for he had a right to reject the obligation to his wife, and, in legal import, it was a bond to himself. Ankerstien v. Clark, 4 T. R. 616. See, also, S. P., Arnold v. Revoult, 1 Brod. & Bing. 445; S. C., 4 Moore 66, cited in the text as Arnold v. Revoult. So, where the declaration upon a bond stated that C. D., by his certain writing obligatory (of which profert was made), became bound to A. B., the plaintiff, in the sum of, &c., to be paid to the said A. B. or his lawful attorney, "*To the which payment, well and truly to be made, the said A. B.* (the plaintiff) *did thereby then and there bind himself,*" &c. The defendant, without craving oyer, pleaded *non est factum;* and, at the trial, relied on a variance in this, that the bond proved stated that *C. D.* bound himself; on a motion for a nonsuit, it was held, that the plaintiff not having undertaken to set out the deed in its words, but only in its operation and effect, which was truly stated, and in no wise affected by the repugnant words, they might be regarded as surplusage, and then there was no variance. Quigley v. Furlong, Fox & Smith, 224. Where a declaration stated that, in a dispute between the defendant and the plaintiff, executor of A., a sum of money was awarded to the plaintiff, and the award exhibited on oyer was of the same sum to the plaintiff and P., executors of A.; this was held no variance, on the ground that the legal operation of the award had not been departed from. Macon v. Crump, 1 Call's Rep. 575.

It should be here observed, that, if there be a variance between the declaration and the oyer, the defendant, should he seek to avail himself of it, must demur specially on that ground; for he cannot take advantage of it on the trial. James v. Walruth, 8 John. Rep. 410; Jansen v. Ostrander, 1 Cowen's Rep. 670; Henry v. Clelland, 14 John. Rep. 400. But in respect to a variance between the instrument produced in evidence and the oyer, or such instrument and the declaration, the rule is otherwise; in these instances, he may avail himself of the defect at the trial under the proper plea. Waugh v. Bussell, 5 Taunt. 707, *supra;* Howell v. Richards, 11 East, 633; Goldie v. Shuttleworth, 1 Camp. 70; Graham's Pr. 443. The plaintiff, however, in an action on a covenant, need not set forth such parts of it as do not, in any way, relate to the breaches assigned; and if, on producing the covenant at the trial, it appear that something not necessary to be set out has been omitted, the variance will be disregarded. Henry v. Clelland, *supra.* See *ante,* of the text. Not so, however, where he has undertaken to set out

such immaterial part, and has alleged it untruly; there the variance will, in general, be fatal. Henry v. Clelland, *supra*. And see the cases cited in the text.

And in relation to simple contracts in writing, if they are truly described in substance and legal effect, variances in other particulars, will, in general, be overlooked. Thus, if the plaintiff does not profess to set out a note *verbatim*, but merely alleges it in the ordinary way, as bearing date the *first day of April*, &c., it will be no variance if the note be actually dated 4 *mo.* 1*st.* Field v. Field, 9 Wend. Rep. 394. And where the declaration alleged an indorsement upon a note, by which it was made payable to C. or order, and on production of the note, the indorsement was, pray pay to C.; held, no variance, for by the indorsement it was in effect payable as alleged. Bull. N. P. 275. In an action, however, by an indorsee against the maker of a promissory note, payable on demand, where the declaration set out an indorsement in common form, but by the indorsement proved, payment was not to be demanded within a year from the date; held, a variance, though the year had expired before the action was commenced. Stanwood v. Scovel et al., 4 Pick. 422. In this case, however, there was a palpable deviation from the legal import of the indorsement. If a declaration on an agreement by the defendant styling himself "treasurer, &c.," but binding himself personally, omit the description, it is no variance. M'Williams v. Willis, 1 Wash. R. 199.

Indeed, it may be laid down as a proposition sustained by nearly all the cases, that whenever the variance does not change the nature of the writing, so as to render the one set out, a different instrument in legal contemplation from that which is sought to be introduced, such variance will be disregarded. Ferguson v. Harwood, 7 Cranch, 408, 414. And see Silver v. Kendrick, 2 N. H. Rep. 160; The Commissioners, &c. v. Muse, 1 Const. Reports, 405. And the words of a contract set forth in the declaration, must have the same construction as they would have in the contract itself. Whenever, therefore, the declaration purports to set forth a contract according to its effect and substance, and in the contract set forth there is a clause nonsensical or repugnant, which the court in construing the contract itself, would reject as surplusage, they will so reject it also in the declaration. And though the contract do not contain such clause, the variance will not be fatal. Ferguson v. Harwood, *supra;* Quigley v. Furlong, Fox & Smith, 224; Silver v. Kendrick, *supra;* Diblee v. Best, 11 John. Rep. 103.

But the legal import and effect of the instrument must be truly described, or the party will fail on the ground of variance. Several cases illustrating this qualification of the general principle, have been already noticed, and others will be found in the text. We shall introduce some additional ones.

The words *for value received*, as ordinarily used in setting forth a promissory note in a declaration, are not to be taken as a mere naked averment of consideration, but as matter of *description;* and if the note when produced want those words, the variance will be fatal. Saxton v. Johnson, 10 John. Rep. 418. So where those words are in the note, but omitted in the declaration, the variance has been held fatal. Rossiter v. Marsh, 4 Conn. Rep. 196. And where an order was declared on as having been given *for value therein acknowledged*, and the order when produced stated no consideration, the variance was held fatal (Treadway v. Nicks et al., 3 M'Cord's Rep. 195); so where a bill declared on was alleged to be for value received by R. H., and the one produced in evidence was for value received *generally*. Highmore v. Primrose, 2 Chitty's Rep. 333. *Sed vide* Grant v. Da Costa, 3 Maule & Selw. 351. In an action against several persons on a note, the declaration contained no averment that the defendants were partners, or acted under a joint name or firm, but alleged that the defendants "made the note, their own proper hands and names being thereunto subscribed;" held, that proof of one of the defendants having subscribed the note with the name of the firm, was not sufficient to prove the contract stated. Peas v. Morgan, 7 John. Rep. 468. But where the declaration averred that the defendants were partners, it was held, that an indorsement in the name of the firm, by one of them, might be declared on as made by the firm. Manhattan Co. v. Ledyard, 1 Caines' Rep. 192; Kane v. Scofield, 2 Id. 368. A. and B. having given a joint and several note to C., and afterwards by agreement with A. and C., D. signed his name to the note, and then C. brought an action against A., B. and D., declaring upon it as their *joint* and *several* note; the court held, that the plaintiff should fail on the ground of variance, the note not being a joint contract by D., A. & B. Ives v. Pickett et al., 2 M'Cord, 271. In a recent English case, decided at Nisi Prius, where the declaration alleged the note to have been made by the defendant, "his own proper

hand being thereunto subscribed," and it appeared that the defendant's son drew the note by his authority, and signed his name thereto, Lord Tenterden, C. J., held, that there was no variance, as those words might be rejected as surplusage. Booth v. Grove, 1 Moody & Malk. 182. *Contra* Levy v. Wilson, 2 Esp. Rep. 180. So where the action was against the payee as indorser, and it was alleged that he indorsed it, his own proper *hand being thereunto subscribed;* Lord Ellenborough inclined to think that if the defendant's name was signed by another, by his procuration, it was enough to satisfy the averment. Helmsley v. Loader, 2 Campb. 450. And the same principle has been expressly laid down as sound law in Alabama and Connecticut. Baldwin v. Stebbins, 1 Alab. Rep. 180; Phelps v. Riley, 3 Conn. Rep. 266. At any rate, the defendant will not be allowed to object the variance in such cases, after he has promised to pay the note with a complete knowledge of the facts. Helmsley v. Loader, *supra.* If a note signed by A., be declared on as the act and deed of B., the variance is fatal; and so if a note signed by A., individually, be declared on as executed for and in behalf of B., by his agent A. Rossiter v. Marsh, 4 Conn. Rep. 196. A variance as to the amount of the note is fatal. Pilie v. Mollere, 2 Mart. Lou. Rep. 666. And where a declaration omits the time when the note is payable, and it is payable in a given number of days after date, the variance is fatal (Sheehy v. Mandeville, 7 Cranch, 208; Caller's Ex'r v. Baykin, 1 Alab. Rep. 206; Sebree v. Dorr, 9 Wheat. Rep. 558; Morris v. Fort, 2 M'Cord, 397); and so of a variance as to the date (Drown v. Smith, 3 N. H. Rep. 299; 2 Campb. Rep. 307, 308, note), or the place where the note is made payable. Sebree v. Dorr, *supra.* But where a note was alleged in a declaration as having been *made* on the 7th of January, 1808, and the proof was of a note actually made on that day, but by mistake *dated* January 7th, 1807; it was held no variance. Phœnix Ins. Co. v. Walden, Anth. N. P. 126. In De La Courtier v. Bellamy (2 Shower, 422), the declaration omitted the date, but the time of drawing the bill was set out, and all the other averments accorded strictly with the tenor of the bill; upon exception taken because of omitting the date, the court said they would intend it dated when drawn. See Hague v. French, 3 Bos. & Pull. 173, S. P.; also Coxon v. Lyon, 2 Campb. 307. In a case, however, before Lord Ellenborough, at the sittings after May term, 1809, where the declaration alleged that the defendant on, &c., made his certain bill, &c., *bearing date the same day and year aforesaid,* and the real date was different, his Lordship held the variance fatal. 2 Campb. 307, 308, note. Where the declaration alleged a bill drawn by Elisha Brown, it was held, that a bill drawn by Elijah Brown could not be given in evidence. Craig v. Brown, 1 Peters' C. C. Rep. 139. But the plaintiff, after submitting to a nonsuit in this case, had liberty to set it aside and amend.

If a bond be given to A., his assigns, &c., and enures to the benefit of the plaintiffs by assignment, who prosecute upon it, and declare as upon a bond given to themselves without mentioning the assignment, the variance will be fatal. Gordon et al. v. Browne's Ex'r, 3 Hen. & Munf. 219. And so, if the penal sum mentioned in a bond be misdescribed. Adams v. Spear, 1 Hayw. Rep. 215. And, where a bond was alleged to bear date on the 4th of January, 1773; and when produced, turned out to bear date on the 4th of January, 1775, the variance was held fatal. Gordon v. Browne's Ex'r, 3 Hen. & Munf. 219. See Cooke v. Graham's Adm'r, 3 Cranch, 229. If the plaintiff declare on "a writing obligatory, sealed," &c., he will not be permitted to give in evidence a writing which is not a specialty. Foster v. Ross, 1 Alab. Rep. 421. And where the deed, in an action of covenant, was declared upon as made between the plaintiff, of the one part, J. C. of the second part, and A. B. of the third; and when produced, it appeared on its face to be by the plaintiff as trustee of J. C. of the one part, G. C. of the second, and A. B. of the third (J. C. being named in the body of the deed as the party of the second part, but G. C. having actually executed it as such); held, that the variance was fatal, although the breaches assigned in no way affected the party, who was intended to be described as of the second part. Mayelston v. Palmerston, 2 Carr. & Payne, 474. And in an action on a bail bond, where the condition as alleged in the declaration was to answer the plaintiff in a plea of trespass, "and also to a plea to be exhibited against said defendant, for £60 upon promises," and the bond, when produced, did not contain the words *upon promises;* held, that the variance was fatal. Baker v. Newbegin, Ry. & Mood. 93. In covenant, where, in setting out the deed, the declaration stated that "it was witnessed, among other things, that as well in consideration of," &c., and part of the considerations were omitted, and there were no words in the declaration answering to the phrase *as well;* held, that this was a fatal variance. Swallow v. Beaumont, 1 Chit. Rep. 618.

Proof of a submission by one of two executors will not support a declaration alleging a sub-

mission by both. Tevis' Ex'r v. Tevis' Ex'rs, 4 Monroe, 46. In debt, on a bond with a condition, if the plaintiff allege that the bond is lost, he must set out the substance of the condition; otherwise, proof of a bond with a condition, will be a fatal variance. Rand v. Rand, 4 N. Hamp. Rep. 267. Where, in debt upon a recognizance, the recognizance was alleged generally, and upon *nul tiel record* it appeared to be a recognizance with a condition, the variance was held fatal. Harrington v. Brown et al., 7 Pick. 232. So, if the recognizance be, to appear and answer a charge for beating another, whereof he died, and the declaration state it to be, to answer a charge for beating another merely, the variance is fatal. Dillingham v. United States, 2 Wash. C. C. Rep. 422. And in an action upon a recognizance of bail, where the declaration averred a judgment against the principal: a variance in the amount of the judgment of six cents, was held fatal, under the plea of *nul tiel record*. Bibbins v. Noxon, 4 Wend. 207. See also Beecher v. Chester, 2 Root's Rep. 90, S. P. And where a judgment was described in the declaration as against David Goodrich, and upon *nul tiel record* pleaded it appeared to be a judgment against David Goodrich, jun., the variance was held fatal. De Kentland v. Somers, 2 Root's Rep. 437. So a record of a judgment, stating a recovery in trespass for $102.64, cannot be given in evidence in support of an averment, in an action for breach of covenant for quiet enjoyment, that the recovery was $600. Webb v. Alexander, 7 Wend. Rep. 281. And where debt was brought, upon a decree in chancery, for £860 12*s.* 1*d.*, and the decree, when produced, was for £860 12*s.* 1*d.*, with interest from a certain day, to the day of rendering the decree, the variance was held fatal. Thompson v. Jameson, 1 Cranch, 282. In an action for malicious prosecution, the declaration alleged an information before a magistrate, made through the procurement of the defendant, which charged the plaintiff with having feloniously stolen, and ridden away with, two geldings, &c., and it was held, that a count stating the matter in this way, could not be sustained by proof of an information charging a mere trespass, in taking away the geldings. Milton v. Ellmore, 4 Carr. & Payne, 456. In a criminal prosecution on the 7th and 9th sections of the act of Congress (July 29th, 1813, ch. 34), for making a false declaration, the indictment having stated the purport of a written paper to be, that the vessel was of the burden of fourteen tons and 45-95ths of a ton, whereas the paper produced stated it to be fourteen tons and 50-95ths, the variance was held fatal. United States v. Lakeman, 2 Mason, 229. And where, in an indictment for perjury, the crime was alleged to have been committed at a circuit court, held on the 19th day of May; whereas the record showed the court to have been held on the 20th of May, the variance was adjudged fatal. United States v. M'Neal, 1 Gall. Rep. 387. *Contra*, Rex v. Coppard, 3 Carr. & Payne, 50.

3. If the instrument is neither set out in the pleadings by its tenor, nor described by its legal import, but is merely brought forward to sustain an allegation not referring to it expressly in any way whatever, a variance will not be fatal if the substance of what is alleged be proved. Instances of this character occur frequently in the action of assumpsit, where the plaintiff may declare upon his promise generally, without averring it to be in writing. Lawes on Pl. in Assumpsit, 90. See per Spencer, J., in Nelson v. Dubois, 13 John. 175, 177. Thus, where the plaintiff declared, that on the 2d of December, 1822, he having delivered certain articles to the defendant, &c., to be safely kept at the defendant's expense, the defendant undertook and promised to keep them safely, and return them on demand; the plaintiff, to prove his contract, introduced a written memorandum of the agreement, bearing date the 22d of December, 1822; the defendant interposed an objection, on the ground of variance as to the date, which was overruled; and afterwards, the case coming up for review, the decision at the trial was held correct; for although, say the court, "where a plaintiff declares upon a written instrument as bearing a particular date, a variance from the date stated is fatal; yet, when a count is founded upon a contract, it is not important what day is laid, unless the date be made material by the nature of the contract." Drown v. Smith, 3 New Hamp. Rep. 299, 301. And where a declaration stated the consideration of a promise to be, that "A., at the request of C., *would consent* to suspend proceedings against B.," and the written agreement stated the consideration to be, that "A., at the request of C., *consented*," &c., the variance was held immaterial. Paine v. Wilson, 1 Mann. & Ryl. 708. So where the declaration alleged the consideration of the defendant's undertaking to be, that the plaintiffs *would delay* service of an execution, and the written contract produced read as follows: "if said execution be delayed," &c.; the varianee was disregarded. Lent v. Paddleford, 10 Mass. Rep. 230. So where the declaration was for not transporting salt, according to

contract, and the price or consideration of the defendant's engagement was alleged to be one dollar eighty-seven and a-half cents per tierce, to be paid by the plaintiff; held, that this was sustained by evidence of a written agreement to transport for fifteen shillings, and by proof that by the currency of the place where the contract was made, the amount was the same. Salter v. Kirkbride, 1 South. Rep. 223.

And it is proper to be noticed here, that where the plaintiff merely alleges the agreement without stating whether it is in writing or not, he will be precluded from introducing in evidence a specialty in which the parol contract is merged. Landis v. Urie, 10 Serg. & Rawle, 316. But a specialty accepted as a *collateral security* is not within the principle, for it does not merge the original contract. Charles v. Scott, 1 Serg. & Rawle, 294. See January v. Goodman, 1 Dall. Rep. 208. Nor does a foreign judgment merge an account stated. Hall v. Odher, 11 East, 118.

In an action for pirating a book, the declaration averred that the plaintiff was the author of a certain book, being a musical composition, called "Captain Wyke," and the proof was that "Captain Wyke" was only one of a collection of tunes called "White's collection of new and favorite tunes, as performed at all fashionable assemblies," &c.; yet held, that the allegation was supported. White v. Gerock, 1 Chitty's Rep. 24. Where a count in *quare impedit* stated that R. L., by deed, conveyed the fourth part of his advowson to L. S., and the deed purported to convey the whole of the advowson; held, that as it was admitted by the pleadings that R. L. had only a fourth part, and hence could convey no more, and the declaration did not profess to describe the deed *in verbis*, the variance was not fatal. Gully v. The Bishop of Exeter, 12 Moore's Rep. 501. It being alleged also that the deed was made for the *considerations* therein stated, and the deed when produced contained only *one*, a pecuniary consideration, the variance was disregarded. Id. Where the plaintiff, in an action of trespass *quare clausum fregit*, declared by the name of William Robinson, and the deed under which he claimed was to William T. Robinson, the variance was held immaterial. Franklin v. Talmadge, 5 John. Rep. 84. See Richards v. M'Donald, 1 Const. Rep. 114. An allegation that an action is pending in his Majesty's court of the bench at Westminster, is not supported by proof of a *pluries* bill of Middlesex; for by such allegation the Court of Common Pleas must be intended. Impey v. Taylor, 3 Maule & Selw. 166. And see Sheldon v. Whittaker, Ryan & Mood. 266, stated *supra*. See also Berkley v. Cook, 3 Call's Rep. 378; Renalds v. Smith, 6 Taunton, 551; S. C., 2 Marshall, 258; Sheldon v. Whittaker, 4 Barn. & Cresswell, 657; and *post*, of the text; also 4 Starkie's Evidence, 1603, *et seq.* In assumpsit for money paid to the defendant's use, the declaration stated that an execution had been issued against the defendants, inhabitants of the town of N., for taxes, and that property had been seized thereon, for which the plaintiff had given his receipt; and that, in consequence, he was compelled to pay the money in satisfaction for the taxes; a receipt was given in evidence, stating the property to have been seized on an execution against the collector; and it was held that the variance was not fatal, evidence having been produced, that the execution on which the property was seized and receipted, was in fact against the town. Beers v. Botsford, 3 Day, 159. In Louisiana, in a proceeding by the plaintiffs to obtain satisfaction of a judgment against their curator, the petition stated that the curator was appointed in 1813, and the record of appointment showed that the appointment took place in 1815; held, that as the time was immaterial, the record was admissible. Pigeau et al v. Commeau, 4 Mart. Lou. Rep. (N. S.) 190. And it is said that in general, where the instrument introduced is not the gist of the action, slight variances will be disregarded. Baldwin v. Hazzleton, 3 Mart. Lou. Rep. (N. S.) 61. But in an action on a sheriff's bond, where the declaration was for the non-payment of taxes of 1785, the court held that the record of a judgment for the balance of taxes collected by him in 1786, was not evidence.

In some of the numerous decisions which have been made on this subject, judges have occasionally expressed themselves in allowing objections for variance, as yielding to the force of previous authority with great reluctance, especially in those instances where it was apparent that the party objecting to a particular variance was in no wise misled by it, and could not in any event be injured or prejudiced, if it were entirely disregarded. In order to obviate the difficulty as far as possible, a practice has grown up, under the sanction of many of the courts, of allowing the pleadings to be amended after trial, so as to make them conform to the evidence, and in this way save the necessity of a new suit. Thus, in Holland v. Hopkins (2 Bos. & Pull. 244), the plaintiff had been nonsuited at the trial, on the ground that the evidence offered differed mate-

rially from the bill of particulars delivered; and though the court concurred in the opinion of the judge who nonsuited the plaintiff, they set aside the nonsuit, and gave the plaintiff leave to amend the bill of particulars on payment of costs. And in Holhead v. Abrahams (3 Taunt. 81), the action was on a replevin bond, and there was a fatal variance in setting out the goods replevied, upon which the plaintiff was nonsuited; afterwards, on motion, the nonsuit was set aside on payment of costs. Bayley, J., said in this case, that "if he had been a judge of the court where the action was brought, he would have amended the declaration, *pro tanto*, at the trial."

Since the above decisions in England, a bill passed the Parliament (9 Geo. IV, c. 15), called Lord Tenterden's Act, which provides in very general terms for amendments at the trial, as to variances between any matter in writing or in print, produced in evidence, and the recital or setting forth thereof upon the record, &c. Under this statute it is discretionary to allow the amendment or not; and in Jelf v. Oriel (4 Carr. & Payne, 22), Lord Tenterden refused an amendment, where there was a variance which would not have occurred if common care had been used in drawing the declaration. But where there was a mistake in the date of a bill of exchange declared on, the judge allowed the amendment. Bentzing v. Scott, 4 Carr. & Payne, 24. So where a record of one court was set out as that of another. Briant v. Eicke, 1 Mood. & Malk. 359. It has been held, too, that this law was applicable only to cases where some written instrument is professed to be set out or recited in the pleading. Accordingly, in replevin, the defendant having avowed for rent in arrear, and alleged a tenancy on certain terms which varied from the lease, Park, J., would not permit him to amend, being, as he said, most clearly of opinion that the case did not fall within either the letter or spirit of the act. Ryder v. Malbon, 3 Carr. & Payne, 594. Very recently, however, in Laney v. Bishop (4 Barn. & Adol. 479), where the declaration was upon a contract, but did not show whether it was in writing or not; and, on the trial, it appeared to be in writing and variant from the one set out; the court thought the case within the act, and so allowed the plaintiff to amend. And Denman, C. J., referred to a case decided in the Court of Common Pleas, which he considered conclusive on the question presented. That was an action for disobedience to a subpœna; the declaration stated, that the plaintiff caused to be left with the defendant a copy of the writ; on the trial it turned out that the writ was directed to the defendant and two others, while the copy left was directed to him and John Doe, the latter name not being in the original subpœna at all; and held, that the judge at his Nisi Prius might amend the declaration by inserting, instead of "a copy of the writ of subpœna," "a copy of so much of the writ of subpœna as related to the defendant." Masterman v. Judson, 8 Bing. 224. "Looking to the object of this act," says Tindal, C. J., delivering the opinion of the court, "which was, according to its title, to prevent a failure of justice by reason of variances between records and writings produced in evidence in support thereof, we think it should receive a construction as liberal as the words will admit, and that the amendment now under consideration falls within the fair interpretation of the words of the act." Id.

In New York also, a statute has been passed, similar in its purpose to the one above referred to. It provides that "Every variance between process, pleadings, or any instrument in writing recited or referred to in any other process, pleading or record, and every mistake in the name of any officer or other person, in stating any day, month or year, or in the description of any property, in any pleading or record which, according to law, could be amended by the court after verdict rendered in any cause, shall be disregarded upon the trial of such cause, unless such variance or mistake be calculated to surprise or mislead the adverse party, and to prevent his making due preparation for a full answer on the merits, to the matter concerning which such variance or mistake shall have been made." 2 R. S. 406, § 49.

There is obviously a defect in the phraseology of this section, which renders its meaning somewhat obscure. "Every variance between process, pleadings, or any instrument in writing," recited and referred to elsewhere, is not easily understood; and we apprehend its true reading to be as follows: "Every variance between process, pleadings, or any instrument in writing;" and the recital of or reference to the same, "in any other process, pleading, or record," &c.

The term "written instrument," contained in the above provision, has no technical meaning in our law, though it has in the Scotch. See Jacobs' Law Dict. Instruments, Instrument of Premonition, Instrument of Resignation. The only signification, in popular language, which would

in any degree satisfy the statute, is one of those affixed to the word in Johnson's (4to) Dict., viz: "a writing containing any contract or order." We believe, however, that in order to accomplish the intent of the legislature, the definition should be at least sufficiently broad to embrace all writings of every kind "*recited or referred to*" in the pleadings, and which are necessary to be proved upon the trial. See Revisor's Rep. part 3, ch. 7, pp. 39, 40.

The term *property*, also contained in this statute, has a very extensive signification, both in law and popular language. It comprehends real and personal property—property in possession and in action. The legislature probably intended to cover by it misdescriptions of personal property, as in trover, and of trespass of goods; and of real property in ejectment, waste, &c., which must now be very particular. 2 R. S. 304, § 8; Id. 334, § 5. See Borst v. Griffin, 9 Wend. 307. Whether it extends to the *interest* which the plaintiff has in the premises within the same statutes, *quere.*

The variance contemplated, furthermore, is such an one as the court *would allow the party to amend after verdict;* and by 2 R. S. 425, § 7, sub. 10, mistakes in names, sums of money, descriptions of property, or in reciting any day, month, or year, may be so amended, provided the correct name, time, sum, or description, shall have been once rightly alleged. In the same action (sub. 14), it is provided that any default or negligence of a clerk or officer of the court, or of the parties, their counselors or attorneys, by which neither party shall have been prejudiced, may in like manner be amended; and by Id. § 8, all *variances* of the like nature as those enumerated, may be amended after verdict.

And before the above statute was passed, the Supreme Court had gone a great way in allowing amendments after verdict. Thus where, by a mere clerical mistake, the cause of action was laid after the commencement of the suit. Sargent v. Dennis, 2 Cowen's Rep. 515. So where the plaintiff had, by mistake, declared on and made profert of a bond, as *under seal*, whereas the seal had been torn off. Rees v. Overbaugh, 4 Cowen's Rep. 124. Also where oyer of a sealed instrument was wrong, although the defendant relied on moving in arrest, supposing the oyer right till the trial. Daley v. Atwood, 7 Cowen's Rep. 483. And this simply on paying the costs of the motion; it not appearing that the defendant was deprived, by the mistake, of a substantial defence, but merely relied on the apparent defect. Id. So a declaration for notes in trover, which misdescribed them, was allowed to be amended after verdict. Hoffnagle v. Leavitt, 7 Cowen's Rep. 517. But because the defendant, relying on the variance, had not prepared for a defence which he had on the merits, the amendment was granted, on condition that the plaintiff should consent to a new trial. Id. And where the defendant avowed as executor, when it should have been as devisee, by which he lost his defence at the trial, he was allowed to amend on payment of costs. Wright v. Williams, 5 Cowen's Rep. 501. So, after nonsuit for not confessing lease, entry and ouster in ejectment, the Nisi Prius record was amended by inserting the defendant's name, in the place where it was usually inserted, before the allegation of entry and ouster; and the court would not hear an affidavit of merits to prevent the amendment. Jackson ex dem. Young v. Young, 1 Cowen's Rep. 131. Where, in ejectment, the plaintiff was nonsuited for a misdescription of the situation of the property, the court set aside the nonsuit. Jackson ex dem. Sinclair v. Bailey, 5 Cowen's Rep. 265. So where the plaintiff declared on a warranty of a bellows *to blow three fires*, and on the trial the proof was of a warranty to blow three fires for *the term of one year*, the court, to avoid the expense of a new suit, granted a motion to amend after verdict, on the plaintiff consenting to a new trial and paying costs. Hull v. Turner, 1 Wend. Rep. 72. In Lion v. Burtis (18 John. Rep. 510), the court recognize the difficulty of laying down any general rule with respect to allowing amendments after verdict, as every case must necessarily depend upon its own circumstances; and they say, "we do not intend to carry the practice so far as to amend at the trial, but we mean to say that when a plaintiff has been nonsuited for a variance in the date of the instrument declared on, or for any other variance arising from clerical mistake, we will set aside the nonsuit, and give leave to amend on payment of costs. There may be cases in which the judge at the trial will use a sound discretion in suffering the plaintiff to take a verdict, and put the party to his application to the court for amendment. It may be discreet to adopt this course, where the defendant has not been taken by surprise, and where his whole defence has been gone into, or where he is prepared to go into it.

We find but few decisions since the statute. One was a case of mere clerical mistake on the part of the plaintiff in setting forth a submission to arbitrators; the judge at the circuit overruled

stated that the plaintiff in a certain term (naming the term and the year), by judgment recovered "as appears by the record," and the proof was that he recovered by a judgment of another term and a different year: the court held that this was not a material variance; that the averment, "as appears by the record," was mere surplusage, and might be rejected, inasmuch as the judgment was not the foundation of the action, but only inducement to it.

6. Of amendments in civil suits.

It is now proposed to consider the various modern enactments passed for the purpose of preventing failures of justice, caused by the rules relative to variances in civil actions.

Lord Tenterden's Act (9 Geo. IV, c. 15) provided a partial, though very limited, remedy upon the subject of variance. That act was passed for preventing a failure of justice, which is often occasioned by variances between records and writings produced in evidence in support of the records. It recites, "that great expense is often incurred, and delay or failure of justice takes place at trials, by reason of variances between writings pro-

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the objection taken by the defendant, and the plaintiff had a verdict. The defendant made a case in order to obtain a new trial, and the plaintiff moved to amend; the motion was resisted on an affidavit of the defendant, stating that he had a meritorious defence, but that under the advice of counsel, relying upon the variance, he had not prepared for trial. *Per Cur.* Savage, C. J.: "The defendant swearing to a defence, and that, relying upon the variance, he omitted to prepare for trial, we cannot permit this verdict to stand. The defendant ought not to have availed himself of the technical error in the declaration; still, strictly, he might take the course which he has adopted, and all we can do is to relieve the plaintiff, without subjecting him to costs. Let a rule be entered that the plaintiff have leave to vacate his verdict, and to amend his declaration without costs." Carpenter v. Payne, 10 Wend. R. 604, 605. Another case is that of Hess v. Fox, 10 Wend. R. 436, stated *ante*, note 234. In neither of them, however, does it appear that any notice was taken of the statute, and consequently they furnish no guide as to its construction.

**There has been a growing tendency in the courts for many years, to disregard variances where the adverse party has not actually been misled. It is not deemed necessary to add to the cases which illustrate that tendency, contained in the foregoing notes. The late Practice Code of the State of New York (Laws of 1848, p. 525), contains the following provisions, viz:

§ 145. "No variance between the allegation in a pleading and the proof, shall be deemed material, unless it have actually misled the adverse party, to his prejudice, in maintaining his action or defence, upon the merits. Whenever it shall be alleged, that a party has been so misled, *that fact shall be proved to the satisfaction of the court, by affidavit, showing in what respect he has been misled;* and thereupon, the court may order the pleading to be amended, upon such terms as shall be just."

§ 146. "Where the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs."

§ 147. "Where, however, the allegation of the cause of action or defence to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance within the last two sections, but a failure of proof."

All that is essentially new in these provisions, is the text contained in section 145, *i. e.* proof "to the satisfaction of the court, by affidavit, showiug in what respect" the party has been misled.** See Notes to Vol. III of the text.

duced in evidence and the recital or setting forth thereof upon the record on which the trial is had, in matters not material to the merits of the case, and that such record cannot now in any case be amended at the trial, and in some cases cannot be amended at any time:" and then proceeds to enact, "that it shall be lawful for every court of record holding plea in civil actions, any judge sitting at Nisi Prius, and any court of oyer and terminer and general jail delivery in England, &c., to cause the record on which any trial may be pending before any such judge or court in any civil action, or in any indictment or information for any misdemeanor—when any variance shall appear between any matter in writing or in print, produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending—to be forthwith amended in such particular by some officer of the court, on payment of such costs (if any) to the other party, as such judge or court shall think reasonable; and thereupon the trial shall proceed, as if no such variance had appeared; and in case such trial shall be had at Nisi Prius, the order for the amendment shall be indorsed on the *postea*, and returned together with the record; and thereupon the papers, rolls, and other records of the court from which such record issued, shall be amended accordingly."

Under this statute it has been held that, in setting out a record of a judgment, a misstatement as to the court in which it was obtained may be amended;(1) and that a mistake in the date of a bill of exchange(2) may be rectified.

Civil actions.

In the case of Masterman agt. Judson,(3) which was an action for not obeying a subpœna, the Court of Common Pleas held, that a declaration might be amended by inserting instead of "a copy of a writ of subpœna," "a copy of so much of the writ of subpœna as related to the defendant."

On the authority of this case the Court of King's Bench decided, in Lamey agt. Bishop,(4) that the statement of a contract might be made conformable to the written contract produced at the trial, as to the time for the performance of it, though it did not appear in the declaration whether the contract was written or oral. And in Smith agt. Brandram,(5)

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(1) Briant v. Eicke, M. & M. 359.

(2) Bentzing v. Scott, 4 C. & P. 24; Parks v. Edge, 1 C. & M. 429.

Under the Code of New York, all such mistakes may be corrected on the trial; for no variance is deemed material unless it has actually misled the opposite party. § 169; Egbert v. Wicker, 10 How. Pr. R. 197; Catlin v. Gunter, Id. 321; 1 Kernan, 368. And a manifest mistake may be disregarded, without amendment. Harmony v. Bingham, 1 Duer, 210.

(3) 8 Bing. 480.

(4) 4 B. & Ad. 479.

(5) 9 Dowl. P. C. 430.

Where all the essential facts are put in issue by the pleadings, but the plaintiff proves a different

a material variance, in point of legal effect, between a contract of guaranty produced in evidence, and the contract set out in the declaration, was held to be amendable within this act. The case of Lamey agt. Bishop appears to overrule an earlier decision of Park, J., at Nisi Prius,(1) who held that a variance between the statement in an avowry of terms of a tenancy, and the proof produced in support of it, was not within the statute.

The Court of Exchequer has held, that this statute was limited to cases where some matter in print or writing was produced in evidence, and did not apply to a variance between the statement of a writing in the pleadings, and the secondary evidence of the writing. Thus, in an action for a libel,(2) where the libel, as set out in the record, imputed to the plaintiff "mismanagement or ignorance;" and it appeared in evidence that the alleged libel had been contained in a letter which had been destroyed, and secondary evidence was given of its contents, from which it appeared that the expression was "ignorance or inattention; it was held that this variance could not be amended, and that it was fatal.

In one case, Lord Tenterden, C. J., is said to have refused to amend the declaration, on the ground that the mistake arose from want of common care in drawing it:(3) but in many instances, it has been the want of common care that caused the mistake; and to prevent the failure of justice through such carelessness or ignorance, was one of the objects of the legislature in passing the act.

Indictment.

The reported decisions upon this statute, with regard to amendments in cases of misdemeanor, are very few, and are confined to indictments for perjury.

The judges appear to have shown a disposition to make amendments in such cases but very sparingly,(4) upon the grounds, it seems, that by an amendment a presentment on oath by the grand jury is altered; and that variances, by ordinary care in collation, might be avoided.(5)

In one case,(6) where the indictment alleged that a judgment was en-

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cause of action from that alleged in his complaint, the court will order the pleadings to be properly amended on the trial; and the plaintiff may recover on the cause of action proved, though the pleadings be not in form amended. Hall v. Gould, 3 Kernan R. 127.

(1) Ryder v. Malbon, 3 C. & P. 594.

(2) Brooks v. Blanshard, 1 C. & M. 779. In Briant v. Eicke (*ut supra*), an erroneous statement of a judgment was amended from the examined copy of the judgment produced in evidence; but this, as will be seen hereafter, is primary evidence of a judgment. See Vol. II, Chap. 3, *Proof of Records.*

(3) Jelf v. Oriel, 4 C. & P. 22.

(4) By Patteson, J., 7 C. & P. 561; by Coleridge, J., 9 Id. 789.

(5) By Coleridge, J., *ut supra.*

(6) R. v. Cooke, 7 C. & P. 559.

tered up "*in* or *as of* Trinity Term, 5 Wm. IV," and the copy of the judgment was dated "June 26th, 5 Wm. IV,"(1) Patteson, J., after consulting with Littledale, J., refused to amend the indictment.

In another case,(2) where it was alleged that, under a commission to examine witnesses, A., B., C., and D. were commanded to examine the witnesses, and it appeared from the commission, when put in, that A., B., C., and D., "or any three or two of them," were so commanded; Coleridge, J., refused to amend the record by the insertion of the words that had been accidentally omitted.

But in a later case,(3) where the indictment alleged that A. had produced the affidavit of B., "intitled in the Court of Chancery, in a suit between the *Commissioners* of Charitable Donations, &c., and J. D.;" and the affidavit, when produced, was entitled, "In Chancery; between the *Commissioner* of, &c.," Lord Denman amended the record by striking out the word "intitled."

A much fuller remedy and more complete power of making amendments in civil actions was given to judges and courts of record, by the statutes 3 & 4 Wm. IV, c. 42.

Allowing amendments to be made on the record in certain cases.

The 23d section of that act recites, that "great expense is often incurred, and delay or failure of justice takes place at trials, by reason of *variances*,(4) as to some particular or particulars between the proof and the *recital*,(5) or setting forth on the record or document on which the trial is had, of contracts, customs, prescriptions, names, and other matters or circumstances, not material to the merits of the case, and by the misstatement of which the opposite party cannot have been prejudiced, and the same cannot in any case be amended at the trial, except where the variance is between any matter in writing or in print produced in evidence and the record, and that it is expedient to allow amendments to be made on the trial of the cause:" it then enacts, "that it shall be lawful for any court of record, holding plea in civil actions, and any judge sitting at Nisi Prius, if such court or judge shall see fit so to do, to cause the record, writ, or document, on which any trial may be pending before any such court or judge, in any civil action, or in any information in the nature of a *quo warranto* or proceedings on a mandamus, when any variance shall appear between the proof and the recital or setting forth on the record, writ or document on which the trial is proceeding, of any contract, custom, prescription, name or other matter, in any particulars, in the judg-

(1) Pursuant to the Rule of Court, Hil., 4 Wm. IV, No. 3.
(2) R. v. Hewins, 9 C. & P. 786.
(3) R. v. Christian, Car. & M. 388.
(4) "Vacancies," in the king's printer's copy.
(5) "Record," in the king's printer's copy.

ment of such court or judge, not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution or defence, to be forthwith amended by some officer of the court or otherwise, both in the part of the pleadings where such variance occurs, and in every other part of the pleadings which it may become necessary to amend, on such terms as to payments of costs to the other party, or postponing the trial to be had before the same or another jury, or both payment of costs and postponement, as such court or judge shall think reasonable; and in case such variance shall be, in some particular or particulars, in the judgment of such court or judge, not material to the merits of the case, but such as that the opposite party may have been prejudiced thereby in the conduct of his action, prosecution or defence, then such court or judge shall have power to cause the same to be amended upon payment of costs to the other party, and withdrawing the record or postponing the trial aforesaid, as such court or judge shall think reasonable; and after any such amendment the trial shall proceed, in case the same shall be proceeded with, in the same manner in all respects, both with respect to the liability of witnesses to be indicted for perjury, and otherwise as if no such variance had appeared; and in case such trial shall be had at Nisi Prius, or by virtue of such writ as aforesaid,(1) the order for the amendment shall be indorsed on the *postea* or the writ, as the case may be, and returned, together with the record or writ; and thereupon such papers, rolls and other records of the court from which such record or writ issued, as it may be necessary to amend, shall be amended accordingly; and in case the trial shall be had in any court of record, then the order for amendment shall be entered on the roll or other document upon which the trial shall be had; provided that it shall be lawful for any party who is dissatisfied with the decision of such judge at Nisi Prius, sheriff or other officer, respecting his allowance of any such amendment, to apply to the court from which such record or writ issued, for a new trial upon that ground; and in case any such court shall think such amendment improper, a new trial shall be granted accordingly, on such terms as the court shall think fit, or the court shall make such order as to them may seem fit."

Special finding.

The twenty-fourth section enacts, "That the said court and judge shall and may, in all such cases of variance, instead of causing the record or document to be amended as aforesaid, direct the jury to find the fact or facts according to the evidence, and thereupon such finding shall be stated on such record or document, and, notwithstanding the finding on the issue joined, the said court, or the court from which the record has issued, shall,

(1) Writ of trial before the sheriff under § 17. See as to amendment on trial of issues before the sheriff, 1 Hill v. Salt, 2 C. & M. 420.

if they shall think the said variance immaterial to the merits of the case, and the mis-statement such as could not have prejudiced the opposite party in the conduct of the action or defence, give judgment according to the very right and justice of the case.(1)

The power of amendment given by this act extends only to civil actions, or informations in the nature of *quo warranto*, or proceedings on a *mandamus*.

The variances which are amendable are those which appear between the proof—and the recital or setting forth on the record, writ, or document, on which the trial is proceeding—of any contract, custom, prescription, name, or other matter.

Amendment how made.

The power of making amendments, is to be exercised, by causing the record, writ or document on which the trial is pending, to be amended by some officer of the court, or otherwise, in the part of the pleadings where the variance occurs, and in every other part of the proceedings which it may become necessary to amend.

The judge is authorized to order such variances to be amended, *in any particular which in his judgment is not material to the merits of the case, and by which the opposite party cannot have been prejudiced* in the conduct of his action, prosecution or defence; the terms on which the amendment is to be made, are payment of costs, or postponing the trial, or both payment and postponement, as the judge may think reasonable; the amendment is to be forthwith made, and after amendment the trial to proceed (if it proceed) in the same manner in all respects as if no such variance had appeared.

Where variance may be prejudicial.

Power is also given to the judge to direct amendments to be made, even in cases where the variance is in some particular *by which the opposite party may have been prejudiced in the conduct* of his defence, *provided the variance is not material to the merits of the case.* In these cases, the amendment may be made on payment of reasonable costs to the other party, *and withdrawing the record*, or postponing the trial. The power of amending in these latter cases, where the opposite party *may have been prejudiced* by the variance, is the same as that in the cases before mentioned, when the opposite party *cannot have been prejudiced;* but the terms, on which the amendment is be made, vary in some small degree—the power of ordering

(1) The Common Law Procedure Acts of 1852 and 1854, have still further amplified the authority of courts, and judges sitting at Nisi Prius, to correct errors and defects in civil proceedings, and make all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties, either with or without costs, as to the judge may seem fit. 15 & 16 Vict. c. 76, § 222, and 17 & 18 Vict. c. 125, § 96.

the record to be withdrawn being given in the latter case, but not in the former.

The words of the act, relating to the particular in which the amendment may be made, namely, where the variance appears "*in any particular or particulars in the judgment of the court or judge not material to the merits of the case*," are very general and undefined. The words immediately following, which are specific, and which point to circumstances clearly connected with the merits of the case, "*and by which the opposite party cannot have been prejudiced in the conduct of his action*," &c., seem intended as an explanation or qualification of the more general expressions in the preceding clause. Those general expressions may at least be taken to relate to the substantive matter which the parties come to try, without reference to the precise terms of the defence.(1)

If the judge allows an amendment, and one of the parties is dissatisfied with his decision, he may take the case before the court in banc; and if they think the amendment improper, they have power to direct a new trial, or make such other order as they may think fit. But the court will not interfere, unless it plainly appears that the judge was wrong, or that the defendant was prejudiced by the amendment.(2)

If the judge refuses to allow an amendment at the trial, the statute (apparently by an oversight) affords no remedy, and the court in banc will not interfere with his decision.(3)

Lastly, if the judge at the trial wishes to avoid the responsibility of deciding upon the question of amendment, he may (under the twenty-fourth section), direct the jury to find the facts according to the evidence, and so leave the question as to the materiality of the evidence to the decision of the court in banc.

Where the facts are specially found under this section, it is not unusual for the parties at the trial to consent that the court shall have the same power to amend, if they think it a case for amendment, as the judge had at Nisi Prius;(4) but, in the absence of any such consent, the court cannot amend the record, nor impose terms upon the party ultimately succeeding;(5) nor, if they consider the variance material, can they expunge the indorsement of the special finding.(6)

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(1) See by Tindal, C. J., 9 Dowl. P. C. 406.

(2) Sainsbury v. Matthews, 4 M. & W. 343.

(3) See Doe d. Poole v. Errington, 1 A. & E. 750; Whitwill v. Scheer, 8 Id. 309; Jenkins v. Phillips, 9 C. & P. 768. But see Pullen v. Seymour, 5 Dowl. P. C. 164. It has been doubted whether the court in banc has any power to revise the decision of a judge at Nisi Prius with regard to allowing or refusing an amendment under the previous stat. 9 Geo. IV, c. 15. See Parkes v. Edge, 1 C. & M. 429.

(4) See Parry v. Fairhurst, 2 C., M. & R. 190; cit. by Patteson, J., 5 A. & E. 126; Roberts v. Snell, 1 M. & G. 577. See, also, Chapman v. Sutton, 2 C. B. 634.

(5) Guest v. Elwes, 5 A. & E. 118. And see Davis v. Dunn, 1 Dowl. (N. S.) 317.

(6) Knight v. M'Douall, 12 A. & E. 438.

The very large powers granted by this act for amending the record have enabled the courts to reduce the expenses of prolixity in pleading; with this view, they have made rules prohibiting a multiplicity of counts and pleas. To prevent these restrictive rules from operating to the prejudice of parties, it is necessary that the power of making amendments and correcting variances, should be exercised liberally,—at the same time exercised cautiously, so as not to prejudice either party on the real and substantial merits of the case.(1)

In proportion to the strictness of the courts, on the one hand, in reducing the number of counts in declarations, must be, on the other hand, the liberality of exercising the power of amendment. The accuracy of a contract may be ambiguous, and it must be set out according to its legal effect: if a mistake is made, and the legal effect is misstated, great injury would be done by the rule which confines the plaintiff to one count, unless the judge at trial should allow the error to be set right by amendment. And in case he entertains a doubt, the best course will be to allow, rather than disallow, the amendment; for if he allows at the trial an amendment which ought not to be permitted, the statute provides a remedy; but, as before stated, there is no remedy when the judge does not allow the amendment.(2)

Amendment when to be made.

An amendment of the record, at Nisi Prius, must be made (at least where the record is not *withdrawn*)(3) during the trial, and before the verdict, except when both parties consent to an amendment afterwards. This construction of the statute may be inferred from those parts which speak of amendments to be made *on the trial*, and to be made *forthwith*, and of the document amended as that *on which the trial is proceeding*, and still more strongly from the recital, that it is expedient to allow the amendments to be made on the *trial of the cause*. It has been decided that amendments cannot be made after verdict.(4)

It is now proposed to consider respectively the cases in which amendments have been allowed under the statute, and in which they have been disallowed.

1. Cases in which amendments have been allowed.

Amendments have been generally allowed where a contract, a duty, or other matter alleged in the pleadings, has been *more general* or *more par-*

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(1) See by Parke, B., 4 M. & W. 347. See, also, Doe d. Marriott v. Edwards, 1 Moo. & R. 321; and by Tindal, C. J., 9 Dowl. P. C. 405.

(2) See by Coleridge, J., 9 C. & P. 769.

(3) See *supra*, p. 879.

(4) Doe d. Bennett v. Long, 9 C. & P. 773; Brashier v. Jackson, 6 M. & W. 549. But where the court grants a new trial, they may allow amendments, not under the statute, but by their common-law jurisdiction. See Doe d. Bacon v. Brydges, 6 M. & G. 350.

ticular than the proof adduced in support of it, or where there has been a misdescription of such contract or duty.

The declaration in an action for a breach of warranty of a horse stated a *general* warranty; to which the defendant pleaded non-assumpsit. Upon the proofs it appeared, that the warranty was *sound except in one foot.*" The breach of warranty complained of consisted in an unsoundness of wind. Alderson, B., amended the declaration, observing, that if the defence had depended in any way upon the qualification of the warranty, he would not have allowed it, as that would have gone to the merits.(1) So also in an action on the case for a false representation of the soundness of a horse, and the plea was not guilty, Alderson, B., amended the declaration, by substituting, for allegation that the defendant represented the horse to be *sound and a good worker*, an allegation that the defendant represented the horse to be *sound in the wind.*(2)

Where a declaration alleged a general custom in a trade for a master to pay certain expenses for a journeyman, and the custom proved was, that there were certain exceptions to the master's liability, the declaration was amended by the insertion of these exceptions, as proved.(3)

In an action upon a wager that a railroad would be completed by a certain time, "for the general conveyance of passengers;" these words were struck out of the declaration, the wager that was proved being that the railroad would be *completed* by that time; as that was construed to mean that the railway should be complete, so as to be in public use.(4)

In an action for the use and occupation of "standings, market places, and sheds," an agreement was put in relating to a demise of "tolls" by the plaintiffs to the defendant; the declaration was amended by the insertion of the word "tolls."(5)

Where the plaintiff declared upon a promise that the defendant should lay out a sum of money in the purchase of a government *annuity*, and the proof was that the money was intrusted to him to lay out in a government *security*, the variance was held to be amendable;(6) the only difference between the allegation and the proof being, that the former stated that the money was to be laid out in a *particular* government security, and the latter showed that it was to be invested in *some* government security; and the ground of complaint was that it was not laid out in *any* government security.(7)

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(1) Hemming v. Parry, 6 C. & P. 580, commenting upon Jones v. Cowley, 4 B. & C. 445, under the old state of the law.

(2) Mash v. Densham, 1 Moo. & R. 442.

(3) Read v. Dunsmore, 9 C. & P. 588.

(4) Evans v. Fryer, 10 A. & E. 609. But see 8 & 9 Vict. c. 109, § 18, by which no action will now lie upon a wager.

(5) Carmarthen (Mayor, &c). v. Lewis, 6 C. & P. 608.

(6) Gurford v. Bayley, 3 M. & G. 781.

(7) See by Maule, J., 3 M. & G. 782.

A statement in a declaration of a contract *to pay* for certain goods to be delivered, has been altered to a statement of a contract *to guaranty payment* for them.(1)

Where the contract alleged was that the defendant should build on a certain spot of ground, *a room, booth or building*, and fit it up *according to certain plans* agreed upon, for £20, *by the 28th of June*, and the contract proved, which was a verbal agreement, was that the defendant should place upon a plot of ground, hired by the plaintiff, certain *seats and tables*, to be completed *four or five days before the 28th of June*, for £25, and it did not appear that there were any plans agreed upon, the judge at the trial directed the declaration to be amended in conformity with the contract proved; and the court above refused a new trial,(2) considering it to be exactly the sort of case which the statute meant to provide for, though, as was urged, the contract as proved differed from that alleged, in the nature of the work to be done, in the time for doing it, and in the price.(3)

In one case,(4) the variance was between a contract for certain poles to be paid for on delivery, and a contract to pay cash on delivery with five per cent. discount. It further appeared that part had been delivered. An application to amend was opposed on the ground, that, if the contract had been stated properly, the defendant might have been prepared to show, that he rescinded the contract on the plaintiff's refusal to pay on the first delivery. Alderson, B., allowed the cause to proceed, and nothing appearing to show that the defendant rescinded the contract on that ground, the learned judge directed the amendment, and the plaintiff had a verdict.

When an averment in the declaration may be properly considered as a statement of the *legal effect* of a contract, and not as a substantive part of the contract, it may be amended, and the statement as to the legal effect may be made conformable with that which is proved. Thus, where the declaration on a charter party, after setting out that part of the contract which related to the voyage, alleged a promise to have an agent at a place named, to give orders, &c.; but this allegation was not (as was intended) a correct statement of the legal effect of the charter party; it was struck out, and another more correct statement was inserted.(5)

Where a declaration upon an agreement to refer stated that the costs of the reference and the award were to abide the event, and it appeared that the agreement also provided for the costs of making the agreement a rule of court, an amendment was permitted.(6)

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(1) Hanbury v. Ella, 1 A. & E. 61.

(2) Ward v. Pearson, 5 M. & W. 16. See Sainsbury v. Matthews, 4 Id. 343; Clark v. Morrell, 1 M. & G. 841, for other examples of amendment in the statement of a contract.

(3) See Beckett v. Dutton, 7 M. & W. 157, *infra*, p. 883.

(4) Ivey v. Young, 1 Moo. & R. 546.

(5) Whitwill v. Scheer, 8 A. & E. 301. But see Bowers v. Nixon, 2 C. & K. 372, *infra*, p. 887.

(6) Duckworth v. Harrison, 5 M. & W. 427.

In an action on the case against the defendants, as *carriers*, for *negligence in conveying* the plaintiff's goods; the defendants pleaded not guilty. Upon the evidence, it appeared that the defendants, if liable at all, were liable only to *forward* the goods as *wharfingers*. No application was made for an amendment until after the defendant's case was closed, and the plaintiff's counsel was about to reply. The judge refused to amend, but left to the jury the question of the liability of the defendants as wharfingers. The jury finding this question in favor of the plaintiff, the judge directed the verdict on the unamended issue to be entered for the defendant, and the special finding of the jury to be indorsed on the record, in order that, if the court should be of opinion that the amendment ought to have been allowed, the declaration might be altered and set right. There were special circumstances in the case showing that the defendant might have been prejudiced in the conduct of his defence. The court made the rule absolute for a new trial on payment of costs; Parke, B., observing that under the circumstances, he should have exercised the power of amendment given by the statute, postponing the trial to another day to enable the defendants to show the fact (notice of limited liability), which might have exonerated them altogether.(1)

Where an agreement was stated in the pleadings to have been made between the plaintiff and the defendant, and the agreement produced was between the plaintiff on the one part, and the defendant and two others on the other part, but was signed only by the plaintiff and the defendant, an amendment was allowed.(2) So where a guaranty was alleged to be that the defendant would repay certain advances that might be made by the plaintiffs as members of a banking firm, and the guaranty in proof was, that the defendant would repay the advances made by the plaintiffs "or any other persons of whom the firm might from time to time consist," the declaration was amended so as to correspond with the evidence.(3)

Amendments have also been allowed where an instrument declared upon as a bill of exchange has appeared to be a promissory note;(4) and where a promissory note was alleged to have been made *by the defendant*, dated the *9th November*, 1838, payable *on demand*, and the note produced was a joint and several note made *by the defendant and his wife*, dated the *6th December*, 1837, payable *twelve months after date*.(5)

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(1) Parry v. Fairhurst, 2 C., M. & R. 190. See Guest v. Elwes, 5 A. & E. 118, an action against the sheriff for an escape; where an omission to arrest was proved, and an amendment allowed.

(2) Boys v. Ancell, 5 N. C. 390.

(3) Chapman v. Sutton, 2 C. B. 634. See, also, Boyd v. Moyle, Id. 644. But see Boucher v. Murray, 6 Q. B. 362, *infra*, p. 886.

(4) Moilliet v. Powell, 6 C. & P. 233. The case was undefended. In the same case, Alderson, B., also allowed an amendment of the judge's order, which had been obtained for admitting the handwriting of the defendant and the indorsers of the instrument.

(5) Beckett v. Dutton, 7 M. & W. 157. See Ward v. Pearson, 5 M. & W. 16, *supra*, p. 881.

In an action of trespass,(1) in which issue was joined on the plaintiff's property in a close named specifically, but incorrectly, in the declaration, Coleridge, J., allowed the name to be set right. So, a misstatement of the name of a parish has been amended in an action of ejectment;(2) and in a similar action,(3) where it appeared that the day on which the right of entry accrued, was subsequent to the day of the demise in the declaration (being the Monday immediately after), Parke, B., allowed the declaration to be amended, and the date of the demise to be altered to the day preceding; and the Court of Common Pleas afterwards were of opinion that the judge had power to make this amendment. The lord chief justice said: "There was a variance between the allegation in the record and the proof, and this was amendable under the act. The moment the amendment is made, the declaration is to be considered to have been always in its amended form, and the consent rule adapts itself to its terms." In this case, where the ejectment was brought for a forfeiture, the lease giving the right of re-entry was produced, and the amendment was made according to it; but a similar amendment will be allowed, though there is nothing to amend by, beyond the necessity of the amendment to maintain the plaintiff's right of action.(4)

In an action of slander,(5) where the defendant pleaded not guilty, and the variance was (according to the evidence produced at the trial) that the defendant said *he had heard* that the plaintiff was to be tried, &c., instead of saying (as represented in the declaration) positively, and as from his own knowledge, that *the plaintiff was to be tried;* the Court of Common Pleas were of opinion that an amendment had been properly made at the trial. "It may be difficult," said Tindal, C. J., "to give any very exact meaning to the words of the act, "*merits of the case,*" in an action of this sort; but it may be taken to mean the substantive matter which the parties came to try, without reference to the precise terms of the defence; and therefore the act will clearly apply to this amendment, so as to supply the place of those various allegations which formerly would have been introduced into the declaration, in order to meet every contingency which might arise." With regard to the other words of the same act, "*by which the opposite party cannot have been prejudiced,*" his Lordship said, "there could not be any prejudice in this case by amending the declaration, because the witnesses who would be called, either to prove or disprove the

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(1) Howell v. Thomas, 1 Moo. & R. 342.

(2) Doe d. Marriott v. Edwards, 6 C. & P. 208; S. C., 1 Moo. & R. 319.

(3) Doe d. Edwards v. Leach, 3 M. & G. 229.

(4) Doe d Simpson v. Hall, 5 M. & G. 795. But see Doe d. Parsons v. Heather, 8 M. & W. 158; Doe d. Poole v. Errington, 1 Moo. & R. 343; S. C., 1 A. & E. 750, *post*, p. 888.

It may be remarked that similar amendments were made in ejectment before the statute. See Doe d. Hardman v. Pilkington, 4 Burr. 2447; Doe d. Bumford v. Miller, 1 Chit. R. 536.

(5) Smith v. Knowelden, 2 M. & G. 561.

fact of the words being spoken, would be just the same, whether one set of words was used or the other."

In another action for slander,(1) the slanderous words were set out in English, but the words proved to have been spoken were Welsh, of the same meaning; an amendment was allowed to be made (upon terms), by inserting in the declaration Welsh words, which were the exact Welsh translation of the English words, set out in the declaration.

So in an action for a libel,(2) alleged to have been "contained in a certain weekly newspaper, called," &c., where the proof was that the defendant had given a slip of paper containing the libelous matter to several persons to read, but it did not appear that it was cut from the newspaper named, an amendment was allowed by striking out the allegation in question.

An amendment will even be made by adding a count to the declaration, as *e. g.* a count for goods sold and delivered, where it was proved that such a count was in the declaration and issue delivered,(3) and that the omission was entirely casual; or, under similar circumstances, the words "by statute" might be added to a plea of "not guilty."(4)

Where the declaration alludes to "the commencement of the suit," but the record does not contain the date of the writ of summons, the plaintiff may be allowed to amend by annexing the writ to the record.(5)

In an action on a banker's check, where the declaration alleged notice of dishonor, but the facts proved did not support that allegation, although if properly alleged they would have amounted to an excuse for the want of notice, Parke, B., postponed the trial, and gave the plaintiff leave to amend upon terms.(6)

In an action upon a bill of exchange, where the plea alleged that the bill was accepted in satisfaction of money lost by gaming and playing at vingt-un, and also by playing at hazard, the plea was amended by striking out the allegation as to the game of vingt-un, there being no evidence to support that allegation.(7) And in a similar plea, an amendment was allowed in the statement of the name of the game.(8)

2. Cases in which amendments have been refused.

The statute of 3 & 4 Wm. IV, c. 42, it seems, gives no power to supply a material omission in the pleadings. In an action of trespass for taking two different articles of property,(9) Parke, B., refused to amend a plea

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(1) Jenkins v. Phillips, 9 C. & P. 766.
(2) Foster v. Pointer, 9 C. & P. 718.
(3) Ernest v. Brown, 2 Moo. & R. 13.
(4) See Forman v. Dawes, Car. & M. 127.
(5) Cox v. Painter, 7 C. & P. 767; S. C., 6 A. & E. 491.
(6) Jackson v. Carrington, 2 C. & K. 750.
(7) Cooke v. Stratford, 13 M. & W. 379.
(8) Marten v. Barrett, 2 C. & K. 717.
(9) John v. Currie, 6 C. & P. 618.

which justified the taking of the one article by extending the justification to the other also. And in action of replevin, in respect of goods taken in a house and brewery, where the avowry was confined to the goods in the house, an amendment was refused.(1)

Nor does the statute give any authority to amend the award of *venire* on the Nisi Prius record :(2) nor to strike out the name of a co-defendant who was not fixed by the evidence ;(3) nor to increase the amount of damages laid in the declaration.(4) But in an action on a bond in which the penalty was laid at £260, an amendment of the amount to £200, thereby diminishing the sum claimed, was held to be proper.(5)

An amendment, which would introduce an entirely new contract and new breach, is not within the statute. Thus, where the declaration stated that the plaintiff became and was *tenant* to the defendant of a messuage, on terms contained in articles of agreement between them, whereby the defendant agreed to grant a future lease ; and that the defendant promised that the plaintiff should hold and enjoy without eviction ; and alleged as a breach that one B. having lawful title, evicted the plaintiff ; it was held(6) that amendments could not be made in order to treat the agreement, not as an actual demise, but merely as an agreement for a future lease ; and to make the breach consist, not in the eviction of the plaintiff, but in the defendant's not having a title to grant a lease.

So where a declaration on a guaranty stated that, in consideration that the plaintiff would make advances of money to B., the defendant promised to repay the plaintiff such sum if B. should make default, the breach being that B. did make default, and the defendant did not repay the plaintiff ; and the plea was, that the plaintiff did not make the advances to B. ; it was held that the record could not be amended, by stating in the declaration the consideration to be, that the plaintiff would procure the B. and A. bank, in which the plaintiff was a partner, to make *advances* of money to B., and the defendant's promise to repay the *bank*, and the breach that the defendant did not repay the *bank ;* and in the plea, that the plaintiff did not procure the bank to make the *advances.*(7)

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(1) Bye v. Bower, Car. & M. 262. As to casual omissions in copying the record, see Ernest v. Brown, 2 Moo. & R. 13 ; Forman v. Dawes, Car. & M. 127, *supra*, p. 885.

(2) Adams v. Power, 7 C. & P. 76. Such an amendment must be made by a judge at chambers. Id.

(3) Cooper v. Whitehouse, 6 C. & P. 545.

(4) Watkins v. Morgan, 6 C. & P. 661. In Doe v. Katz (8 Id. 315), Lord Denman, C. J., before the cause was called on, allowed the amounts mentioned in the counts in an action of debt to be altered from £100 to £200, where the particulars of demand claimed £168. But this was done by the consent of the defendant's counsel, and without reference to the statute.

(5) Hill v. Salt, 2 C. & M. 420.

(6) Brashier v. Jackson, 6 M. & W. 549.

(7) Boucher v. Murray, 6 Q. B. 362. But see Chapman v. Sutton, 2 C. B. 634, *supra*, p. 883.

Even the introduction of entirely new matter seems objectionable. Thus, where to action upon a promissory note, the defendant pleaded that the plaintiff had received another note from the defendant and a third person, in satisfaction of the note declared on;(1) and it appeared in evidence that this other note had been received in satisfaction, not of the note declared on, but of an intermediate note, which had been given by the defendant alone, in satisfaction of the note declared on; it was held that the judge at the trial had no power to amend the plea by the substitution of a description of the intermediate note.

Although, as has been seen,(2) where a party states the legal effect of a contract, an amendment will in general be allowed, to make the statement conformable to the legal effect of the contract proved; yet the power of amendment will not be exercised where a party has designedly framed his pleading in a manner which gives rise to the objection; thus, if a deed were recited according to what a party contended was its legal effect, and the judge should decide that was not its legal effect, it seems this is not a case for amendment.(3)

If a covenant in a lease is alternative, that the tenant shall do one of two things, and the plaintiff in an action upon the covenant assign as a breach an omission to do one of the two things only, the judge ought not to amend the declaration by adding the rest of the covenant, if there are other issues which it would be difficult to adapt to the amended declaration.(4)

An amendment of the declaration will also be refused, if it appears probable that the variance may have prevented the defendant from pleading a good bar to the action;(5) or if the amendment in the declaration is one which might have induced the defendant to plead different pleas, or to demur.(6) Thus, in an action of covenant by the assignee of the reversion against the personal representative of the lessee, where the declaration set out a deed purporting to be attested *by two witnesses*, whereby one J. P., in pursuance of a power, appointed the premises to the plaintiff, and the defendant traversed the appointment; it appearing at the trial, that one of the attesting witnesses was the wife of the appointee, and that the deed was void as not being executed in pursuance of the power, the court expressed a strong opinion that the declaration could not be amended

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(1) Daniel v. Preece, 5 Q. B. 440.
(2) Whitwill v. Scheer, 8 A. & E. 301, *supra*, p. 882.
(3) Bowers v. Nixon, 2 C. & K. 372.
(4) Richards v. Bluck, 6 C. B. 437.
(5) Ivey v. Young, 1 Moo. & R. 545.
(6) See by Maule, J., 3 M. & G. 784, 785.

at Nisi Prius, by stating the deed as operating, either by way of grant or as a covenant to stand seized to uses.(1)

Where the plaintiff complained of an injury sustained by the diversion of a watercourse, the right to which he claimed in respect of a mill, and the defendant traversed the right to the watercourse;(2) it appeared at the trial, before Alderson, B., that the mill was of modern erection, and that therefore the plaintiff's claim to the water was not in respect of the mill, but *ex jure naturæ*, in right of the stream running to his land, and of an antecedent appropriation of the water by the plaintiff before the erection of the mill. An application to amend the declaration was refused, but the learned judge directed a special finding under the 24th section, that the defendant had diverted the water from its accustomed and proper course to the plaintiff's premises, as they existed before the mill was erected. The verdict was entered for the defendant on the issue. On a motion for entering judgment for the plaintiff "according to the right and justice of the case," the court refused the rule as prayed for, saying, that the variance was material, and that the defendant might have prepared his defence to meet the claim made in respect of the mill, and not of the land.(3)

In an action of ejectment,(4) where the demise was joint by two lessors of the plaintiff, it appeared that they claimed as tenants in common: an application was made to amend, by striking out the name of one of the lessors of the plaintiff, or adding proper words applicable to the title as it appeared. Taunton, J., refused the application, being of opinion that the amendment was in a particular very material to the merits of the case.(5)

Where a declaration in ejectment omitted the year of the demise, though it mentioned a day, it was held that the judge at the trial had improperly amended it by inserting the year, according to the title as proved.(6)

It has been seen what amendments will be allowed in actions for slander and libel;(7) but where innuendoes have been improperly introduced in

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(1) Perry v. Watts, 3 M. & G. 775, explained by Maule, J., *ut supra*. An arrangement was ultimately come to between the parties.

(2) Frankum v. Falmouth (Earl), 6 C. & P. 529; S. C., 2 A. & E. 451.

(3) 2 A. & E. 455.

(4) Doe d. Poole v. Errington, 1 Moo. & R. 343.

(5) See Doe d. Bacon v. Brydges, 3 M. & G. 304. It may, perhaps, be doubted, whether the decision in Doe d. Poole v. Errington would now be acted upon. It followed very soon after the passing of the statute.

(6) Doe d. Parsons v. Heather, 8 M. & W. 158. The plaintiff, however, is not prejudiced in such a case, as the omission is not a ground of nonsuit. The proper course for a defendant, under such circumstances, is to apply to the court to compel the plaintiff to insert the correct date. By Parke, B., Id.

(7) *Supra*, p. 885.

the declaration; the judge will not amend the record by striking them out.(1)

It has been said by Lord Denman, C. J.,(2) that the statute does not apply to the amending of pleadings so as to remove objections which would have been good in arrest of judgment; its object being to prevent nonsuits on variances, and not to make pleadings good which are vicious in themselves; but this observation was extra-judicial, and it has since been decided by the Court of Common Pleas(3) that the authority of the judge to amend is not affected by the circumstance that the amendment would deprive the defendant of a ground of motion in arrest of judgment; if he means to avail himself of an arrest of judgment he should not urge the point of variance.(4)

Where a declaration, after reciting two several contracts between the parties, alleged that they agreed to consolidate them, but the several contracts alone were proved in evidence, and the fact of an agreement to consolidate was negatived: it was ruled that the variance was fatal, and that the declaration could not be amended.(5)

7. Of variances in criminal cases.

Proof of time.

The rule that it is not necessary to prove the time precisely as laid, unless that particular time is material, is the same in criminal as in civil cases.(6) This is the constant course of proceeding in criminal prosecutions from the highest offence to the lowest; although every material fact must be alleged in the indictment to have occurred on a day certain and at a particular place.(7) It is sufficient if the offence with which the party is charged is proved to have occurred before the finding of the bill by the grand jury. In high treason, evidence may be given of an overt act either before or after the day specified in the indictment; the particular day is not material in point of proof, and is merely matter of form. Objections of this kind, on behalf of the prisoner, have been repeatedly overruled.(8)

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(1) Prudhome v. Fraser, 1 Moo. & R. 435.

(2) In Atkinson v. Raleigh, 3 Q. B. 79, 86. See, also, by Patteson, J., Id. As to amending a plea, pleaded to two counts, so as to make it applicable to one only, see Callendar v. Dittrich, 4 M. & G. 68.

(3) Harvey v. Johnston, 6 C. B. 295.

(4) By Wilde, C. J., Id. 298.

(5) Moncrieff v. Reade, 2 C. & K. 705.

(6) *Supra*, p. 854.

(7) See R. v. Holland, 5 T. R. 624; R. v. Haynes, 4 M. & S. 214; R. v. O'Connor, 5 Q. B. 16. See, also, 7 Geo. IV, c. 64, § 20.

(8) Lord Balmarino's Case; Lord Kilmarnock's Case; Townley's Case; How. St. Tr.; Fost. 8. See R. v. Levey, 2 Stark. R. 458, as to a misdemeanor. See, also, R. v. Treharne, 1 Moo. Cr. C.

Proof of place.

On the trial of an indictment, for an offence of a transitory nature, such as treason, murder, larceny, or even highway robbery,(1) it will be sufficient to show, that the offence was committed in some place within the jurisdiction of the court. Mr. Sergeant Hawkins says,(2) it seems to be agreed, that the mistake of the place, in which an offence is laid, will not be material upon the evidence, of the plea of not guilty, if the fact be proved at some other place in the same county. Even if there should appear to be no such parish in the county, as that laid, it has been doubted whether the indictment would be bad.(3)

298, where the offence was alleged to have been committed before the passing of the statute upon which the prisoner was tried.

NOTE 248.—The authorities are uniform in support of the doctrine contained in the text. 2 Hawk. P. C., b. 2, c. 46, § 169; 2 Inst. 218; 3 Id. 230; 1 Hale's P. C. 361; 2 Id. 179; Macnally's Ev. 496, 497, *et seq.*; The State v. Hanney, 1 Hawks' Rep. 460; Commonwealth v. Harrington, 3 Pick. 26; 4 Starkie's Ev. 1568; Starkie's Crim. Pl. 58. But where the date of a particular fact is necessary to ascertain with precision the offence charged, it must be proved as alleged. 10 Petersd. Abr. 508, note. So, where a day is averred, by way of describing a written instrument. Id. And see note 247.

(1) See R. v. Dowling, Ry. & M. Cr. C. 433.

(2) Bk. 2, ch. 25, § 84.

(3) R. v. Dowling, *ut infra;* R. v. Woodward, Ry. & M. C. C. 323; R. v. Perkins, 4 C. & P. 363. But see 9 H. V, st. 1, c. 1.

NOTE 249.—This, however, is only so where the place is laid as mere matter of venue. But if a certain place is made part of the description of a fact charged in the indictment, the least variance as to such place will be fatal; as where a trespass in taking away goods, or other offence, is alleged in such a parish, in the house of J. S., or in such a parish, in a play-house in Lincoln's inn fields; and upon evidence it appears to have been done at the house of a different person, or that there is no play-house in Lincoln's inn fields. Hawk. P. C. b. 2, c. 46, § 171; Macnally's Ev. 501. In Regina v. Carnage (3 Salk. 385), the defendants were indicted for riotously assembling at the parish of St. Giles, in the fields, and breaking and entering the bedchamber of Sarah S., in the dwelling-house of D. *James*, and taking and carrying away certain goods. Upon evidence, it appeared to be the dwelling-house of D. *Jameson;* and held, that though part of the offence was transitory, viz: the taking and carrying away the goods, yet the other part being local, and the whole being put together as one entire fact, under one description, the variance in respect to the dwelling-house was fatal to the prosecution. Mr. Starkie doubts the propriety of this decision, and suggests a *quere*, whether, under such circumstances, the defendant might not be convicted of that which is merely transitory, though the prosecutor fail as to the local part (4 Starkie's Evidence, 1571, n. *e*); but he cites no authority showing that the case has been overruled.

Where the offence charged is of a local nature, as in burglary, &c., whatever is alleged by way of describing the place where it was committed, must be proved as laid (Rex v. White, East's P. C. 780; Rex v. Woodward, Id.; The State v. Martin, 3 Murph. 533); and though the description be more particular than was necessary, the whole must be established. Rex v. Owen, Ry. & Mood. Cr. Cas. 118. But where locality does not enter into the substance of the charge, and the description is *wholly immaterial*, it may be rejected as surplusage, and a variance will not be fatal.

Though the allegation of place be intended only as venue, it is nevertheless so far important, that the prosecutor must prove the offence charged to have been committed in the county where

Where, however, the offence is of a local character, such as riotously demolishing churches, &c.,(1) maliciously firing a dwelling-house,(2) and the like, if there is no such place as that laid in the indictment, the prisoner must be acquitted; unless the local offence with which he is charged includes a transitory offence, when the prisoner, though he must be acquitted of the former, may be convicted of the latter; thus upon an indictment for burglary, or housebreaking,(3) or stealing in a dwelling house,(4) if the locality of the premises is wrongly described, the prisoner cannot be convicted of the major offence, though he may be of a simple larceny.

Allegations in indictments as to value are not material, especially since the distinction between grand and petty larceny has been abolished;(5) except where the value is essential to constitute the offence,—as in the case of a bankrupt concealing property to the amount of £10.(6)

8. Of amendments in criminal cases.

The power to amend variances in criminal cases has, probably from an erroneous notion of lenity, been much more tardily given by the legislature.

The statute 7 Geo. IV, c. 64, related to some technical defects and im-

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the venue is laid; and if this be not made out, or the contrary be shown in evidence, the defendant will be acquitted, except where a different rule has been provided by statute. See 1 Chitty's Crim. Law, 177. In larceny, however, if property is stolen in the county of A., and carried into the county of B., the offender may be convicted in the latter place, under an indictment charging the offence to have been committed there (Hawk. P. C. b. 1, c. 151); and it has been a question in some of our courts whether the same doctrine applied to the case of property stolen in one state and carried into another. In Massachusetts the course of decision has been uniform that it did. Commonwealth v. Cullens, 1 Mass. Rep. 116; Commonwealth v. Andrews, 2 Id. 14. And the solicitor-general, in the case last cited, referred to another which Dana, C. J., said he remembered; it was that of Paul Lord, who broke open a shop in Rhode Island, and stole goods which he brought into York county, Massachusetts, where he was indicted as for a theft committed there; and it was determined by the whole court, five justices being present, that he might be convicted of the larceny, though not of the shop breaking. In New York, however, until recently a contrary doctrine has prevailed. The People v. Gardner, 2 John. Rep. 477. But now it is expressly provided by statute, that "every person who shall feloniously steal the property of another in any other state or country, and shall bring the same into this state, may be convicted and punished in the same manner as if such larceny had been committed in this state; and in every such case, such larceny may be charged to have been committed in any town or city, into, or through which such stolen property shall have been brought." 2 R. S. 698, § 4. See The People v. Burke, 11 Wend. 129.

(1) R. v. Richards, 1 Moo. & R. 177.

(2) R. v. Woodward, *ut supra.*

(3) R. v. St. John, 9 C. & P. 40; R. v. Bullock, cit. 1 Moo. Cr. C. 324, n.; R. v. Brookes, Car. & M. 543; S. C., 2 Russ., Cr. & M. by Greaves, 801.

(4) R. v. Napper, 4 Moo. Cr. C. 44; R. v. Jackson, 2 Russ., Cr. & M. 801.

(5) By 7 & 8 Geo. IV, c. 28.

(6) Under 6 Geo. IV, c. 16, § 112. See R. v. Forsyth, Russ. & R. Cr. C. 274.

material averments in indictments and informations either in cases of felony or misdemeanor.

The nineteenth section enacted that no indictment or information should be abated by reason of any dilatory plea of misnomer, or want of addition, or of wrong addition, if the court should be satisfied, by affidavit or otherwise, of the truth of such plea; but in such case the court should forthwith cause the indictment or information to be amended according to the truth, and should call upon such party to plead thereto, and should proceed as if no such dilatory plea had been pleaded. Under this section, where a woman was indicted for the murder of her husband, and was described as "Ann, the wife of J. O.," the judges at the trial ordered an amendment by striking out the word "wife" and inserting the word "widow."(1)

The twentieth section enacted, "that no judgment upon any indictment or information for any felony or misdemeanor, whether after verdict or outlawry, or by confession, default or otherwise, shall be stayed or reversed for want of the averment of any matter unnecessary to be proved; —nor for the omission of the words 'as appears by the record;' or of the words 'with force and arms;' or of the words 'against the peace;'—nor for the insertion of the words 'against the form of the *statute*;' instead of the words 'against the form of the *statutes*,' or *vice versa*;—nor for that any person is therein designated by a name of office or other descriptive appellation instead of his proper name;—nor for omitting to state the time of the commission of the offence where time is not of the essence of the offence;—nor for stating the time imperfectly,—nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or the exhibiting of the information, or on an impossible day, or a day that never happened;—nor for want of a proper or perfect venue, where the court shall appear to have had jurisdiction over the offence."(2)

Lord Tenterden's Act (9 Geo. IV, c. 15), gave the same powers, in trials for *misdemeanor*, for amending variances between matters in writing

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(1) R. v. Orchard, 8 C. & P. 565.

(2) Before this statute, judgment was continually arrested upon indictments for the causes above enumerated.

NOTE 250.—In New York, it is also provided by statute that no indictment shall be deemed invalid, nor shall the trial, judgment or proceedings thereon be affected, 1st. By reason of having omitted the addition of the defendant's title, occupation, estate or degree; or by reason of the misstatement of such matter, or of the town or county of his residence, when the defendant shall not be misled or prejudiced by such misstatement; or, 2d. By the omission of the words "with force and arms," or words of similar import; or, 3d. By reason of omitting to charge any offence to have been committed contrary to a statute or several statutes, notwithstanding such offence may have been created or the punishment thereof may have been declared by any statute; or 4th. By reason of any other defect or imperfection in matter of form, which shall not tend to the prejudice of the defendant. 2 R. S. 728, § 52.

as averred and as proved, as were given in civil actions.(1) This statute did not extend to *felonies*, and in these cases, till a very recent period, no amendment was allowed. But by the statute 11 & 12 Vict. c. 46, § 4, it was enacted "that it shall and may be lawful for any court of oyer and terminer and general jail delivery,(2) if such court shall see fit so to do, to cause the indictment or information of any offence whatever, when any variance or variances shall appear between any matter in writing or in print produced in evidence and the recital or setting forth thereof in the indictment or information whereon the trial is pending, to be forthwith amended in such particular or particulars by some officer of the court, and after such amendment the trial shall proceed in the same manner in all respects, both with regard to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance or variances had appeared."

And now at length Lord Campbell's Act (14 & 15 Vict. c. 100), "for further improving the administration of criminal justice," after reciting that "offenders frequently escape conviction on their trials, by reason of the technical strictness of criminal proceedings in matters not material to the merits of the case: and that such technical strictness may safely be relaxed in many instances, so as to insure the punishment of the guilty, without depriving the accused of any just means of defence: and that a failure of justice often takes place, on the trial of persons charged with felony and misdemeanor, by reason of variances between the statement in the indictment, on which the trial is had, and the proof of names, dates, matters and circumstances therein mentioned, not material to the merits of the case, and by the misstatement whereof the person on trial cannot have been prejudiced in his defence,"—enacts by section 1, that "whenever on the trial of any indictment for any felony or misdemeanor there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof, in the name of any county, riding, division, city, borough, town corporate, parish, township or place mentioned or described in any such indictment, or in the name or description of any such person or persons, or body politic or corporate, therein stated or alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offence charged therein, or in the name or description of any person or persons, body politic or corporate, therein stated or alleged to be injured or damaged, or intended to be injured or damaged, by the commission of such offence, or in the Christian name or surname, or both Christian name and surname, or other description whatsoever, of any person or persons whomsoever therein

(1) *Vide supra*, pp. 873, 874.

(2) Extended by 12 & 13 Vict. c. 45, § 10, to courts of general or quarter sessions.

named or described, or in the name or description of any matter or thing whatsoever therein named or described, or in the ownership of any property named or described therein, it shall and may be lawful for the court before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on such merits, to order such indictment to be amended, according to the proof, by some officer of the court or other person, both in that part of the indictment where such variance occurs, and in every other part of the indictment which it may become necessary to amend, on such terms as to postponing the trial to be had before the same or another jury as such court shall think reasonable; and after any such amendment the trial shall proceed, whenever the same shall be proceeded with, in the same manner in all respects, and with the same consequences, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had occurred; and in case such trial shall be had at Nisi Prius, the order for the amendment shall be indorsed on the postea, and returned together with the record, and thereupon such papers, rolls, or other records of the court from which such record issued, as it may be necessary to amend, shall be amended accordingly by the proper officer, and in all other cases the order for the amendment shall either be indorsed on the indictment, or shall be engrossed on parchment, and filed, together with the indictment, among the records of the court; provided that in all such cases where the trial shall be so postponed as aforesaid, it shall be lawful for such court to respite the recognizances of the prosecutor and witnesses, and of the defendant, and his surety or sureties, if any, accordingly; in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence respectively, and the defendant shall be bound to attend to be tried, at the time and place to which such trial shall be postponed, without entering into any fresh recognizances for that purpose, in such and the same manner as if they were originally bound by their recognizances to appear and prosecute or give evidence at the time and place to which such trial shall have been so postponed: provided, also, that where any such trial shall be to be had before another jury, the crown and the defendant shall respectively be entitled to the same challenges as they were respectively entitled to before the first jury was sworn."

The statute also enacts that verdicts and judgments after such amendments shall be valid,(1) and records shall be drawn up, when necessary to be drawn up, in the amended form, without noticing the amendments.(2)

These important enactments have removed a grievous defect from our

(1) Sect. 2.
(2) Sect. 3.

system of criminal jurisprudence, and have assimilated the powers of amendment in criminal cases to those which had previously been conferred by the 3 & 4 Wm. IV, c. 42,(1) in civil cases. One good effect resulting from them will probably be the shortening of indictments, which, as in the case of pleadings in civil actions formerly, were made to contain a great variety of counts, presenting the charge in different forms so as to meet the evidence.(2)

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(1) Sect. 23, *supra*, p. 876, *et seq.*

(2) Lord Campbell's Act contains several other highly valuable improvements as to the form of indictments and the statement of offences, with a view to prevent a failure of justice by the escape of offenders upon purely technical grounds. The greater part of these are not within the scope of the present work; but some of them will be found to be adverted to in the Introductory Chapter to this volume.

See 17 & 18 Vict. c. 125.

END OF VOL. I.

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